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SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

APPENDIX 12(f)

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Office of Juvenile Justice and Delinquency Prevention

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Statutory Rape Known to Law Enforcement

Karyl Troup-Leasure and Howard N. Snyder

At the national level, the incidence of statutory rape is relatively unknown. The FBI's Uniform Crime Reporting Program (UCR) maintains national data on forcible rape and other sex offenses but does not isolate statutory rape crimes in its annual *Crime in the United States (CIUS)* report. In contrast to the *CIUS* report, the FBI's National Incident-Based Reporting System (NIBRS) captures a broad range of information on statutory rape incidents reported to participating law enforcement agencies throughout the country. What NIBRS can teach us about the victims and offenders in statutory rape incidents can assist investigators and decisionmakers in their policy development and program designs.

The findings that follow are based on an analysis of the NIBRS master files containing reports from law enforcement agencies in 21 states for the years 1996 through 2000 (see box on page 2). An analysis of these data characterize victim and offender attributes (e.g., age, gender, relationship) and law enforcement's response to the incident.

Highlights of the findings include:

- In 2000, there was 1 statutory rape for every 3 forcible rapes involving a juvenile victim reported to law enforcement.
- Most (95%) statutory rape victims were female.
- Regardless of victim gender, almost 3 of every 5 victims of statutory rape were age 14 or 15, with relatively equal proportions in each of these ages.
- More than 99% of the offenders of female statutory rape victims were male.
- Of all offenders of male statutory rape victims, 94% were female.
- Of all offenders of female statutory rape victims, 18% were younger than age 18.
- Of all offenders of male statutory rape victims, 70% were age 21 and older, while 45% of offenders of female statutory rape victims were 21 and older.
- The median age difference between female offenders and their male statutory rape victims was 9 years. The median age difference between male offenders and their female statutory rape victims was 6 years.
- Three of every 10 statutory rape offenders were boyfriends or girlfriends and 6 in 10 were acquaintances.
- An arrest occurred in 42% of statutory rape incidents with the probability of arrest declining as victim age increased.

A Message From OJJDP

According to the 1997 National Longitudinal Survey of Youth, 27% of youth ages 14–17 were sexually active during the survey year. Although the age of consent varies by state, all states prohibit sex with a minor. This Bulletin defines statutory rape as nonforcible sexual intercourse with or between people who are younger than the age of consent.

Statutory Rape Known to Law Enforcement summarizes an analysis of data from the FBI's National Incident-Based Reporting System (NIBRS). Although national data are not available, NIBRS includes data on reported statutory rape crimes from 21 states. This Bulletin provides the first large-scale look at the patterns of and response to statutory rape.

For example, the analysis found that the median age difference between victims and offenders is great (between 6 and 9 years, depending on gender). It also found that as the age of a victim increased, the probability of arrest decreased, and that some reported incidents were not cleared by arrest due to lack of victim cooperation.

This analysis demonstrates how incident-based crime data can be used to better understand the profiles of victims and offenders and the justice system response. Law enforcement officials, advocates, and program planners can use available local analyses to develop strategies and educational materials to help reduce instances of this crime in their communities.

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12f-000002

NIBRS data provide insight into statutory rape

The National Incident-Based Reporting System (NIBRS) administered by the Federal Bureau of Investigation (FBI) collects a wide range of data on a variety of crimes. NIBRS includes information on victims, offenders, and incident circumstances. Local law enforcement personnel collect information on crimes that come to their attention and submit these data for inclusion in NIBRS. For a crime to be included, the incident need only be reported; it does not have to be cleared or result in an arrest.

Since the FBI implemented NIBRS in 1988, voluntary state and local agency participation has grown steadily. Nevertheless, the NIBRS master files are limited by the number of contributing law enforcement agencies and therefore may not be nationally representative. Even though geographic coverage is limited, NIBRS data warrant systematic study to clarify the nature of statutory rape among victims and their offenders.

This Bulletin includes data reported for the years 1996–2000 from agencies in 21 participating states: Arkansas, Colorado, Connecticut, the District of Columbia, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia. The incidents included for analysis were those for which the most serious offense was forcible rape or statutory rape. The unit of count is the victim. The total number of victim records analyzed was 28,098. Of these victim records, 27% involved statutory rape. The analyses presented here include incidents with male and female victims ages 7–17 and male and female offenders age 7 and older. Statutory rape victims and offenders younger than age 7 were considered data entry errors and were excluded. Records with victims older than age 17 were also thought to be data errors (or possibly persons with disabilities) and were also excluded. Thus, the 1996–2000 NIBRS master files provide details for incidents involving 7,557 statutory rape victims ages 7–17.

What is statutory rape?

Statutory rape is a general term used to describe an offense that takes place when an individual (regardless of age) has consensual sexual relations with an individual not old enough to legally consent to the behavior. Stated another way, statutory rape is sexual relations between individuals that would be legal if not for their ages. In accordance with the FBI definition, this Bulletin characterizes statutory rape as nonforcible sexual intercourse with a person who is younger than the statutory age of consent.

Each state has laws that prohibit sex with a minor. The offender may be an adult or a juvenile. The age of consent varies from state to state as well as the label of and the punishment for the crime. In addition to individual ages, some state laws specifically address sexual contact with a minor by a person who is a defined number of years older than the minor or by a person of authority, such as an athletic coach or teacher.

Statutory rape literature has focused primarily on female victims. Recent high profile cases of educator sexual misconduct involving female teachers and their teenage male victims bring into question the commonly held statutory rape offender/victim stereotype in which predatory older men prey on young female victims. Statutory rape incidents recorded in NIBRS present both of these patterns along with other characteristics of male and female offenders and victims across age ranges and represent only those incidents that have been reported as crimes.

For every 1 statutory rape there were 3 forcible rapes of juvenile victims

For every statutory rape victim identified in the NIBRS data, there were approximately 3 juvenile victims of forcible rape. While some attributes of statutory and forcible rape were similar, some were very different.

The vast majority of victims had only one offender (90% of statutory rape victims and 89% of forcible rape victims). Law enforcement coded the location of the crime as a residence in 85% of statutory rape incidents and 83% of forcible rape incidents. The residence could have been that of the victim, the offender, or another individual. The other statutory rapes occurred (from most frequent to least frequent) in hotels/motels, in fields/woods, on streets/highways, in parking lots, and in schools.

Statutory rapes and forcible rapes differ in that a substantial proportion (about two-thirds) of forcible rapes involve the use of a weapon (e.g., firearm, fist), and in one-fifth of forcible rapes, law enforcement reported that the victim was physically injured. Weapon use and bodily injury were not attributes of statutory rapes.

3 of every 10 statutory rape offenders were boyfriends or girlfriends

NIBRS classifies the relationship between the statutory rape victim and the offender as a boyfriend or a girlfriend in 29% of statutory rapes. Another 62% were classified as acquaintances. A small percentage of offenders (2%) were strangers to the victim and 7% were coded as family members.

In comparison, 11% of the offenders in forcible rapes of juvenile victims were classified as a boyfriend or a girlfriend and 62% were classified as acquaintances. Family members were more involved in forcible than statutory rapes, with 22% of the offenders in the forcible rapes of juvenile victims being a family member. As with statutory rape, a relatively small proportion (5%) of the offenders in the forcible rapes of juveniles were strangers to the victim.

A comparison of counts in UCR and NIBRS can provide a rough annual estimate of statutory rapes

The FBI's *Crime in the United States 2000* report estimates there were 90,186 forcible rapes known to law enforcement. Law enforcement agencies in the 2000 NIBRS sample reported 13,862 forcible rapes that are consistent with the UCR definition of forcible rape. Therefore, the agencies in NIBRS had 15% of all the forcible rapes in the United States in 2000. Assuming that they also had 15% of all the statutory rapes, the 2,414 statutory rapes in the 2000 NIBRS sample would imply there were about 15,700 statutory rapes reported to all law enforcement agencies in the United States in 2000.

12f-000003

Male and female victims had similar age profiles

Males accounted for 5% of statutory rape victims between ages 7 and 17. Even though the numbers of such incidents are relatively small, they warrant systematic study to clarify the nature of statutory rape among all victims.

Regardless of victim gender, almost 3 of every 5 victims of statutory rape were age 14 or 15, with relatively equal proportions in each of these age groups.

	Victim	
Victim Age	Female	Male
7–11	4%	5%
12	7	4
13	17	11
14	31	27
15	28	29
16	8	15
17	4	8
Total	100	100

Note: Totals may not equal 100% because of rounding.

In comparison, 2 of every 5 juvenile victims of forcible rape were ages 14 and 15. In fact, the peak ages for all victims (i.e., juvenile and adult victims) of forcible rape were also ages 14 and 15.

Male victims had older offenders than did female victims

The age profile of offenders varied with the gender of the victims. Offenders of male victims tended to be older than those of female victims: 18% of the offenders of female victims were juveniles, compared with 12% of the offenders of male victims. Of the offenders of female victims, 45% were age 21 and older, compared with 70% of the offenders of male victims. In fact, 45% of the offenders of male victims were older than age 24, compared with 25% of the offenders of female victims.

	Victim	
Offender Age	Female	Male
7–11	<1%	1%
12–14	2	4
15–17	16	7
18–20	36	18
21–24	21	25
25–34	16	33
35 and older	8	12
Total	100	100

Note: Totals may not equal 100% because of rounding.

The vast majority of statutory rapes involved victims and offenders of opposite sexes

Few male victims of statutory rape were victimized by male offenders (6%). Male offenders were involved in almost all statutory rape incidents with female victims (more than 99%).

The younger the female victim, the more likely her male offender was a juvenile

Opposite-Sex	Female Victim Age						Male Victim Age
Offender Age	7–13	14	15	16	17	7–17	7–17*
Younger than 18	32%	16%	13%	2%	1%	18%	8%
18–20	30	43	38	28	22	36	19
21–24	14	21	24	28	29	21	26
25 and older	24	20	25	42	48	25	47
Total	100	100	100	100	100	100	100

- One-third (32%) of male offenders of female victims younger than age 14 were juveniles.
- About 5 of every 6 male offenders of 14-year-old females were at least age 18.
- Rarely were the male offenders of 16- and 17-year-old female victims themselves juveniles (i.e., younger than age 18).
- For 16-year-old female victims, 7 out of 10 of their male offenders were age 21 or older.

7 out of every 8 male statutory rape offenders of female victims were more than 2 years older than their victims, regardless of victim age

Opposite-Sex Offender	Female Victim Age						Male Victim Age
Offender Age	7–13	14	15	16	17	7–17	7–17*
Same age or younger	1%	1%	1%	0%	1%	1%	1%
1–2 years older	5	6	12	11	13	8	3
3–5 years older	32	43	38	28	29	37	19
6–9 years older	32	27	24	23	19	27	30
10 or more years older	30	23	25	38	38	27	46
Total	100	100	100	100	100	100	100

- For female victims younger than age 14, 30% of their male offenders were at least 10 years older than the victims.
- At least half of the male offenders of female victims were 6 or more years older than their victims.
- More than 75% of female offenders of male victims were at least 6 years older than their victims.
- Compared with female offenders of male victims, male offenders of female victims tended to be closer in age to that of their victims. On average, male offenders of female statutory rape victims were about 6 years older than their victims, while female offenders of male victims were about 9 years older.

* There were too few male victims to obtain reliable percentages by male victim age.

Note: Totals may not equal 100% because of rounding.

Data source: Federal Bureau of Investigation. *National Incident-Based Reporting System Master Files* for the years 1996, 1997, 1998, 1999, and 2000 [machine-readable data files].

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Age influences the probability of arrest

Overall, an arrest occurred in 42% of statutory rape incidents (compared with an arrest rate of 35% in forcible rape incidents). In general, as the age of a statutory rape victim increased, the probability of arrest in the incident decreased.

Victim Age	Percentage of Incidents Involving Arrest
7–11	40%
12	50
13	46
14	42
15	42
16	35
17	30

The probability of arrest was related to the victim-offender relationship. Persons coded as boyfriends and girlfriends were the least likely to be arrested. Of offenders classified as boyfriend or girlfriend, 37% were arrested, compared with 44% of acquaintances, 47% of family members, and 47% of strangers.

Juvenile offenders in statutory rape incidents were less likely to be arrested than were adult offenders.

Offender Age	Percentage of Incidents Involving Arrest
12–14	28%
15–17	37
18–20	42
21–24	45
25–34	44
35 and older	46

About one-third (36%) of all statutory rapes were cleared by the arrest of an adult and 6% were cleared by the arrest of a juvenile. In the NIBRS data, 44% of statutory rapes were not cleared by law enforcement. The remaining incidents were cleared when the victim refused to cooperate or when prosecution was declined.

Data source

Federal Bureau of Investigation. *National Incident-Based Reporting System Master Files* for the years 1996, 1997, 1998, 1999, and 2000 [machine-readable data files]. Washington, DC: Federal Bureau of Investigation.

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 21, 2005

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Robert D. McCallum, Jr. RDM
Acting Deputy Attorney General

SUBJECT: Waiver of Corporate Attorney-Client and Work Product Protection

The Department of Justice places significant emphasis on the prosecution of corporate crimes. The Department's policy on charging business organizations is contained in the Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereinafter "*Thompson Memorandum*"), *reprinted in United States Attorneys' Manual*, tit. 9, Crim. Resource Manual, §§ 161-62. The *Thompson Memorandum* sets forth nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization. One of the nine factors is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." *Thompson Memorandum* § II.A.4.

To ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process for your district or component. The *United States Attorneys' Manual* will be amended to reflect this policy. Such waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations.

NATIONAL STRATEGY FOR PANDEMIC INFLUENZA



HOMELAND SECURITY COUNCIL

NOVEMBER 2005

12f-000007

NATIONAL STRATEGY FOR

PANDEMIC INFLUENZA



HOMELAND SECURITY COUNCIL

NOVEMBER 2005

12f-000008

THE WHITE HOUSE
WASHINGTON

My fellow Americans,

Once again, nature has presented us with a daunting challenge: the possibility of an influenza pandemic.

Most of us are accustomed to seasonal influenza, or "the flu," a viral infection that continues to be a significant public health challenge. From time to time, changes in the influenza virus result in a new strain to which people have never been exposed. These new strains have the potential to sweep the globe, causing millions of illnesses, in what is called a pandemic.

A new strain of influenza virus has been found in birds in Asia, and has shown that it can infect humans. If this virus undergoes further change, it could very well result in the next human pandemic.

We have an opportunity to prepare ourselves, our Nation, and our world to fight this potentially devastating outbreak of infectious disease.

The *National Strategy for Pandemic Influenza* presents our approach to address the threat of pandemic influenza, whether it results from the strain currently in birds in Asia or another influenza virus. It outlines how we intend to prepare, detect, and respond to a pandemic. It also outlines the important roles to be played not only by the Federal government, but also by State and local governments, private industry, our international partners, and most importantly individual citizens, including you and your families.

While your government will do much to prepare for a pandemic, individual action and individual responsibility are necessary for the success of any measures. Not only should you take action to protect yourself and your families, you should also take action to prevent the spread of influenza if you or anyone in your family becomes ill.

Together we will confront this emerging threat and together, as Americans, we will be prepared to protect our families, our communities, this great Nation, and our world.

GEORGE W. BUSH
THE WHITE HOUSE
November 1, 2005

NATIONAL STRATEGY FOR PANDEMIC INFLUENZA

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NATIONAL STRATEGY FOR PANDEMIC INFLUENZA

INTRODUCTION

Although remarkable advances have been made in science and medicine during the past century, we are constantly reminded that we live in a universe of microbes - viruses, bacteria, protozoa and fungi that are forever changing and adapting themselves to the human host and the defenses that humans create.

Influenza viruses are notable for their resilience and adaptability. While science has been able to develop highly effective vaccines and treatments for many infectious diseases that threaten public health, acquiring these tools is an ongoing challenge with the influenza virus. Changes in the genetic makeup of the virus require us to develop new vaccines on an annual basis and forecast which strains are likely to predominate.

As a result, and despite annual vaccinations, the U.S. faces a burden of influenza that results in approximately 36,000 deaths and more than 200,000 hospitalizations each year. In addition to this human toll, influenza is annually responsible for a total cost of over $10 billion in the U.S.

A pandemic, or worldwide outbreak of a new influenza virus, could dwarf this impact by overwhelming our health and medical capabilities, potentially resulting in hundreds of thousands of deaths, millions of hospitalizations, and hundreds of billions of dollars in direct and indirect costs. This *Strategy* will guide our preparedness and response activities to mitigate that impact.

THE PANDEMIC THREAT

Pandemics happen when a novel influenza virus emerges that infects and can be efficiently transmitted between humans. Animals are the most likely reservoir for these emerging viruses; avian viruses played a role in the last three influenza pandemics. Two of these pandemic-causing viruses remain in circulation and are responsible for the majority of influenza cases each year.

Pandemics have occurred intermittently over centuries. The last three pandemics, in 1918, 1957 and 1968, killed approximately 40 million, 2 million and 1 million people worldwide, respectively. Although the timing cannot be predicted, history and science suggest that we will face one or more pandemics in this century.

The current pandemic threat stems from an unprecedented outbreak of avian influenza in Asia and Europe, caused by the H5N1 strain of the Influenza A virus. To date, the virus has infected birds in 16 countries and has resulted in the deaths, through illness and culling, of approximately 200 million birds across Asia. While traditional control measures have been attempted, the virus is now endemic in Southeast Asia, present in long-range migratory birds, and unlikely to be eradicated soon.

A notable and worrisome feature of the H5N1 virus is its ability to infect a wide range of hosts, including birds and humans. As of the date of this document, the virus is known to have infected 121 people in four countries, resulting in 62 deaths over the past two years. Although the virus has not yet shown an ability to transmit efficiently between humans, as is seen with the annual influenza virus, there is concern that it will acquire this capability through genetic mutation or exchange of genetic material with a human influenza virus.

It is impossible to know whether the currently circulating H5N1 virus will cause a human pandemic. The widespread nature of H5N1 in birds and the likelihood of mutations over time raise our concerns that

the virus will become transmissible between humans, with potentially catastrophic consequences. If this does not happen with the current H5N1 strain, history suggests that a different influenza virus will emerge and result in the next pandemic.

THE *NATIONAL STRATEGY FOR PANDEMIC INFLUENZA*

Preparing for a pandemic requires the leveraging of all instruments of national power, and coordinated action by all segments of government and society. Influenza viruses do not respect the distinctions of race, sex, age, profession or nationality, and are not constrained by geographic boundaries. The next pandemic is likely to come in waves, each lasting months, and pass through communities of all size across the nation and world. While a pandemic will not damage power lines, banks or computer networks, it will ultimately threaten all critical infrastructure by removing essential personnel from the workplace for weeks or months.

This makes a pandemic a unique circumstance necessitating a strategy that extends well beyond health and medical boundaries, to include the sustainment of critical infrastructure, private-sector activities, the movement of goods and services across the nation and the globe, and economic and security considerations. The uncertainties associated with influenza viruses require that our *Strategy* be versatile, to ensure that we are prepared for any virus with pandemic potential, as well as the annual burden of influenza that we know we will face.

The *National Strategy for Pandemic Influenza* guides our preparedness and response to an influenza pandemic, with the intent of (1) stopping, slowing or otherwise limiting the spread of a pandemic to the United States; (2) limiting the domestic spread of a pandemic, and mitigating disease, suffering and death; and (3) sustaining infrastructure and mitigating impact to the economy and the functioning of society.

The *Strategy* will provide a framework for future U.S. Government planning efforts that is consistent with *The National Security Strategy* and the *National Strategy for Homeland Security*. It recognizes that preparing for and responding to a pandemic cannot be viewed as a purely federal responsibility, and that the nation must have a system of plans at all levels of government and in all sectors outside of government that can be integrated to address the pandemic threat. It is guided by the following principles:

- The federal government will use all instruments of national power to address the pandemic threat.
- States and communities should have credible pandemic preparedness plans to respond to an outbreak within their jurisdictions.
- The private sector should play an integral role in preparedness before a pandemic begins, and should be part of the national response.
- Individual citizens should be prepared for an influenza pandemic, and be educated about individual responsibility to limit the spread of infection if they or their family members become ill.
- Global partnerships will be leveraged to address the pandemic threat.

PILLARS OF THE *NATIONAL STRATEGY*

Our *Strategy* addresses the full spectrum of events that link a farmyard overseas to a living room in America. While the circumstances that connect these environments are very different, our strategic principles remain relevant. The pillars of our *Strategy* are:

- **Preparedness and Communication**: Activities that should be undertaken before a pandemic to ensure preparedness, and the communication of roles and responsibilities to all levels of government, segments of society and individuals.
- **Surveillance and Detection**: Domestic and international systems that provide continuous "situational awareness," to ensure the earliest warning possible to protect the population.
- **Response and Containment**: Actions to limit the spread of the outbreak and to mitigate the health, social and economic impacts of a pandemic.

IMPLEMENTATION OF THE *NATIONAL STRATEGY*

This *Strategy* reflects the federal government's approach to the pandemic threat. While it provides strategic direction for the Departments and Agencies of the U.S. Government, it does not attempt to catalogue and assign all federal responsibilities. The implementation of this *Strategy* and specific responsibilities will be described separately.

PILLAR ONE: PREPAREDNESS AND COMMUNICATION

Preparedness is the underpinning of the entire spectrum of activities, including surveillance, detection, containment and response efforts. We will support pandemic planning efforts, and clearly communicate expectations to individuals, communities and governments, whether overseas or in the United States, recognizing that all share the responsibility to limit the spread of infection in order to protect populations beyond their borders.

Planning for a Pandemic

To enhance preparedness, we will:

- Develop federal implementation plans to support this *Strategy*, to include all components of the U.S. government and to address the full range of consequences of a pandemic, including human and animal health, security, transportation, economic, trade and infrastructure considerations.
- Work through multilateral health organizations such as the World Health Organization (WHO), Food and Agriculture Organization (FAO), World Organization for Animal Health (OIE) and regional organizations such as the Asia-Pacific Economic Cooperation (APEC) forum, as well as through bilateral and multilateral contacts to:
    - Support the development and exercising of avian and pandemic response plans;
    - Expand in-country medical, veterinary and scientific capacity to respond to an outbreak; and
    - Educate populations at home and abroad about high-risk practices that increase the likelihood of virus transmission between species.
- Continue to work with states and localities to:
    - Establish and exercise pandemic response plans;
    - Develop medical and veterinary surge capacity plans; and
    - Integrate non-health sectors, including the private sector and critical infrastructure entities, in these planning efforts.
- Build upon existing domestic mechanisms to rapidly recruit and deploy large numbers of health, medical and veterinary providers within or across jurisdictions to match medical requirements with capabilities.

Communicating Expectations and Responsibilities

A critical element of pandemic planning is ensuring that people and entities not accustomed to responding to health crises understand the actions and priorities required to prepare for and respond to a pandemic. Those groups include political leadership at all levels of government, non-health components of government and members of the private sector. Essential planning also includes the coordination of efforts between human and animal health authorities. In order to accomplish this, we will:

- Work to ensure clear, effective and coordinated risk communication, domestically and internationally, before and during a pandemic. This includes identifying credible spokespersons at all levels of government to effectively coordinate and communicate helpful, informative messages in a timely manner.
- Provide guidance to the private sector and critical infrastructure entities on

their role in the pandemic response, and considerations necessary to maintain essential services and operations despite significant and sustained worker absenteeism.

- Provide guidance to individuals on infection control behaviors they should adopt pre-pandemic, and the specific actions they will need to take during a severe influenza season or pandemic, such as self-isolation and protection of others if they themselves contract influenza.
- Provide guidance and support to poultry, swine and related industries on their role in responding to an outbreak of avian influenza, including ensuring the protection of animal workers and initiating or strengthening public education campaigns to minimize the risks of infection from animal products.

Producing and Stockpiling Vaccines, Antivirals and Medical Material

In combination with traditional public health measures, vaccines and antiviral drugs form the foundation of our infection control strategy. Vaccination is the most important element of this strategy, but we acknowledge that a two-pronged strategy incorporating both vaccines and antivirals is essential. To establish production capacity and stockpiles in support of our containment and response strategies, we will:

- Encourage nations to develop production capacity and stockpiles to support their response needs, to include pooling of efforts to create regional capacity.
- Encourage and subsidize the development of state-based antiviral stockpiles to support response activities.
- Ensure that our national stockpile and stockpiles based in states and communities are properly configured to respond to the diversity of medical requirements presented by a pandemic, including personal protective equipment, antibiotics and general supplies.
- Establish domestic production capacity and stockpiles of countermeasures to ensure:
    - Sufficient vaccine to vaccinate front-line personnel and at-risk populations, including military personnel;
    - Sufficient vaccine to vaccinate the entire U.S. population within six months of the emergence of a virus with pandemic potential; and
    - Antiviral treatment for those who contract a pandemic strain of influenza.
- Facilitate appropriate coordination of efforts across the vaccine manufacturing sector.
- Address regulatory and other legal barriers to the expansion of our domestic vaccine production capacity.
- Expand the public health recommendations for domestic seasonal influenza vaccination and encourage the same practice internationally.
- Expand the domestic supply of avian influenza vaccine to control a domestic outbreak of avian influenza in bird populations.

Establishing Distribution Plans for Vaccines and Antivirals

It is essential that we prioritize the allocation of countermeasures (vaccines and antivirals) that are in limited supply and define effective distribution modalities during a pandemic. We will:

- Develop credible countermeasure distribution mechanisms for vaccine and antiviral agents prior to and during a pandemic.

- Prioritize countermeasure allocation before an outbreak, and update this prioritization immediately after the outbreak begins based on the at-risk populations, available supplies and the characteristics of the virus.

Advancing Scientific Knowledge and Accelerating Development

Research and development of vaccines, antivirals, adjuvants and diagnostics represents our best defense against a pandemic. To realize our goal of next-generation countermeasures against influenza, we must make significant and targeted investments in promising technologies. We will:

- Ensure that there is maximal sharing of scientific information about influenza viruses between governments, scientific entities and the private sector.
- Work with our international partners to ensure that we are all leveraging the most advanced technological approaches available for vaccine production.
- Accelerate the development of cell culture technology for influenza vaccine production and establish a domestic production base to support vaccination demands.
- Use novel investment strategies to advance the development of next-generation influenza diagnostics and countermeasures, including new antivirals, vaccines, adjuvant technologies, and countermeasures that provide protection across multiple strains and seasons of the influenza virus.

PILLAR TWO: SURVEILLANCE AND DETECTION

Early warning of a pandemic and our ability to closely track the spread of avian influenza outbreak is critical to being able to rapidly employ resources to contain the spread of the virus. An effective surveillance and detection system will save lives by allowing us to activate our response plans before the arrival of a pandemic virus to the U.S., activate additional surveillance systems and initiate vaccine production and administration.

Ensuring Rapid Reporting of Outbreaks

To support our need for "situational awareness," both domestically and internationally, we will:

- Work through the International Partnership on Avian and Pandemic Influenza, as well as through other political and diplomatic channels such as the United Nations and the Asia-Pacific Economic Cooperation forum, to ensure transparency, scientific cooperation and rapid reporting of avian and human influenza cases.
- Support the development of the proper scientific and epidemiologic expertise in affected regions to ensure early recognition of changes in the pattern of avian or human outbreaks.
- Support the development and sustainment of sufficient U.S. and host nation laboratory capacity and diagnostic reagents in affected regions and domestically, to provide rapid confirmation of cases in animals or humans.
- Advance mechanisms for "real-time" clinical surveillance in domestic acute care settings such as emergency departments, intensive care units and laboratories to provide local, state and federal public health officials with continuous awareness of the profile of illness in communities, and leverage all federal medical capabilities, both domestic and international, in support of this objective.
- Develop and deploy rapid diagnostics with greater sensitivity and reproducibility to allow onsite diagnosis of pandemic strains of influenza at home and abroad, in animals and humans, to facilitate early warning, outbreak control and targeting of antiviral therapy.
- Expand our domestic livestock and wildlife surveillance activities to ensure early warning of the spread of an outbreak to our shores.

Using Surveillance to Limit Spread

Although influenza does not respect geographic or political borders, entry to and egress from affected areas represent opportunities to control or at the very least slow the spread of infection. In parallel to our containment measures, we will:

- Develop mechanisms to rapidly share information on travelers who may be carrying or may have been exposed to a pandemic strain of influenza, for the purposes of contact tracing and outbreak investigation.
- Develop and exercise mechanisms to provide active and passive surveillance during an outbreak, both within and beyond our borders.
- Expand and enhance mechanisms for screening and monitoring animals that may harbor viruses with pandemic potential.
- Develop screening and monitoring mechanisms and agreements to appropriately control travel and shipping of potentially infected products to and from affected regions if necessary, and to protect unaffected populations.

PILLAR THREE: RESPONSE AND CONTAINMENT

We recognize that a virus with pandemic potential anywhere represents a risk to populations everywhere. Once health authorities have signaled sustained and efficient human-to-human spread of the virus has occurred, a cascade of response mechanisms will be initiated, from the site of the documented transmission to locations around the globe.

Containing Outbreaks

The most effective way to protect the American population is to contain an outbreak beyond the borders of the U.S. While we work to prevent a pandemic from reaching our shores, we recognize that slowing or limiting the spread of the outbreak is a more realistic outcome and can save many lives. In support of our containment strategy, we will:

- Work through the International Partnership to develop a coalition of strong partners to coordinate actions to limit the spread of a virus with pandemic potential beyond the location where it is first recognized in order to protect U.S. interests abroad.
- Where appropriate, offer and coordinate assistance from the United States and other members of the International Partnership.
- Encourage all levels of government, domestically and globally, to take appropriate and lawful action to contain an outbreak within the borders of their community, province, state or nation.
- Where appropriate, use governmental authorities to limit non-essential movement of people, goods and services into and out of areas where an outbreak occurs.
- Provide guidance to all levels of government on the range of options for infection-control and containment, including those circumstances where social distancing measures, limitations on gatherings, or quarantine authority may be an appropriate public health intervention.
- Emphasize the roles and responsibilities of the individual in preventing the spread of an outbreak, and the risk to others if infection-control practices are not followed.
- Provide guidance for states, localities and industry on best practices to prevent the spread of avian influenza in commercial, domestic and wild birds, and other animals.

Leveraging National Medical and Public Health Surge Capacity

Rather than generating a focal point of casualties, the medical burden of a pandemic is likely to be distributed in communities across the nation for an extended period of time. In order to save lives and limit suffering, we will:

- Implement state and local public health and medical surge plans, and leverage all federal medical facilities, personnel and response capabilities to support the national surge requirement.
- Activate plans to distribute medical countermeasures, including non-medical equipment and other material, from the Strategic National Stockpile and other distribution centers to federal, state and local authorities.
- Address barriers to the flow of public health, medical and veterinary personnel across state and local jurisdictions to meet local shortfalls in public health, medical and veterinary capacity.
- Determine the spectrum of public health, medical and veterinary surge

capacity activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

Sustaining Infrastructure, Essential Services and the Economy

Movement of essential personnel, goods and services, and maintenance of critical infrastructure are necessary during an event that spans months in any given community. The private sector and critical infrastructure entities must respond in a manner that allows them to maintain the essential elements of their operations for a prolonged period of time, in order to prevent severe disruption of life in our communities. To ensure this, we will:

- Encourage the development of coordination mechanisms across American industries to support the above activities during a pandemic.
- Provide guidance to activate contingency plans to ensure that personnel are protected, that the delivery of essential goods and services is maintained, and that sectors remain functional despite significant and sustained worker absenteeism.
- Determine the spectrum of infrastructure-sustainment activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

Ensuring Effective Risk Communication

Effective risk communication is essential to inform the public and mitigate panic. We will:

- Ensure that timely, clear, coordinated messages are delivered to the American public from trained spokespersons at all levels of government and assist the governments of affected nations to do the same.
- Work with state and local governments to develop guidelines to assure the public of the safety of the food supply and mitigate the risk of exposure from wildlife.

ROLES AND RESPONSIBILITIES

Because of its unique nature, responsibility for preparedness and response to a pandemic extends across all levels of government and all segments of society. No single entity alone can prevent or mitigate the impact of a pandemic.

The Federal Government

While the Federal government plays a critical role in elements of preparedness and response to a pandemic, the success of these measures is predicated on actions taken at the individual level and in states and communities. Federal responsibilities include the following:

- Advancing international preparedness, surveillance, response and containment activities.
- Supporting the establishment of countermeasure stockpiles and production capacity by:
    - Facilitating the development of sufficient domestic production capacity for vaccines, antivirals, diagnostics and personal protective equipment to support domestic needs, and encouraging the development of production capacity around the world;
    - Advancing the science necessary to produce effective vaccines, therapeutics and diagnostics; and
    - Stockpiling and coordinating the distribution of necessary countermeasures, in concert with states and other entities.
- Ensuring that federal departments and agencies, including federal health care systems, have developed and exercised preparedness and response plans that take into account the potential impact of a pandemic on the federal workforce, and are configured to support state, local and private sector efforts as appropriate.
- Facilitating state and local planning through funding and guidance.
- Providing guidance to the private sector and public on preparedness and response planning, in conjunction with states and communities.

Lead departments have been identified for the medical response (Department of Health and Human Services), veterinary response (Department of Agriculture), international activities (Department of State) and the overall domestic incident management and Federal coordination (Department of Homeland Security). Each department is responsible for coordination of all efforts within its authorized mission, and departments are responsible for developing plans to implement this *Strategy*.

States and Localities

Our communities are on the front lines of a pandemic and will face many challenges in maintaining continuity of society in the face of widespread illness and increased demand on most essential government services. State and local responsibilities include the following:

- Ensuring that all reasonable measures are taken to limit the spread of an outbreak within and beyond the community's borders.
- Establishing comprehensive and credible preparedness and response plans that are exercised on a regular basis.
- Integrating non-health entities in the planning for a pandemic, including law enforcement, utilities, city services and political leadership.

- Establishing state and community-based stockpiles and distribution systems to support a comprehensive pandemic response.
- Identifying key spokespersons for the community, ensuring that they are educated in risk communication, and have coordinated crisis communications plans.
- Providing public education campaigns on pandemic influenza and public and private interventions.

The Private Sector and Critical Infrastructure Entities

The private sector represents an essential pillar of our society because of the essential goods and services that it provides. Moreover, it touches the majority of our population on a daily basis, through an employer-employee or vendor-customer relationship. For these reasons, it is essential that the U.S. private sector be engaged in all preparedness and response activities for a pandemic.

Critical infrastructure entities also must be engaged in planning for a pandemic because of our society's dependence upon their services. Both the private sector and critical infrastructure entities represent essential underpinnings for the functioning of American society. Responsibilities of the U.S. private sector and critical infrastructure entities include the following:

- Establishing an ethic of infection control in the workplace that is reinforced during the annual influenza season, to include, if possible, options for working offsite while ill, systems to reduce infection transmission, and worker education.
- Establishing contingency systems to maintain delivery of essential goods and services during times of significant and sustained worker absenteeism.
- Where possible, establishing mechanisms to allow workers to provide services from home if public health officials advise against non-essential travel outside the home.
- Establishing partnerships with other members of the sector to provide mutual support and maintenance of essential services during a pandemic.

Individuals and Families

The critical role of individuals and families in controlling a pandemic cannot be overstated. Modeling of the transmission of influenza vividly illustrates the impact of one individual's behavior on the spread of disease, by showing that an infection carried by one person can be transmitted to tens or hundreds of others. For this reason, individual action is perhaps the most important element of pandemic preparedness and response.

Education on pandemic preparedness for the population should begin before a pandemic, should be provided by all levels of government and the private sector, and should occur in the context of preventing the transmission of any infection, such as the annual influenza or the common cold. Responsibilities of the individual and families include:

- Taking precautions to prevent the spread of infection to others if an individual or a family member has symptoms of influenza.
- Being prepared to follow public health guidance that may include limitation of attendance at public gatherings and non-essential travel for several days or weeks.
- Keeping supplies of materials at home, as recommended by authorities, to support essential needs of the household for several days if necessary.

International Partners

We rely upon our international partnerships, with the United Nations, international organizations and private non-profit organizations, to amplify our efforts, and will engage them on a multilateral and bilateral basis. Our international effort to contain and mitigate the effects of an outbreak of pandemic influenza is a central component of our overall strategy. In many ways, the character and quality of the U.S. response and that of our international partners may play a determining role in the severity of a pandemic.

The International Partnership on Avian and Pandemic Influenza stands in support of multinational organizations. Members of the Partnership have agreed that the following 10 principles will guide their efforts:

1. International cooperation to protect the lives and health of our people;
2. Timely and sustained high-level global political leadership to combat avian and pandemic influenza;
3. Transparency in reporting of influenza cases in humans and in animals caused by virus strains that have pandemic potential, to increase understanding and preparedness and especially to ensure rapid and timely response to potential outbreaks;
4. Immediate sharing of epidemiological data and samples with the World Health Organization (WHO) and the international community to detect and characterize the nature and evolution of any outbreaks as quickly as possible, by utilizing, where appropriate, existing networks and mechanisms;
5. Rapid reaction to address the first signs of accelerated transmission of H5N1 and other highly pathogenic influenza strains so that appropriate international and national resources can be brought to bear;
6. Prevent and contain an incipient epidemic through capacity building and in-country collaboration with international partners;
7. Work in a manner complementary to and supportive of expanded cooperation with and appropriate support of key multilateral organizations (including the WHO, Food and Agriculture Organization and World Organization for Animal Health);
8. Timely coordination of bilateral and multilateral resource allocations; dedication of domestic resources (human and financial); improvements in public awareness; and development of economic and trade contingency plans;
9. Increased coordination and harmonization of preparedness, prevention, response and containment activities among nations, complementing domestic and regional preparedness initiatives, and encouraging where appropriate the development of strategic regional initiatives; and
10. Actions based on the best available science.

Through the Partnership and other bilateral and multilateral initiatives, we will promote these principles and support the development of an international capacity to prepare, detect and respond to an influenza pandemic.


SEAL OF THE PRESIDENT OF THE UNITED STATES

DEC. 05

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

NIJ

Research in Brief





Co-Offending and Patterns of Juvenile Crime

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DEC. 05

Co-Offending and Patterns of Juvenile Crime

This report is based on findings presented by the authors in "Patterns of Juvenile Delinquency and Co-Offending," in *Crime and Social Organization*, vol. 10 of *Advances in Criminological Theory*, E. Waring and D. Weisburd (eds.), New Brunswick, NJ: Transaction Publishers, 2002: 15–30; and "A Longitudinal Examination of the Relation between Co-Offending With Violent Accomplices and Violent Crime," *Aggressive Behavior* 28 (2) (2002): 97–108. These articles are available from the National Criminal Justice Reference Service at www.ncjrs.org.

Findings and conclusions of the research reported here are those of the authors and do not necessarily reflect the official position or policies of the U.S. Department of Justice or the National Institutes of Health.

This research was supported by the National Institute of Justice under grant number 92–IJ–CX–K008, "Delinquent Networks in Philadelphia: Co-Offending and Gangs." The study's final report, "Longitudinal Examination of the Relation Between Co-Offending with Violent Accomplices and Violent Crime," by Kevin P. Conway and Joan McCord (2001), is available at www.ncjrs.org/pdffiles1/nij/grants/192289.pdf.

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ABOUT THIS REPORT

Observers of juvenile crimes have long noticed that most are co-offenses; that is, they involve more than one offender. An NIJ-sponsored study of juvenile offenders in an urban center uncovered several patterns of crime related to co-offending. This report focuses on three of those patterns—how co-offending is related to (1) the age of offenders, (2) recidivism, and (3) violence.

What did the researchers find?

The distribution of co-offending exaggerates the contribution of young offenders to crime events; ignoring co-offending when computing crime rates may produce severely misleading reports about crime and the effects of incarceration.

Offenders age 13 and under are more likely to commit crimes in pairs and groups than are 16- and 17-year-old offenders. About 40 percent of juvenile offenders commit most of their crimes with others. Co-offenders also are more likely than solo offenders to be recidivists. When very young co-offenders were compared with very young solo offenders, only the co-offenders had high recidivism rates and only the co-offenders committed high numbers of violent crimes. These young co-offenders warrant special attention from the criminal justice system.

Co-offending actually may increase the likelihood that offenders will commit violent crimes. When young offenders affiliate with offenders who have previously used violence, the result appears to be an increase in the likelihood that they will subsequently commit a violent crime. Co-offending violence rose throughout adolescence among the study group.

These trends suggest that an effective strategy would be to intervene early in the development of a criminal trajectory and to especially target co-offenders. For example, police could inquire about co-offending and record all participants in a crime.

12f-000027

Joan McCord and Kevin P. Conway

Co-Offending and Patterns of Juvenile Crime



About the Authors

The late Joan McCord, Ph.D., Professor of Criminal Justice at Temple University, was a groundbreaking criminal justice researcher and an eloquent teacher, speaker, and writer in the field, often focusing on juvenile crime, violence, and the efficacy of intervention programs. Kevin P. Conway, Ph.D., is Deputy Branch Chief of the Epidemiology Research Branch at the National Institute on Drug Abuse. His research interests center on drug abuse etiology and juvenile delinquency, with emphasis on links between antisocial behavior and drug abuse.

Juveniles who commit crimes typically commit them in the company of their peers. This basic fact has been regularly reported in the literature since the late 1920s.[1] Nevertheless, with rare exceptions, contemporary research focuses almost exclusively on juvenile delinquents as individual actors.[2] Indeed, police records tend to undercount co-offending, and published crime rates rarely take co-offending into account.

Most crime rates are computed from individuals, with an assumption that each criminal event reported by or about an individual represents a crime event (see "Measuring Juvenile Crime"). Yet co-offenders provide a basis for multiple reports of single crime events. Not only are those who first offended before age 13 most likely to be co-offenders, but also the sizes of their offending groups (from 2 to 30 in the current study) tend to further exaggerate the contributions of youthful offenders to crimes. This exaggeration seems to contribute to a fear of youths that may be counterproductive.

Analyses that consider both co-offending and age at first arrest show that youthful offenders are most at risk for subsequent crimes if they commit their crimes with accomplices. Although very young offenders are responsible for a high proportion of juvenile crimes, their annual crime rate is not particularly high unless they are co-offenders.

Violence appears to be learned in the company of others. Those who commit crimes with violent offenders, even if the group does not commit violent crimes, are likely to subsequently commit violent crimes. This suggests that young offenders pick up attitudes and values from their companions.

To address issues raised by co-offending, including whether co-offending increases violence, the National Institute of Justice sponsored a study in Philadelphia that examined

Measuring Juvenile Crime

Data about juvenile crime typically come from three sources: arrest data, reports from victims, and self-reports about crimes committed. These sources have limitations and important intrinsic inaccuracies—one of which is that they ignore co-offending.

Arrest data. Typically derived from the FBI's Uniform Crime Reports, arrest data count each arrest of each individual as a crime, thus relying on such factors as policies of particular police agencies, cooperation of victims, and the skill of crime perpetrators. If more than one person is arrested for a single crime, information from arrests inflates the crime rate. Multiple arrests of a single person also inflate the crime rate when rates are presented as a proportion of the population who are arrested.

Victims' reports. Victims' reports have been systematically collected since 1973 in the National Crime Victimization Survey. Using a nationally representative sample of households, victims over the age of 12 report their experiences with specific crimes (rape, sexual assault, personal robbery, aggravated and simple assault, household burglary, theft, and motor vehicle theft). Data are not available from this source for homicides, victims under the age of 13, or victims who are not parts of households. Information about perpetrators is available from these records only for crimes involving contact between victim and criminal. Estimates of juvenile crimes depend on the victims' estimates of age. Crimes with more than one victim may have multiple reports in these records.

Self-reports. Self-reports about crimes committed are collected in a variety of settings. Many surveys take advantage of the fact that schools provide a convenient location for data collection, but they typically miss the most likely perpetrators of crimes—those absent from school because of illness, dropping out, or truancy. Many self-reporting questionnaires record delinquencies that would not be considered serious enough to call police, and few obtain information about the more serious types of crimes included on the FBI Indexes. Self-reports of crimes tend to reflect social responses to criminality, with accuracy of reporting varying by gender, ethnicity, and recidivism.

the criminal histories of a random sample of juvenile offenders. This Research in Brief discusses the study's findings and implications, considering four questions:

- Why consider co-offending?
- How is co-offending related to the age of offenders?
- How is co-offending related to recidivism?
- How is co-offending related to violence?

Why consider co-offending?

Co-offending distorts reported crime rates by equating number of offenders with number of incidents and may increase a juvenile's risk for committing violent crimes through association with violent peers. Statistics on crimes typically are based on the number of criminals accused or convicted of crimes. Even when self-reports are used, they indicate only which individuals within a stipulated population have committed crimes. Such statistics create a distorted picture of crime because many crimes are committed by more than one criminal

and the proportion differs among different groups.

The distortion can be seen in the rare instances when crimes by lone offenders have been separated from those committed by multiple offenders. For example, the *Sourcebook of Criminal Justice Statistics, 2001,* reports that 64 percent of the violent crimes attributed to lone offenders were committed by white offenders, but only 51 percent of the violent crimes attributed to multiple offenders were committed by offenders in "all white" groups.[3] These figures suggest that nonwhites are more likely to offend in groups. Therefore, crime rates based on arrests may exaggerate the contributions of nonwhites to crime in the United States.

The distortion has a particularly strong effect for juvenile crimes. In 1997, for example, the Supplemental Homicide Reports indicated that 44 percent of murders known to involve juveniles involved more than one perpetrator.[4] According to the Bureau of Justice Statistics, 23 percent of violent crimes in 1999 attributed to lone offenders were committed by juveniles under the age of 18, whereas over 40 percent of violent crimes attributed to multiple offenders were committed by juveniles.[5]

The fact that particular crimes are committed by more than one criminal not only distorts the connection between criminals and crimes, but also distorts estimates of effects from various crime prevention policies. For example, researchers questioning the focus on incapacitation of high-rate offenders noted that offenders' crime rates would be exaggerated if they had committed a large proportion of their crimes in groups. To more accurately measure the effect of incapacitation on crime rates, attention also must be given to the continued criminal involvement of the co-offenders who remain in the community.[6]

In addition to distorting crime rates based on individuals and distorting the effects of intervention policies, co-offending may actually increase participation in crimes.[7] Furthermore, the present study provides evidence that co-offending may increase violence (see "How co-offending is related to violence," page 8).

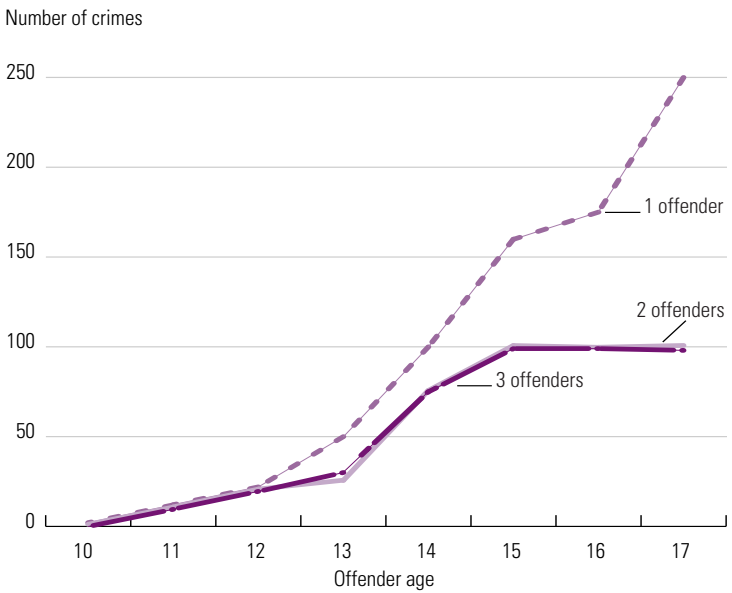
The fact that particular crimes are committed by more than one criminal not only distorts the connection between criminals and crimes, but also distorts estimates of effects from various crime prevention policies.

How co-offending is related to the age of offenders

Because prior evidence[8] suggests that youths who start offending early commit more crimes than those who start late, effects of the age of first criminality should be considered along with co-offending. Most offenders in the Philadelphia study committed their first offense between the ages of 13 and 15.

Researchers identified youths who committed a crime before the age of 13 as "young starters" and those who committed a first crime after age 15 as "late starters." They noted a relative decline in co-offending in relation to age, but this reflects a sharp increase in the number of crimes committed by single offenders rather than a decline in the number of co-offenses (see exhibit 1).

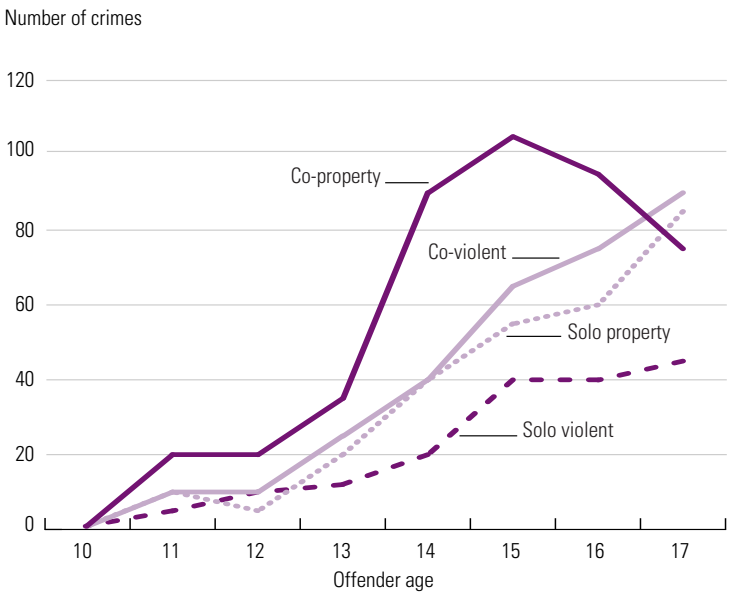
Exhibit 1. Number of crimes by number of offenders and age



From ages 10 to 17, crimes committed alone, in pairs, and in groups increased. The number of crimes committed alone increased more rapidly than the number of crimes committed with accomplices. Rates for pairs and for groups were almost identical after age 14.

When researchers differentiated property crimes from violent crimes,[9] they found a decline in co-offending after the age of 15 for property offenses (see exhibit 2). This decline, however, was paralleled by a rise in solo property offending. Co-offending violence increased throughout adolescence, while solo violent offending leveled off around age 15. Among 16- and 17-year-old offenders, violent crimes were almost twice as likely to be co-offenses as solo offenses.

Exhibit 2. Crimes, age, and co-offending

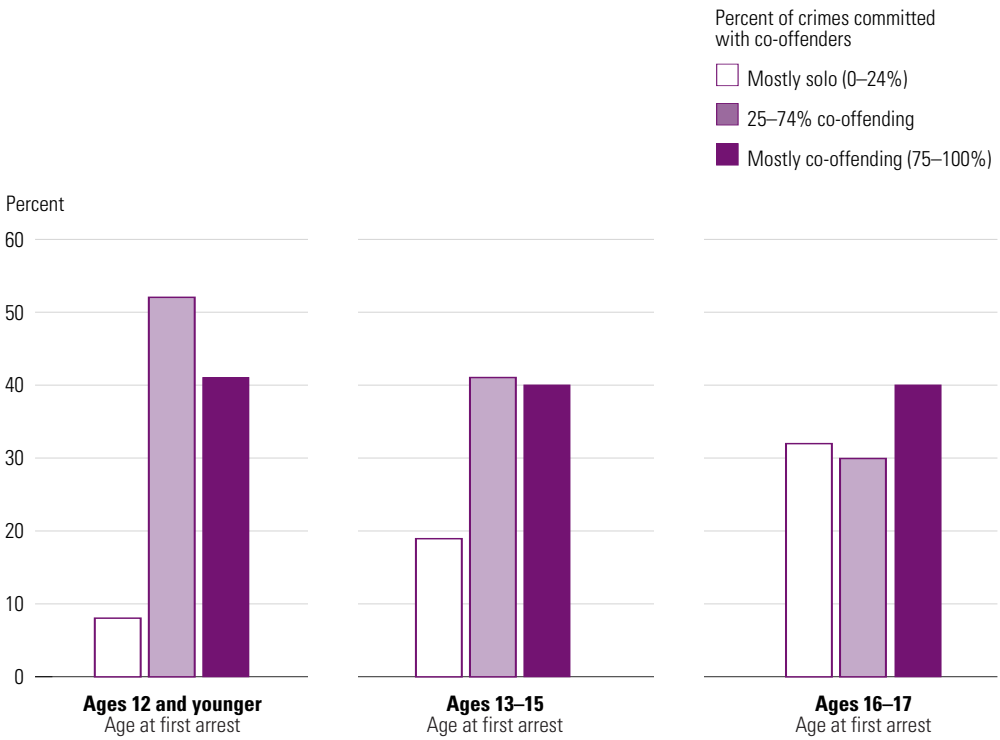


The youngest offenders at first arrest were the most likely to mix co-offending and solo offending, but least likely to commit all their crimes alone. Those first arrested at ages 16 or 17, on the other hand, were most likely to commit crimes alone. About 40 percent of offenders committed most of their crimes with accomplices, regardless of their age at first arrest (see exhibit 3).

How co-offending is related to recidivism

The Philadelphia delinquents first arrested when they were under 13 years of age had higher rates of recidivism than those first arrested when they were older. Co-offending, however, distorts the picture of recidivism because there are actually fewer crime incidents than individual crime rates indicate

Exhibit 3. Age at first arrest and co-offending



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(see exhibit 4). Specifically, crime rates are inflated if co-offending is not taken into account. In contrast, crime rates that account for co-offenders count each crime incident once even if multiple offenders have been arrested for the crime. The crime-incident ratio, which accounts for co-offending, is greatest for the young starters—indicating that crime rates for young delinquents are most likely to be inflated when co-offending is not taken into account.

Study findings on recidivism provide a good example of the increased information that comes from recognizing co-offending. The number of Index crimes was consistently higher for delinquents who co-offended at least 25 percent of the time. This pattern was particularly evident for the young starters. The young starters who co-offended at least 25 percent of the time were arrested for almost twice as many Index crimes as the young starters who typically committed solo offenses.[10] Thus, the number of arrests for Index crimes reflected both the age at first arrest and the proportion of crimes that were co-offenses (see exhibit 5), revealing that young-starter delinquents who mostly co-offend committed the most crimes.

An examination of annual crime rates further demonstrates how crime rates can be inflated by inattention to co-offending. In each category of age for first arrest, individual co-offending rates were higher than solo rates (see exhibit 6). The offenders first

To determine whether a decline in group offending with age is a result of smaller groups committing crimes, of reform, or of shifts from co-offending to solo offending, researchers in a 1991 study* analyzed criminal records of 411 male criminals in London. They discovered that individuals with long criminal histories tended to move from group to solo offending. Both recidivism and co-offending declined with increasing age at first offense. The same study also reported that co-offending delinquents committed crimes at higher rates than solo offenders.

*See Reiss, A.J., Jr., and D.P. Farrington, "Advancing Knowledge About Co-Offending: Results From [a] Prospective Longitudinal Survey of London Males," *Journal of Criminal Law and Criminology* 82 (1991): 360–395.

Exhibit 4. Crime incidents and co-offenders

Age at first crime	Mean number of: Reported crimes	Mean number of: Actual incidents*	Crime-incident ratio
< 13 years	7	3	2.3
13–15 years	4	2	2.0
16–17 years	2	1	2.0

*When co-offending is factored in.

arrested at ages 16 and 17 had the highest rates for both solo and co-offenses. However, these high recidivism rates are due to both the compressed duration of their measured criminal activities and the fact that such a high proportion of their crimes are co-offenses.

Despite committing crimes at lower rates, the offenders who had first been arrested under the age of 13 had the highest ratio of co-offending to solo offending. But young starters are not high recidivists if one considers the length of time they are exposed to the juvenile justice system.[11]

These analyses show not only that crime rates based on individuals are most inflated for young-starting delinquents, but also that targeting youthful co-offenders could be the most productive approach to reducing future crime.

Exhibit 5. Age at first crime, co-offending, and Index crimes

Age at first crime and rate of co-offending	Mean number of Index crimes
< 13 years	
Co-offend < 25% of crimes	3
Co-offend 25–74% of crimes	6
Co-offend > 74% of crimes	6
13–15 years	
Co-offend < 25% of crimes	2
Co-offend 25–74% of crimes	4
Co-offend > 74% of crimes	3
16–17 years	
Co-offend < 25% of crimes	1
Co-offend 25–74% of crimes	2
Co-offend > 74% of crimes	1

Note: Figures have been rounded.

How co-offending is related to violence

Those who generally committed crimes with others were more likely to commit violent crimes than were solo offenders. The association between co-offending and violence was strongest for young starters.

Young starters. On average, offenders who had accomplices for at least 25 percent of their crimes and had been arrested before the age of 13 committed more than two violent crimes (see exhibit 7).

Young starters who committed most of their crimes alone, however, were not particularly prone to committing violent crimes. On the other hand, co-offending young starters were considerably more likely to commit violent

crimes than were late starters, especially late starters who mostly worked solo.

Thus, because the vast majority of young starters commit many of their crimes with others, the effects of age and co-offending on violence tend to be confounded.

Is violence learned? The association between co-offending and violence raises the question of whether kids who tend to be violent hang out together and therefore commit violent crimes or whether learning accounts for some of the high level of violence. To test the latter, researchers identified 236 offenders in the random sample of 400 who had not committed violent crimes before committing a crime with others.

These offenders committed their first co-offenses with 514 accomplices. Groups ranged from 2 to 15 offenders. Pairs committed 42 percent of these crimes. Co-offenders typically matched their accomplices in ethnic identity.[12] Age comparisons revealed that most of the offenders identified in their first co-offense were younger than their accomplices.[13]

Among the 236 offenders who had not been violent before their first co-offense, 90 participated in a violent first co-offense; among these, 62 percent committed at least one additional violent

Exhibit 6. Individual crime rates and co-offending

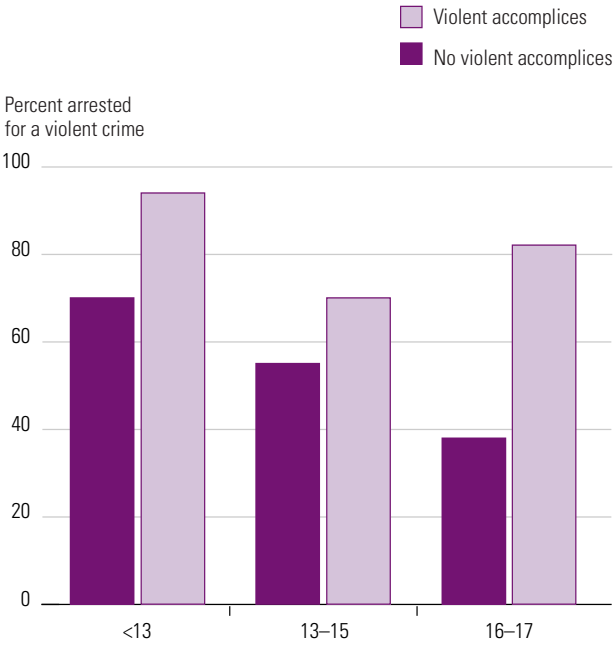
	Individual annual crime rates		
Age at first arrest	**Solo crimes**	**Co-offenses**	**Ratio of co-offending to solo offending**
< 13 years	0.3	0.6	1.9
13–15 years	0.4	0.6	1.5
16–17 years	0.6	0.7	1.2

Exhibit 7. Young co-offenders—at risk for violence

Age at first crime and rate of co-offending	**Mean number of violent crimes**
< 13 years	
Co-offend < 25% of crimes	1.0
Co-offend 25–74% of crimes	2.4
Co-offend > 74% of crimes	2.0
13–15 years	
Co-offend < 25% of crimes	0.9
Co-offend 25–74% of crimes	1.1
Co-offend > 74% of crimes	1.7
16–17 years	
Co-offend < 25% of crimes	0.3
Co-offend 25–74% of crimes	0.8
Co-offend > 74% of crimes	0.8

offense after this first one. Another 61 juveniles participated in a nonviolent co-offense with co-offenders who had previously been violent. These juveniles were even more likely to subsequently commit a violent crime than those who had actually participated in a violent crime for their first co-offense.[14]

Exhibit 8. Violent crimes after first co-offense (percent of category)



To check whether peer contagion[15] may have influenced the learning of violence, researchers divided the previously nonviolent offenders who committed a first co-offense that was not violent into two groups according to whether their accomplices had been violent before the target co-offense. Those who committed a nonviolent offense with violent people were considerably more likely to commit a subsequent violent crime—80 percent of those with violent accomplices, compared with 56 percent of those with only nonviolent accomplices, committed at least one violent crime after the co-offense.[16]

The data showed no systematic relationship between age at first offense and whether or not nonviolent offenders co-offended with violent offenders for a first co-offense. Nevertheless, both whether a violent offender participated in the first co-offense and age at first arrest predicted whether a previously nonviolent offender would commit a violent crime (see exhibit 8).

Committing a first co-offense with violent accomplices

contributed to the likelihood that violent crimes would be committed, regardless of age at first arrest. That is, violent peers increase the likelihood that nonviolent offenders will commit violent offenses.

How may violence be learned? Peer delinquency seems to be more than a training process for learning how to be delinquent. Interaction among delinquent peers apparently encourages and escalates their proclivity to commit crimes. Co-offenders may learn through the influence of violent accomplices that violence can be an effective means for getting money or satisfying other desires. They also may learn that insults or fear provide adequate grounds for violence.[17]

An adequate theory of crime should take into account both how others influence individual behavior and how individuals selectively seek companions who are likely to promote criminal behavior. Construct Theory postulates that co-offending provides a young offender justification for continued delinquency, encouraging him or her to seek out accomplices and commit additional crimes (see "Construct Theory"). This implies that interventions need not be directed at deep-seated emotions. Rather, behavioral change can be expected as a consequence of changing beliefs in relation to grounds for action.

Implications for policy and practice

Because many juvenile crimes are committed in the company of others, crime rates cannot be accurately portrayed unless co-offending is accurately recorded. Yet inspection of official records indicates that attention has not focused on this feature of crime events. Too often, a crime is considered to be solved when a single arrest has been made.

The Philadelphia study demonstrates that crime records should contain accurate information about co-offending. Such accuracy is necessary if the effects of policy shifts are to be measured or if differences in crime rates are to be used as a basis for such preventive actions as deploying police and implementing target-hardening measures.

Co-offenders may learn through the influence of violent accomplices that violence can be an effective means for getting money or satisfying other desires.

Construct Theory

Several theories have been introduced to explain how people learn from their environments. Many of these involve an assumption that learning takes place in response to receiving rewards or avoiding punishments for specific types of actions. Other learning theories refer to the frequency of encountering particular types of behavior. McCord's learning theory—Construct Theory—explains an individual's intentional actions as the natural result of how that individual constructs his or her environment, based on perceptions and experiences.[a]

According to Construct Theory, delinquents learn to classify criminal actions as appropriate partially through finding that others think it normal to commit crimes. It follows that juveniles would be more likely to consider violent behavior to be appropriate when committing crimes if their companions consider violence appropriate.

Construct Theory differs from other theories purporting to explain criminal behavior in that it does not rest on implied or stated feelings or emotions. Rather, it relies on an empirical judgment that *potentiating reasons* provide the impetus for action. For example, in the case of co-offending, Construct Theory holds that an 11-year-old delinquent often accepts a (usually older) companion's belief that violence is justifiable when committing crimes. This belief becomes a potentiating reason for the youth's own actions.

Some interventions may enhance the effects of co-offending by placing youths in groups that unintentionally provide negative peer learning. Peer values that encourage deviant behavior among misbehaving youths can provide potentiating reasons for continued misbehavior.[b]

The Philadelphia study validates Construct Theory, at least in part, by demonstrating that juvenile offenders are influenced by accomplices who had been violent in prior crimes, even though the present crime was not violent.

Notes

a. See McCord, J., "He Did It Because He Wanted To . . . ," in *Motivation and Delinquency*, ed. W. Osgood, Nebraska Symposium on Motivation, Lincoln, NE: University of Nebraska Press, 44 (1997): 1–43.

b. See McCord, J., "Crime Prevention: A Cautionary Tale," presentation at the Third International Inter-Disciplinary Evidence-Based Policies and Indicator Systems conference, July 2001, published in *Evidence-Based Policies and Indicator Systems, Conference Proceedings*, University of Durham, England, 2002: 186–192.

Perhaps the greatest challenge for intervention is to target youthful co-offenders in a way that reduces the likelihood that they will develop attitudes that promote crime. The study's findings imply that lessons of violence are learned "on the street," where knowledge is passed along through impromptu social contexts, including those in which offenders commit crimes together.[18] Interaction among delinquent peers apparently serves to instigate crimes and to escalate their severity.

More research on this issue is warranted, especially studies that measure peer influence on intentional action, track the selection of accomplices across multiple crimes, examine the learning processes involved in the transfer of violence across offenders, and identify individual offenders who may be particularly susceptible to (or unaffected by) the influence of violent accomplices.

When developing and evaluating strategies designed to prevent or reduce violence, practitioners and evaluators may want to consider co-offending patterns, individuals' choices of accomplices, and factors that increase the risk of co-offending, especially among very young offenders.

Study Methodology[a]

A random number generator identified 400 offenders from police tapes listing 60,821 juvenile arrests in Philadelphia during 1987. Half the sample was drawn from a list of offenses the police had recorded as solo offenses and the other half from a list of co-offenses. If an offender's court record could not be found for the listed offense or if the offender had been previously selected, another crime was drawn, again using a random number generator, and that offender became part of the sample. The complete juvenile criminal records were gathered for all 400 offenders in the sample. Adult records were traced through 1994. Accomplices were traced for the 335 randomly selected offenders who had committed at least one co-offense.

Analyses rely on data from court folders, which contained witness, complainant, police, and co-offender reports. A comparison between the court records and police tapes indicated that police records systematically undercounted co-offending.

Some information about the number of offenders was available in more than 95 percent of the incidents. When a range was given, researchers estimated conservatively, taking the lower number. When "group" was mentioned with an unspecified number of offenders, the number was coded as 3.

A crime was considered to be violent if the offenders were accused of murder, attempted murder, rape, robbery, aggravated assault, simple assault, terroristic threatening, intimidating a witness, prowling, or cruelty to animals, or if the complainant, a witness, or the victim reported violence. By these criteria, 38 percent of the crimes were violent. Crimes committed by groups were more likely to be violent.[b]

Notes

a. For a complete description of methodology, see McCord, J., and K.P. Conway, "Patterns of Juvenile Delinquency and Co-Offending," in *Crime and Social Organization*, vol. 10 of *Advances in Criminological Theory*, ed. E. Waring and D. Weisburd, New Brunswick, NJ: Transaction Publishers, 2002: 15–30.

b. Forty-three percent of crimes committed by groups and 32 percent committed by pairs were violent.

Notes

1. A 1928 study found that 82 percent of juveniles brought to court in Cook County, Illinois, committed their offenses as members of groups. See Shaw, C.R., and H.D. McKay, *Juvenile Delinquency and Urban Areas*, revised edition, Chicago: University of Chicago Press, 1969 (first published 1942). For studies that focused on group processes to try to understand juvenile delinquency, see Cohen, A.K., *Delinquent Boys*, Glencoe: Free Press, 1955; Cloward, R.A., and L. Ohlin, *Delinquency and Opportunity*, New York: Free Press, 1960; and Short, J., and F.L. Strodtbeck, *Group Process and Gang Delinquency*, Chicago: University of Chicago Press, 1965.

2. See Carrington, P.J., "Group Crime in Canada," *Canadian Journal of Criminology* (July 2002): 277–315; Hockstetler, A., "Opportunities and Decision: Interactional Dynamics in Robbery and Burglary Groups," *Criminology* 39 (3) (2001): 737–763; McCarthy, B., J. Hagan, and L.E. Cohen, "Uncertainty, Cooperation and Crime: Understanding the Decision to Co-Offend," *Social Forces* 77 (1) (1998): 155–184; Weerman, F.M., "Co-Offending as Social Exchange: Explaining Characteristics of Co-Offending," *The British Journal of Criminology* 43 (2) (2003): 398–416.

3. Maguire, K., and Pastore, A.L., *Sourcebook of Criminal Justice Statistics, 2001,* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2003, NCJ 196438. Calculations have omitted "mixed" and "not known."

4. Supplemental Homicide Reports are part of the FBI's Uniform Crime Reporting system. See also Snyder, H.N., and M. Sickmund, *Juvenile Offenders and Victims: 1999 National Report*, Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 1999.

5. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1998,* Washington, DC: U.S. Department of Justice, 1999, NCJ 176356.

6. See Reiss, A.J., Jr., "Co-Offending and Criminal Careers," in *Crime and Justice*, vol. 10, ed. N. Morris and M. Tonry, Chicago: University of Chicago Press, 1988: 117–170.

7. See Hindelang, M.J., "With a Little Help From Their Friends: Group Participation in Reported Delinquency," *British Journal of Criminology* 16 (1976): 109–125; and Reiss, A.J., Jr., and D.P. Farrington, "Advancing Knowledge About Co-Offending: Results From [a] Prospective Longitudinal Survey of London Males," *Journal of Criminal Law and Criminology* 82 (1991): 360–395. Also, delinquents in co-offending groups studied in Japan reported that they committed more crimes together than alone. See Suzuke, S., Y. Inokuchi, K. Watanabe, J. Kobayashi, S. Okela, and Y. Takahashi, "Study of Juvenile Co-offending," *Reports of the National Research Institute of Police Science* 36 (1995): 2, 64.

8. Before attention was drawn to co-offending, high recidivism rates had been linked with offenders who were particularly young when they

began to commit crimes. See McCord, J., and K.P. Conway, "Patterns of Juvenile Delinquency and Co-Offending," in *Crime and Social Organization*, vol. 10 of *Advances in Criminological Theory*, ed. E. Waring and D. Weisburd, New Brunswick, NJ: Transaction Publishers, 2002: 16.

9. Property crimes were burglary, vehicle theft, theft other than vehicle, arson, vandalism, criminal trespass, forgery or counterfeiting, embezzlement, fraud, and risking or causing a catastrophe. Violent crimes were murder, attempted murder, rape, robbery, aggravated assault, simple assault, terroristic threatening, intimidating a witness, prowling, and cruelty to animals.

10. Index crimes are eight categories of serious crime collected by the FBI's Uniform Crime Reporting Program. Violent Index crimes are homicide, criminal sexual assault, robbery, and aggravated assault/battery. Property Index crimes are burglary, theft, motor vehicle theft, and arson.

11. If all young criminals spend about 5 years actively committing crimes, only those arrested before their 13th birthdays would spend all their criminal years as juveniles. To compensate for this potential bias, individual crime rates were computed for both solo offenses and co-offenses, on the assumption that once a juvenile committed a crime, he or she would remain a delinquent until the age of 18. Whatever bias this computation introduced affected solo and co-offending rates alike.

12. The ethnic identity of co-offenders and accomplices matched for 96 percent of black offenders, 83 percent of white offenders, and 83 percent of Hispanic or other offenders. Researchers traced the criminal histories of 396 of the accomplices, a success rate of 77 percent.

13. Sixty-three percent were younger, 19 percent were older, and 18 percent were the same age or very close.

14. $X^2_{(1)}=5.626$, $p<.02$.

15. For discussion of this issue, see Dishion, T.J., J. McCord, and F. Poulin, "When Interventions Harm: Peer Groups and Problem Behavior," *American Psychologist* 54 (9) (1999): 1–10.

16. $X^2_{(1)}=9.065$, $p<.003$.

17. Case studies and self-report data converge to suggest that delinquent groups socialize their members in ways that encourage and value violence.

18. See "Construct Theory" sidebar; also see McCord, J., "Understanding Childhood and Subsequent Crime," *Aggressive Behavior* 25 (1999): 241–253.

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How the Justice System Responds to Juvenile Victims: A Comprehensive Model



David Finkelhor, Theodore P. Cross, and Elise N. Cantor

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is committed to improving the justice system's response to crimes against children. OJJDP recognizes that children are at increased risk for crime victimization. Not only are children the victims of many of the same crimes that victimize adults, they are subject to other crimes, like child abuse and neglect, that are specific to childhood. The impact of these crimes on young victims can be devastating, and the violent or sexual victimization of children can often lead to an intergenerational cycle of violence and abuse. The purpose of OJJDP's Crimes Against Children Series is to improve and expand the nation's efforts to better serve child victims by presenting the latest information about child victimization, including analyses of crime victimization statistics, studies of child victims and their special needs, and descriptions of programs and approaches that address these needs.

This Bulletin introduces the concept that a justice system exists that responds to juvenile victims. This juvenile victim justice system is a complex set of agencies and institutions that include police, prosecutors, criminal and civil courts, child protection agencies, children's advocacy centers, and victim services and mental health agencies. The system has a structure and sequence, but its operation, despite the thousands of cases it handles every year, is not as widely recognized and understood as the operation of the more familiar juvenile offender justice system.[1]

The juvenile victim justice system is not as widely recognized in part because it is a fragmented system. It has not been conceptualized as a whole or put into place by a common set of statutes in the way the juvenile offender system has. Many of the agencies that handle juvenile victims are part of other systems, not designed primarily with juvenile victims in mind.

[1] This Bulletin was adapted by the authors, with permission, from "The Justice System for Juvenile Victims: A Comprehensive Model of Case Flow" in *Trauma, Violence, & Abuse* 6(2):83–102 (2005).

A Message From OJJDP

The justice system handles thousands of cases involving juvenile victims each year. These victims are served by a complex set of agencies and institutions, including police, prosecutors, courts, and child protection agencies. Despite the many cases involving juvenile victims and the structure in place for responding to them, the juvenile victim justice system model presented in this Bulletin is a new concept.

Although the juvenile victim justice system has a distinct structure and sequence, its operation is not very well understood. Unlike the more familiar juvenile offender justice system, the juvenile victim justice system has not been conceptualized as a whole or implemented by a common set of statutes.

This Bulletin identifies the major elements of the juvenile victim justice system by delineating how cases move through the system. It reviews each step in the case flow process for the child protection and criminal justice systems and describes the interaction of the agencies and individuals involved.

Recognizing how the juvenile victim justice system works can inform policy decisions and improve outcomes for juvenile victims. Acknowledging the existence of the system has important implications for system integration, information sharing, and data collection—all of which play a key role in ensuring the safety and well-being of juvenile victims.

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This Bulletin describes the major elements of the justice system for juvenile victims and what is known about how cases move through it. Like the system that handles juvenile offenders, the juvenile victim justice system is governed at the state level and implemented differently in each community, resulting in dissimilar practices and procedures from state to state. However, commonalities among these procedures can be described in a schematic way.

Recognizing how the juvenile victim justice system works is especially critical as policies about juvenile victims evolve and more professionals specialize in this area. Acknowledging the existence of a juvenile victim justice system can inform policy decisions and improve outcomes for juvenile victims. Other practical benefits, including victim assistance, information management, and system design, are discussed below.

The figure on page 3 shows how cases involving juvenile victims move through the juvenile victim justice system. Using the figure as a guide, this Bulletin reviews each step, from left to right, in the case flow process for the child protection and criminal justice systems. When possible, research evidence is reviewed at each step and implications for understanding and improving the response to child victims are discussed. For the sake of simplicity, atypical events that can occur within the system are omitted from the figure.

Juvenile Victimization: Crime and Child Maltreatment

One of the central complexities of the juvenile victim justice system is that it encompasses two distinct subsystems: the criminal justice system and the child protection system. These systems are typically thought of as separate, but the interaction between them in cases involving juvenile victims is considerable and increasing.

Officially, the two systems address different problems—crime and child maltreatment—but these domains overlap considerably. The crime domain, in terms of juvenile victims, includes all the offenses customarily seen as violent, such as homicides and physical and sexual assaults. But it also includes sex offenses such as incest and statutory rape, property crimes like theft, and criminal neglect. Across these crime categories, the justice system places no restriction on whom the perpetrator might be—family members, strangers, adults, or juveniles.

In contrast, statutes usually limit the domain of the child protection system (i.e., child maltreatment) to perpetrators who occupy a caretaking relationship to the child victim and thus tend to be adult family members or other caretakers. Child maltreatment is divided into the categories of physical and sexual abuse, neglect, and emotional maltreatment.

Direct overlap between the two systems primarily concerns sexual abuse and serious physical abuse, which are considered both child maltreatment and crimes because they involve assaults. Episodes of neglect and emotional maltreatment may or may not be crimes, depending on the acts and state statutes.

The concept of child maltreatment rarely includes property crimes, even when caretakers and family members commit them. Those professionals concerned with crimes against children also generally ignore property crimes, in part because they seem much less serious than violent crimes and sex offenses. Nonetheless, law enforcement agencies receive reports every year of hundreds of thousands of property crimes against juveniles (Finkelhor and Ormrod, 2000b), which research suggests have a significant and negative psychological impact on their victims (Norris and Kaniasty, 1994). These crimes need to be considered to better understand how the justice system responds to juvenile victims.

That the child protection system's mission can only be accomplished effectively through coordination with the criminal justice system has become increasingly clear. It has also become evident that the criminal justice system cannot provide true justice without ensuring the current and future protection of the child victims whose cases it processes. So, concerns about justice for and protection of juvenile victims have increasingly led professionals from each of the separate systems to look at how to better coordinate the investigative efforts of their systems.

Reported and Unreported Victimization

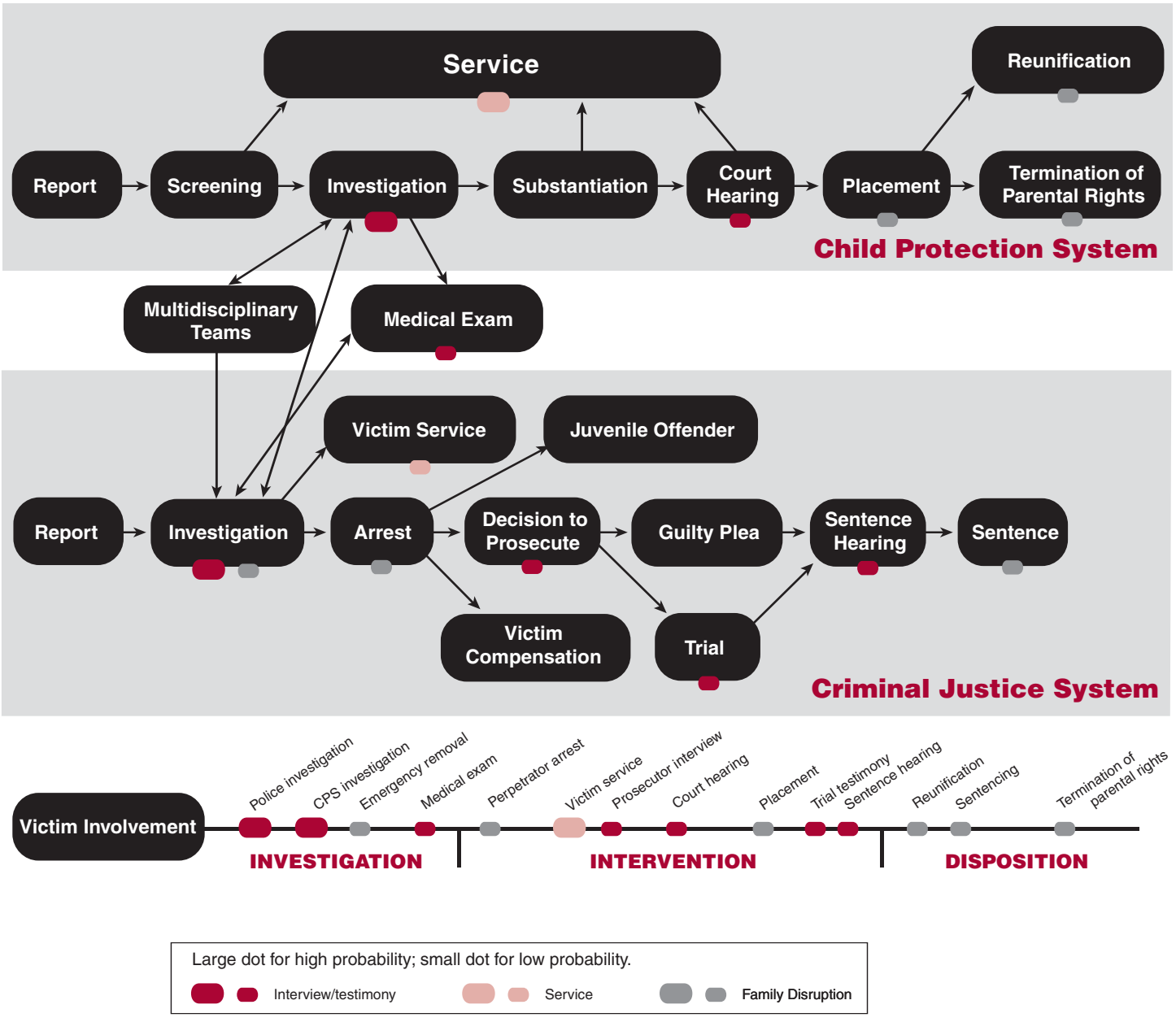
Entry into the juvenile victim justice system begins with a report to an authority—usually either the criminal justice or child protection system. Estimates extrapolated from the National Incident-Based Reporting System suggest that in 1999 about 900,000 violent crimes against children were reported to the police nationwide. These crimes were predominantly assaults (77 percent) and sex offenses (20 percent). About 400,000 property crimes against juveniles (age 17 and younger) were also reported, mostly larceny and theft (77 percent) (Finkelhor and Ormrod, 2000b).

Each year, the National Child Abuse and Neglect Data System records about 2.6 million referrals to child protection authorities. Most of the referrals (59 percent) are for cases involving neglectful caretakers. An additional 19 percent are for physical abuse, and 10 percent are for sexual abuse (U.S. Department of Health and Human Services, 2001a). It is not clear how much overlap exists in these figures; that is, how many children were reported to both police and child protection services. In most police reports involving youth, the victims of violent crime are age 12 or older (71 percent), whereas cases reported to child protection services comprise predominantly younger children (74 percent younger than age 12). This difference suggests that the victim populations overlap only partially.

More than half (55 percent) of the reports made to the child protection system come from professionals who are legally mandated under state law to report suspicions of child maltreatment (U.S. Department of Health and Human Services, 2004). Of these, most come from teachers and educational professionals, followed by criminal justice and human services professionals. Direct reports from victims and families make up only 10 percent of the total.

In contrast, reports to police about juvenile victimization most often come from victims and families. Twenty-nine percent of reports involving the violent victimization of children come from the victims themselves, and 30 percent come from

Figure: The Juvenile Victim Justice System



a member of the victim's household (Ormrod, 2002). For property crimes, the percentage of reports that victims or their family members submit is even higher. Reports to the criminal justice system from professionals such as school authorities are relatively infrequent (21 percent for violent crimes and 14 percent for property crimes), much less than the percentage of reports made from professionals to the child protection system. As might be expected, compared with adult victimizations, juvenile victimizations are more often reported by family members and other officials than by the victims themselves.

Reported offenses, however, do not reflect the actual incidence of child maltreatment or crime victimization. As is widely recognized, a significant percentage of juvenile victims never come to the attention of police or child welfare authorities. According to the National Crime Victimization Survey, only 28 percent of violent crimes against youth ages 12–17 are reported to the police. This reporting rate for offenses against juveniles is substantially lower than for offenses against adults. Moreover, because the youngest children in the survey (the 12 year olds) have the lowest reporting rates, police are even less likely to receive reports involving victims younger than age 12 (Finkelhor and Ormrod, 1999). Crimes are more likely to be reported to the police when they involve injuries, adult or multiple offenders, or families with prior or existing contact with police (Finkelhor and Wolak, 2003).

Because many schools are inclined to handle episodes involving juvenile victims on their own, the number of such crimes reported to the police is further limited.

Like the types of crimes mentioned above, child maltreatment is also widely underreported to authorities. The National Incidence Study of Child Abuse and Neglect (Sedlak and Broadhurst, 1996) found that only 28 percent of cases known to professionals in the community could be traced to any investigation that the local child protection system conducted. The percentage was higher for physical and sexual abuse (48 percent and 42 percent, respectively) than for neglect (18 percent). Although these statistics indicate underreporting by professionals, the data do not distinguish between professionals not reporting maltreatment and child protection officials screening out reports that were made (Sedlak and Broadhurst, 1996). Estimating the incidence of child maltreatment is further complicated by the fact that a considerable amount occurs that is not known even to professionals.

In summary, thousands of children enter the juvenile victim justice system each year as a result of reports to police (mostly by victims and their families) and child protective services (mostly by professionals). However, the victimization of thousands of other children goes unreported.

The Child Protection System

How the juvenile victim justice system operates depends on whether the initial report is made to police or child protection authorities. This Bulletin describes the processes separately, starting with the child protection system. The path for the child protection system is shown at the top of the figure on page 3, and the chronological steps, from left to right, are described below.

Screening

Because state laws require professionals to report "suspicions" of child abuse, the child protection system may receive reports on children who have not actually been victimized. Statistics including such reports can be misleading (e.g., "2.6 million abused children reported each year") (U.S. Department of Health and Human Services, 2001a). Child protection agencies screen out many of these reports, which are based on unfounded suspicions, contain too little or unreliable information, or do not fall within the agency's jurisdiction. Nationwide, about 67 percent of reports that the child protection system receives are accepted for investigation or assessment (U.S. Department of Health and Human Services, 2004). State agencies vary considerably in terms of what they are willing and able to investigate; some accept only very serious and specific allegations, whereas others conduct at least a minimal inquiry into a much broader range of reports (Wells, 1998). One study found that cases involving sexual abuse, allegations of drug use, families on welfare, and direct evidence of maltreatment were more likely to be investigated than cases involving custody disputes (Karski, 1999).

Child Maltreatment Investigation

At the start of any investigation into child maltreatment, the first objectives are to assess the situation and ensure the child's safety. Because children may be in danger, investigations conducted within the child protection system need to be timely. State laws require a response within a fixed period of time. Among states that report investigation response times, the average response takes about 3 days and varies from 5 hours to more than 2 weeks (U.S. Department of Health and Human Services, 2004). During the investigation stage, officials may authorize medical, mental health, or other experts to conduct an examination and an evaluation.

Investigations are not always part of the child protection process. As of 2001, 20 states had implemented an innovative, two-track system (Walter R. McDonald & Associates, Inc., 2001). In this system, only serious allegations are investigated formally. When cases involve less serious allegations and lower levels of risk, child protection workers just assess the family for the possibility that it needs services. In states with such a two-track system, a majority of the reports (e.g., 71 percent in Missouri and 73 percent in Virginia) are handled on the "assessment only" track (Schene, 2001).

When necessary, investigators have the authority to take the child into custody on an emergency basis. In Connecticut, for example, child protection workers may remove children immediately for up to 4 days, typically with the help of the police, if the children have a serious physical illness or injury or are in immediate danger from their surroundings or from being unsupervised (State of Connecticut, Department of Children and Families, 2004).

Referral to police and prosecutors. Cases reported to the child protection system are referred to police and prosecutors primarily at the investigation stage. Some state laws require that certain types of maltreatment allegations be automatically referred to police or prosecutors. Other states allow more discretion when it comes to referring cases. The child protection system involves police when investigative help is required or as soon as evidence confirms that a criminal law has been violated. Referrals to the police are most consistent and immediate in cases involving allegations of sexual abuse, the death of a child, physical abuse (particularly serious injury), or brutality.

In some communities, police and child protection workers investigate independently (Cross, Finkelhor, and Ormrod, 2005). In others, police and child protection workers conduct coordinated investigations as part of a multiagency team. Some jurisdictions have experimented with turning investigation activities over to the police entirely (Cohen et al., 2002). Nationally, police are involved in more sexual abuse investigations (45 percent) than investigations involving physical abuse (28 percent) or neglect (20 percent) (Cross, Finkelhor, and Ormrod, 2005). Because of the differences in state laws and levels of interagency cooperation, investigative practices vary greatly among jurisdictions.

Medical examination. Medical examinations provide crucial evidence needed to substantiate a crime or child maltreatment. The examiners also assess children's overall medical needs and help young victims recover from a traumatic event by easing their worries and providing them with an opportunity to talk with a trusted authority. Many jurisdictions have specialized diagnostic units to perform these exams. Although the percentage varies, children receive medical exams in 10 to 25 percent of all reported sexual abuse cases (Berliner and Conte, 1995; Faller and Henry, 2000; Hibbard, 1998; Whitcomb et al., 1994).

Medical exams can disclose previous similar or related injuries, can determine whether injuries are consistent with the history given by caretakers or reporters, and can often distinguish injuries resulting from accidents or diseases from injuries

that have been inflicted (Jenny, 2002). Examining injuries, genital physiology, semen, and hair can help confirm sexual abuse and identify perpetrators. Often, however, a medical examination can neither confirm nor disconfirm abuse. Definitive physical findings are established in only about one-quarter of examinations prompted by allegations of sexual abuse (Britton, 1998; Kerns, 1998).

Substantiation of Child Maltreatment

Investigations into child maltreatment result in a determination by the investigator as to whether maltreatment occurred, and this determination generally requires a preponderance of evidence as its standard of proof. The most common term for this is "substantiation"; however, other terms, such as "confirmation" or "support," are also used. Some states use the term "indicated," which means that evidence is consistent with child maltreatment but is not strong enough to substantiate (Depanfilis and Salus, 2003).

Nationwide, about 30 percent of all reports are substantiated—this percentage includes both substantiated and indicated reports (U.S. Department of Health and Human Services, 2004). This rate varies somewhat by type of maltreatment and varies dramatically by state. For example, in Massachusetts, allegations were confirmed in 55 percent of investigations in 2002, whereas in New Hampshire, only 9 percent were substantiated (U.S. Department of Health and Human Services, 2004). Historically, as the number of reports has risen, substantiation rates have declined. This phenomenon could reflect increasingly rigorous substantiation standards, a rise in the reporting of less serious situations, or proportionately fewer investigative resources within the child protection system.

Reports of child maltreatment may not be substantiated for a variety of reasons, including failure of the family or other informants to cooperate with the investigation, lack of sufficient evidence, allegations made outside the jurisdiction or authority of the agency, or an agency's inability to adequately investigate because of time or manpower constraints. The number of willfully false or malicious allegations is generally quite small (Everson and Boat, 1989; Jones and McGraw, 1987; Oates et al., 2000). The few states that count intentionally false allegations report that they occur in less than 1 percent of all cases (U.S. Department of Health and Human Services, 2004). In some cases, the substantiation process includes a form of plea bargaining, whereby reports are unsubstantiated or made for a less serious form of maltreatment (e.g., neglect rather than sexual abuse) in exchange for a commitment to accept services or other interventions (Eckenrode et al., 1988).

Provision of Services

An important goal of the child protection system is to prevent future maltreatment of the children it serves. To meet this goal, the child protection system offers preventive and remedial services such as counseling, parent education, and family support. According to state data, services are provided, on average, 7 to 8 weeks after an investigation begins (U.S. Department of Health and Human Services, 2004). About 59 percent of maltreated children receive services from the child protection system, but that percentage varies considerably among states, from 15 to 100 percent. Widespread concern exists that the child protection system does not adequately provide services. However, the fact that a large group of maltreated children do not appear to receive services from the child protection system does not necessarily indicate a failure in the provision of care (U.S. Department of Health and Human Services, 2004). For example, informal and familial solutions to child maltreatment situations (e.g., a parent moving in with grandparents) may be deemed adequate. Children and families may also receive services from other sources, such as family services or mental health agencies. In fact, referral to services may occur at almost every juncture in the juvenile victim justice system, including the criminal justice system (see the figure on p. 3; arrows omitted for the sake of simplicity).

Court Hearing

When child maltreatment is substantiated, the case proceeds to a formal court hearing only when just cause exists to remove the child on more than an emergency basis or to take custody of the child. In 2002, court actions were initiated for 18 percent of the substantiated reports of child maltreatment (U.S. Department of Health and Human Services, 2004).

Child victims involved in such court proceedings require an advocate who will represent their needs and point of view and who is independent from the state agency bringing the action. Examples include court-appointed special advocates or guardians *ad litem*. According to reports from a limited number of states, about 18 percent of child victims received such representation (U.S. Department of Health and Human Services, 2004).

Out-of-Home Placement

Removing a child from his or her home is the child protection system's most serious intervention. In 2002, approximately 134,000 child victims—about 19 percent of those with a substantiated finding of child maltreatment—were removed from their homes (U.S. Department of Health and Human Services, 2004). Rates for individual states varied considerably. Most of the 42 states providing data reported rates between 9 percent and 34 percent; 2 states reported rates below that range, and 8 reported rates above it. Out of cases investigated for suspected child maltreatment, the rate of child removal is roughly 6 percent. An additional 67,000 child nonvictims (typically, siblings of the victims) were also removed. Some children were allowed to remain in their home, but only with supervision.

When removed from the home, children are placed in a variety of settings. According to the Adoption and Foster Care Analysis and Reporting system, three-fourths of children in foster care live with foster families: one-fourth with their relatives, and one-half with nonrelatives (Children's Bureau, 2001; U.S. Department of Health and Human Services, 2001b). About 10 percent of removed children are placed in institutions, and 8 percent are placed in group homes (these percentages include children placed in foster care for reasons other than child maltreatment). Some children are removed from their homes on an emergency basis during the investigation; however, most home removals are for a longer period of time and involve court action. The median length of stay for children in foster care, including victims of child maltreatment, is 16.5 months (Child Welfare Outcomes, 2001; U.S. Department of Health and Human Services, 2001b). Children removed to

live with their relatives tend to stay for longer periods of time because the placement is generally viewed as a permanent one (Child Welfare Outcomes, 2001).

Reunification

Most children placed in foster care return to their families. In 1999, 66 percent of children exiting foster care returned to their families—ranging from 31 percent in Illinois to 85 percent in Idaho. A majority of the reunifications occurred within 12 months (Child Welfare Outcomes, 2001; U.S. Department of Health and Human Services, 2001b). Some children, however, need to re-enter foster care after reunification because of recurring maltreatment or a renewed risk of maltreatment.

Termination of Parental Rights

In the most serious cases of child maltreatment, the state moves to terminate parental rights and place a child for adoption. In 2000, parents of 64,000 children, or about 11 percent of those in foster care, had their parental rights terminated (Children's Bureau, 2001; U.S. Department of Health and Human Services, 2001b). Not all terminations resulted from child maltreatment. Based on a rough annual estimate of 800,000 substantiated victims of child abuse and neglect, the rate of termination of parental rights for substantiated child maltreatment cases is about 8 percent.

Summary

The child protection system's primary goal is to ensure children's safety, but it also seeks to facilitate the delivery of needed services. On average, about 67 percent of the reports submitted to child protection services are investigated. Nationally, about 30 percent of investigations lead to substantiation, though this rate varies greatly by state. The child protection system can initiate various interventions during, or as a result of, an investigation, including medical examinations, referral to the criminal justice system, and the delivery of services from child protection and other agencies. Removing children from their homes on an emergency basis or as a result of a court hearing is fairly rare, and most removed children are later reunified with their families.

The Criminal Justice System

In addition to the referrals it gets from the child protection system, the criminal justice system receives many reports on child victimization from victims, families, and schools and other institutions. Because the criminal justice system deals with all types of crime, including child maltreatment, criminal justice system cases involving child victims are very different from cases reported to the child protection system. Most cases involving child victims reported to the criminal justice system (about 70 percent) involve a nonfamily perpetrator, and more than half are youth-on-youth offenses (Finkelhor and Ormrod, 2000a). Very few criminal justice cases involve simple neglect or emotional abuse. As mentioned earlier, the majority of the victims are teenagers (Finkelhor and Ormrod, 2000a). The criminal justice system also receives approximately 400,000 reports per year involving juveniles who are victims of property crimes (Finkelhor and Ormrod, 2000b).

The path that cases entering the criminal justice system take is illustrated in the figure on page 3. Again, the steps in the process are depicted in chronological order, from left to right. Because most victim-specific research on case processing within the criminal justice system is limited to cases of sexual assault, sexual abuse, and other serious offenses, little is known about juveniles in the justice system who are victims of simple assault, crimes by other youth, and property crimes.

Criminal Justice Investigation

Although police usually investigate reports of juvenile victimization, little research exists on the numbers, percentages, or circumstances related to such investigations. For this Bulletin, data from the National Crime Victimization Survey, a national study that interviewed crime victims, were analyzed. After a case was reported, police made contact with juvenile victims (ages 12 to 17) in 92 percent of violent crimes and 79 percent of property crimes. For these same cases, police took a report (that is, collected information about the crime) in 63 percent of violent crimes and 72 percent of property crimes.

If reports to and investigations made by police lead to a suspicion of child maltreatment, police are required to report this suspicion to child protection services. Unfortunately, no data exist regarding how often referrals are made from the criminal justice system to the child protection system.

Arrest

An arrest is made when police, after finding probable cause that a person has committed a crime, locate and apprehend that person. However, police make an arrest in only a minority of juvenile victim crimes that come to their attention. An analysis of data from the National Crime Victimization Survey shows that offenders are arrested in 28 percent of violent crimes and only 4 percent of property crimes involving juvenile victims. (According to data from the Federal Bureau of Investigation's National Incident-Based Reporting System, the arrest rate for violent crimes involving juvenile victims is 32 percent.) Physical assaults on juvenile victims have somewhat lower arrest rates than assaults on adult victims, but sexual assault crimes against juveniles have higher arrest rates than sexual assaults on adults (Rezac and Finkelhor, 2002). The low arrest rates reflect the limited resources that police have, the absence of information about offenders in many cases (particularly in property crimes), and the fact that many crimes with juvenile victims are judged to be relatively minor in nature.

Arrests are more common in juvenile victimizations involving a weapon and other serious offenses, such as sexual assaults and aggravated assaults (Rezac and Finkelhor, 2002). Arrests are less likely when the perpetrator is a stranger because locating the offender to make an arrest is more difficult. A relatively large number of offenders who victimize juveniles (more than 50 percent) are other juveniles, which is an important feature of juvenile victimization that affects arrests and other aspects of criminal justice activity (Finkelhor and Ormrod, 2000a). Offenses committed by juveniles are handled by the institutions and procedures of the juvenile justice system. Though somewhat less formal and less public than those of the criminal justice system, juvenile justice procedures include analogs to trials (adjudicatory hearings) and sentencing (disposition hearings), at which victims may testify, and unique features, such as victim-offender mediation. (To keep the figure

on page 3 relatively simple, specific components of the juvenile offender justice system are excluded; however, a diagram of that system is available in Snyder and Sickmund, 1999.) Although a large amount of research literature exists on the workings of the juvenile justice system, the experiences of juvenile victims whose offenders are processed in this system have not been extensively examined.

Victim Compensation

All states have systems that compensate victims of crime for medical and mental health care. To obtain compensation, victims must file applications, which victim compensation boards review. Although victims may file claims at any point in the criminal justice process, police referrals prompt many claims. An offender does not need to be convicted for compensation to be awarded to a victim (National Association of Crime Victim Compensation Boards, 2003a).

Nationwide, of those victims receiving compensation, 22 percent were child abuse victims (National Association of Crime Victim Compensation Boards, 2003b), and more than $37 million were provided for services for these victims. Interestingly, more than half of this allocation was spent in California, which has an active record of using victim compensation to support psychotherapy for child victims. No data exist, however, on what percentage of eligible children apply. Nationally, more than 45,000 claims were approved for victims age 17 and younger, but more may be eligible. A perception exists that many victims are unaware of the availability of victim compensation funds.

Decision To Prosecute

Cases are referred to a prosecutor in conjunction with an investigation or after an arrest has been made. Although decisions about prosecution vary considerably from jurisdiction to jurisdiction, prosecutors almost always evaluate the strengths and weaknesses of the case and the likelihood of success before deciding to proceed, sometimes after talking with victims and other witnesses. Prosecutors also consider the potential negative effects of trials on child victims. In many jurisdictions, prosecutors bring a case before a judge, in a preliminary hearing, and a grand jury to determine if probable cause exists. (Children may testify in both situations.) If probable cause is not established, the case is dismissed.

Offenders may be arrested before or after the decision to prosecute. If police have made an arrest, cases are almost always forwarded to prosecutors (Davis and Wells, 1996). Once referred for prosecution, the proportion of child victim cases that proceed to prosecution varies widely. In 13 studies that Cross et al. (2002) reviewed, the proportion of child abuse cases in which charges were brought against the perpetrator ranged from 28 to 94 percent, with a median of 66 percent. Rates differ considerably across prosecutors' offices, not only because of the resources they have and the priority they give to child victim cases, but also because of differences in which cases are referred to prosecutors and which cases are not. Prosecution is less likely when child victims are younger than age 7, when children are related to the perpetrator, and when they suffer less severe offenses (Mennerich et al., 2002). Most likely, these variables correspond to the availability of evidence and children's capacity to talk about the abuse and testify in court. The grand jury, the judge, or prosecutors themselves can later dismiss cases that the prosecutor has accepted. However, in the Cross et al. (2002) sample, an average of 79 percent of cases proceeded without dismissal.

Pleading Guilty Versus Going to Trial

If a case is accepted by a prosecutor and not dismissed, a disposition is reached either by a guilty plea or by a trial. When cases involving child victims are sent forward without dismissal, the likelihood that the offender will plead guilty is high. According to a review of 19 studies examining the prosecution of child abuse cases, an average of 82 percent of offenders against children pled guilty to at least some charge (Cross et al., 2002), which is about the same as the percentage of general violent offenders and very close to the 76 percent of general sexual assault offenders who plead guilty. This consistency reflects the fact that prosecutors go forward only with fairly strong cases in which they can exert considerable leverage negotiating charges and sentences. Still, in about 19 percent of the examined cases, prosecutors failed to obtain a plea and the cases went to trial.

Sentencing

Data from 14 studies of cases in which offenders were prosecuted for child abuse reveal that 54 percent (the median rate) of convicted offenders were incarcerated, although the rates varied from 24 to 96 percent (Cross et al., 2002). In the past, considerable media attention has focused on whether offenders against juveniles receive unusually lenient sentences. An analysis of sentences from a national sample of adult offenders incarcerated in state correctional facilities found that some of the sentencing disparities were explained by the fact that adult offenders against juveniles are less likely to be recidivists, less likely to use weapons, and less likely to be strangers to their victims—factors associated with shorter sentences (Finkelhor and Ormrod, 2001). Even after controlling for such variables, some sentencing disparities related to victim age did exist, but they involved adult offenders against adolescents (age 12 and older), who tended to receive shorter sentences. Evidence does not indicate a leniency toward offenders simply because their victims are young children (Finkelhor and Ormrod, 2001).

Summary

Police investigate most reported crimes involving juvenile victims, but arrests are made in only a minority of such cases. When an arrest is made, most cases are referred to prosecutors, but the proportion that prosecutors accept varies from about 50 to 75 percent. Generalizing from sexual assault crimes, cases tend to be dropped on the basis of concerns about evidence and children's ability to testify. Of the cases carried forward, however, 80 percent end with guilty pleas. Offenders against young juvenile victims do not receive systematically lighter sentences than offenders against adult victims, but sentences may be lighter for offenders against adolescents. Juvenile victims comprise a sizable proportion of those who receive victim compensation awards; however, many victims may not be aware of those funds.

Impact of the Juvenile Victim Justice System on Victims

As described above, cases with juvenile victims may involve a number of institutions that are part of the juvenile victim

justice system, but not all of the institutions have an immediate or direct impact on juvenile victims. For example, an offender may be charged, plead guilty, be sentenced, and enter prison without a victim ever having to see anyone, appear anywhere, or even necessarily know about the events. This situation is not typical, but it is theoretically possible in cases with considerable physical evidence, eyewitnesses, and perpetrators who cooperate with authorities.

Identifying the components of the child protection system and the criminal justice system that have the most frequent and consequential effect on victims is an important part of conceptualizing the juvenile victim justice system. Three specific impacts are important to consider: (1) interviews and appearances that child victims must make before officials, (2) direct therapeutic or reparative services that child victims receive, and (3) family disruptions or other disruptions resulting from institutional decisions within the system. These impacts, which can be charted in terms of their sequencing and likelihood of occurrence, are an important adjunct to understanding how the juvenile victim justice system works. These impacts are represented throughout the figure (page 3); the type of victim involvement and its probability correspond to the ovals in the key.

The impact of the victim justice system is not confined to these three types of events. Some of the most consequential impacts may involve information that a victim receives indirectly. For example, a victim may be told or find out that the prosecutor refused to press charges against the offender or that a perpetrator's attorney called the victim a liar, events that may be extremely distressing. However, those impacts are more difficult to classify.

Interviews, Medical Exams, and Testimony

Of all the events that affect victims, the one that occurs most often is an investigative interview. If the victimization is reported to police, an officer will likely interview the juvenile. When a victimization is reported to child protection services, someone from that system will almost always talk to the child unless the child is very young. An interview with a police officer occurs in 92 percent of violent crimes with juvenile victims reported to the police (according to the National Crime Victimization Survey). An investigation, which typically involves a child interview, occurs in 60 percent of child maltreatment reports recorded by the National Child Abuse and Neglect Data System (U.S. Department of Health and Human Services, 2004). Some cases require more than one investigative interview, which can occur as investigators try to gather additional evidence or when another agency becomes involved (e.g., a case referred from child protection services to the police or vice versa). Analyzing prosecutor case data from 1988–91, Smith and Elstein (1993) found that children were interviewed by law enforcement in 96 percent of cases and by child protection services in 46 percent. These interviews were conducted separately 64 percent of the time, so children often had to tell their stories more than once.

Reducing the number of duplicative investigative interviews and thus their possible negative impact on victims has been a driving force behind the development of multidisciplinary teams and Children's Advocacy Centers. It also has been an important motive behind the effort to videotape investigative interviews more routinely. The development nationwide of several hundred Children's Advocacy Centers and other multidisciplinary programs during the 1990s may have reduced the amount of duplicative interviewing, although confirmation of this trend is needed (Simone et al., 2005).

As part of an investigation, approximately 22 percent of victimized children will receive a medical exam (National Association of Crime Victim Compensation Boards, 2003b). Victims of sexual abuse and physical abuse involving injury are more likely to receive such exams. These exams can be stressful, but one study found it equivalent to providing testimony in juvenile court—twice as stressful as talking to a social worker, but not nearly as stressful as testimony in criminal court (Runyan, 1998).

Child victims may be interviewed at a number of subsequent junctures in the juvenile victim justice system. Prosecutors may decide to interview children again after the police investigation, while making the decision about whether to prosecute and trying to assess the strength of the testimony. As part of the process, a child may be asked to testify at a preliminary hearing or grand jury. Studies report that 12 percent to 31 percent of children in prosecuted cases testify at pretrial proceedings (Cashmore and Horsky, 1988; Cross, Whitcomb, and De Vos, 1995; Goodman et al., 1992; Smith and Elstein, 1993). If the case goes to trial, the child may testify again, often in conjunction with prior meetings with the prosecutor. However, because so many cases end with guilty pleas, relatively few children have to testify in trial court. Only between 5 and 15 percent of cases involve a child victim's testimony at a trial or a court hearing (Berliner and Conte, 1995; Cashmore and Horsky, 1988; Cross, Whitcomb, and De Vos, 1995; Goodman et al., 1992; Martone, Jaudes, and Cavins, 1996; Rogers, 1982). Voluntary opportunities for a victim to testify at a sentencing hearing may also occur (U.S. Department of Justice, 1999).

Services

A specific goal of investigations that child protection services conduct is to promote the well-being of victimized children through needed services. As indicated earlier, about 59 percent of maltreated children are referred for services. Police or prosecutors also may refer children as part of criminal justice system processing; however, little systematic documentation about this referral pathway exists, and such referrals are probably not as frequent as those from child protection services. Some services are clearly beneficial. For example, cognitive-behavioral therapy that teaches sexually abused children and their families how to cope with the effects of abuse has been proven to be more beneficial than standard care (Cohen, Berliner, and Mannarino, 2000; Cohen and Mannarino, 1997; Deblinger, Stauffer, and Steer, 2001).

Family Disruption

The juvenile victim justice system can have a major impact on child victims when it causes family disruption—that is, a major change in living circumstances or the household configuration. One form of disruption may occur early in the process if a child protection worker uses emergency power to remove an endangered child from his or her home. A disruption may also occur if the police arrest and hold a parent suspected of a crime against a child. At later stages in the child protection process, the court may remove a child from the home, either temporarily for foster care placement or later as part of the termination of parental rights.

Reunifications are frequently part of the system process, and they can create other disruptions. The sentencing of an intrafamilial abuser to prison may also disrupt the family. Although all these events may have major impacts on children, they occur in only a minority of child victimization cases.

Implications

This Bulletin describes in general terms the operation of the juvenile victim justice system and what is known about how cases move through it. Recognizing that such a system exists and often contributes to, but sometimes detracts from, the justice, safety, and physical and psychological well-being of juvenile victims has important implications, which are described below.

Policy and practice. More people need to understand the operation of the juvenile victim justice system in its entirety. Agency administrators and line workers need to know more about the other agencies in the system, and policymakers and researchers need to be more familiar with the system as a whole. Such knowledge is important for planning policy and managing individual cases so that decisions made in one part of the system can fully take into account actions that may occur in other parts.

Policymakers need to focus on identifying and prioritizing the most important stages and transitions of the juvenile victim justice system. For a long time, concern about child victims in criminal court concentrated policy attention on ways to mitigate the stress on children having to testify in criminal cases. However, a systems-level analysis demonstrated that only a small percentage of juvenile victims face the prospect of testifying in criminal court. In contrast, issues related to the stress and efficacy of child protection interviews or medical examinations may affect a greater percentage of children. Policy that helps answer questions about why arrests are not made in so many child victim cases or what techniques lead to guilty pleas may result in better outcomes for child victims.

Victim assistance. Juvenile victims need the assistance of professionals who can orient, guide, and support them and their families during their involvement with the juvenile victim justice system. Professionals working for Children's Advocacy Centers or serving as court-appointed special advocates and guardians *ad litem* play such roles, but often only for a part of the system process. Such support should be much more comprehensive and continuous.

System integration. More consideration needs to be given to integrating and rationalizing the system as a whole. In recent years, considerable effort has been devoted to trying to coordinate certain aspects of the juvenile victim justice system—for example, by conducting joint investigations or developing multidisciplinary teams for sharing information and decisionmaking. However, more dramatic forms of integration might be possible. For example, the responsibilities associated with applying criminal sanctions, making decisions related to child custody and services provision, and awarding victim compensation funds might be centralized into a single judicial institution. Such an integration would seek to expedite processes, coordinate decisions, and minimize the negative impacts on victims. Where separation between components of the system is necessary (e.g., between criminal justice and support for families), better methods are required for assessing where cases belong and for moving cases between parts of the system as needs change.

Information sharing. The juvenile victim justice system requires more efficient information exchange among its components. A child can be involved with up to six or seven agencies and a dozen or more professionals over a course of interventions that can last several years. Information from one part of the system can affect decisions made in other parts. The criminal investigation of an alleged perpetrator living in a victim's home, for instance, may influence the child protection system's decision to place the child outside the home. The need for confidentiality sets limits, yet information sharing among agencies often falls short because it is a secondary priority for busy professionals. Whitcomb and Hardin (1996), for example, found that communication between criminal and civil court staff on simultaneous proceedings regarding the same child was often minimal or nonexistent—a situation that increases the risk that the two courts may make contradictory decisions. When communication is present, it tends to occur in the early phases and is often not maintained throughout the child's contact with the system. Case review and case-tracking systems are steps in the right direction, but no central repository of information exists. New methods and technologies for ensuring the adequate flow of information need to be developed.

Service delivery. Greater attention needs to be given to the fact that the juvenile victim justice system can be the entry point for needed services for thousands of victimized children. Agencies that provide services to children and families tend to think about their referral sources as simply other individuals and agencies. Often, the identification of a need for service is viewed as occurring on a case-by-case basis. However, when referral patterns are considered as part of a system involving large numbers of children with service needs, new realities come into focus. For example, the demand made on some children to talk about their victimization at many points in the system over an extended period of time suggests the need for human services professionals to provide children with systemwide support throughout the process. The fact that many child victims with service needs related to trauma or inadequate care come through the system at predictable junctures suggests new places, times, and programming possibilities for addressing children's needs.

Data collection. Systematic and comprehensive information needs to be collected about the operation of the juvenile victim justice system and the interrelationships among its components. Tremendous gaps in information exist, and virtually no data collection effort covers the entire system. Several steps are needed: Pilot studies should be undertaken to track juvenile victims through all the steps and stages in the system. Data elements need to be added to current information systems that track interrelationships. For example, police data that the National Incident-Based Reporting System gathers could record whether a crime was referred to police from child protection services. Data from the child protection system could record whether an arrest was made. In addition, although serious privacy concerns may be raised, having the different systems record victims using a common identifier might make tracking victims through various databases possible, thereby uncovering the pathways through the interrelated systems.

System assessment. Efforts need to be made to characterize and summarize in a comprehensive way how the juvenile victim justice system operates in different

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Data Sources

Many of the statistics on case flow in this Bulletin come from three sources: the National Child Abuse and Neglect Data System (NCANDS), the National Incident-Based Reporting System (NIBRS), and the National Crime Victimization Survey (NCVS).

NCANDS annually gathers and publishes data that the child protection agencies in individual states collect. Although NCANDS provides guidelines for states to use in their data collection, not all states use identical definitions or categories, which results in some problems when data are aggregated. More information about NCANDS is available at www.ndacan.cornell.edu.

NIBRS is an emerging effort by the U.S. Department of Justice to collect more detailed information about crime from local law enforcement. It allows, for the first time, crimes against juveniles to be disaggregated from crimes against adults. However, the data came from jurisdictions in only 17 states in 1999, providing coverage for 11 percent of the nation's population and 9 percent of its crime. Only three states (Idaho, Iowa, and South Carolina) had full participation by all local jurisdictions, and only one city with a population greater than 500,000 (Austin, TX) reported. As a result, the crime experiences of large urban areas are particularly underrepresented in this data system. More information about NIBRS can be found at www.ojp.usdoj.gov/bjs/nibrs.htm.

NCVS is a national survey of the U.S. population age 12 and older that the Bureau of the Census conducts on behalf of the U.S. Department of Justice. The active sample consists of approximately 55,000 households and approximately 100,000 individual respondents. It gathers a wide range of information from citizens regarding crime victimizations, including experiences with law enforcement. However, the survey is limited to specific types of victimizations (i.e., the violent crimes of physical assault, rape, sexual assault, and robbery, and the property crimes of larceny and motor vehicle theft). It provides no information about victims younger than age 12. More information about NCVS is available at www.icpsr.umich.edu/NACJD/NCVS.

communities. Key dimensions need to be delineated so systems can be compared and contrasted. For example, a comparative study might help establish criteria for integrating systems or making them victim-oriented.

Considering implications such as these can help create a justice system more responsive to the needs of the thousands of juvenile victims who encounter it every year.

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DEC. 05

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Research for Policy





Juvenile Accountability Incentive Block Grants: Assessing Initial Implementation

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Juvenile Accountability Incentive Block Grants:
Assessing Initial Implementation



This Research for Policy is based on "Juvenile Accountability Block Grant Program: National Evaluation," by Dale G. Parent and Liz Barnett, final report to the National Institute of Justice (2003), NCJ 202150, available at www.ncjrs.gov/pdffiles1/nij/grants/202150.pdf. Mr. Parent is a Senior Associate and Ms. Barnett is an Associate at Abt Associates Inc.

The Juvenile Accountability Incentive Block Grant (JAIBG) program helped States and localities continue or expand policies that hold young offenders more responsible for their actions and impose increasingly serious sanctions for each delinquent or criminal act, according to a National Institute of Justice (NIJ) evaluation. The process evaluation also found that the program generally achieved congressional goals set for it, including stimulating greater collaboration between State and local agencies. (See "Objectives of the Evaluation.")

Legislative intent of JAIBG

Congress created JAIBG in 1997 to encourage States and localities to strengthen prosecution and adjudication of juvenile offenders, particularly those convicted of serious, violent crime.

Objectives of the Evaluation

NIJ's evaluation examined JAIBG's implementation during its initial years. This process evaluation, conducted by Abt Associates Inc., was not intended to gauge the program's impact on juvenile crime. Rather, it was designed to evaluate how the block grant funds were spent and how States and localities conformed to the policy objectives envisioned by Congress.

Evaluators analyzed funding data from FY 1998, 1999, and 2000 and gathered indepth information through a survey of a sample of FY 1998 programs. They also interviewed State and local program planners, administrators, and staff annually from 1999 to 2002 and made two site visits to each of six States in 2001 and 2003. The study's full report is online at: www.ncjrs.org/pdffiles1/nij/grants/202150.pdf

The legislation specified five policy goals and required States to certify either (1) that their existing laws and practices reflected more stringent juvenile justice policies or (2) that they had actively considered five policy goals spelled out in the legislation. Congress also named 12 broad purposes for which the funds could be used.

Although the legislation did not relate the program's goals to specific activities or "purpose areas," these are presented for FY 1998, for demonstration purposes, in exhibit 1.

In creating JAIBG, Congress expected States and Territories to pass the bulk of JAIBG funds to local governments,

Exhibit 1. Use of JAIBG funds, FY 1998

Policy Goal	Purpose Area	Percentage of Funds Used	
Increase use of graduated sanctions	Capital improvements	13	
	Accountability-based sanctions	19	
	Hiring prosecutors	9	
	Funding for courts and probation offices to hold juveniles accountable	17	
	Gun courts	0.02	
	Drug courts	4	
	Accountability-based programs with law enforcement components	9	
		71	**($140.5 million)**
Encourage prosecution of serious juvenile offenders as adults	Hiring judges, probation officers, and defenders	5	
	Funding for prosecutors to address drug, gang, and youth violence	2	
	Funding for technology, equipment, and training to assist prosecutors	6	
		13	**($27.7 million)**
Make adult/juvenile criminal records systems comparable	Interagency information sharing	**16**	**($33.1 million)**
Establish appropriate drug testing	Implementing drug-testing policies	**2**	**($2.7 million)**
Promote parental responsibility	None		

Note: Percentages may not add up to 100 percent due to rounding.

but allowed flexibility to adapt funding to State laws, policies, and practices. All 56 States and Territories received funding; 35 passed at least 75 percent of that to local units of government. The remaining 21 obtained a waiver allowing them to distribute less than 75 percent of JAIBG funds to local governments. Nine of the 21 proposed retaining all funds at the State level on the grounds that local governments had no role in providing or funding juvenile justice services.

To enhance collaboration, localities often formed regional coalitions that offered economies of scale, enabled them to pool resources, and freed funds for new programs.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) began awarding JAIBG funds in 1998. States made 228 awards to local grantees, and local governments made 1,148 awards to local grantees. State and local governments emphasized different goals and purposes in making awards. For example, local governments spent 7 percent of JAIBG funds on graduated sanctions and 13 percent on interagency information sharing; State governments spent 56 percent on graduated sanctions and 22 percent on interagency information sharing.

In FY 1998 and 1999, Congress appropriated $232 million each year; in FY 2000, $221 million. Evaluators concluded that the States and OJJDP successfully implemented JAIBG within tight time limits.

Key findings of the evaluation

States conformed substantially to four of the five policy goals Congress identified for JAIBG. Key findings for each of goal follow.

Increase use of graduated sanctions. JAIBG required jurisdictions to consider policies that sanctioned young offenders each time they were adjudicated or convicted of a delinquent or criminal act, including probation violations. The program encouraged use of graduated sanctions that increased in severity with each subsequent, more serious offense. Evaluators found that 45 of the 56 jurisdictions met this

requirement. On average, States and localities used almost three-fourths of their funds to expand the range of graduated sanctions, including practices such as intensive probation, restitution, community service, and day treatment.

Encourage prosecution of serious juvenile offenders as adults. JAIBG required that States and localities have or consider adopting policies to prosecute as adults juveniles over the age of 15 who commit serious, violent crimes. Of the 56 jurisdictions receiving funds, 42 reported that their policies conformed to this objective. As the trend in States had been toward toughening juvenile transfer laws, 39 States had such policies when the program began; by 2001, three additional States had enacted laws or adopted policies that strengthened transfer policies. States allocated an average of 11 percent of JAIBG funds in FY 1998–2000 to strengthening prosecution of serious, violent juvenile offenders.

Make adult and juvenile criminal records systems comparable. The program encouraged development of juvenile records systems that paralleled those of adult criminal history systems. When the evaluation concluded, most States had not met this objective, but evaluators pointed out that developing comparable record systems would require years of debate, planning, funding, and implementation. However, States and localities awarded more than 13 percent of their JAIBG funds to juvenile justice information systems. By improving and linking information among law enforcement, courts, prosecutors, and human services agencies, States enhanced the climate for better planning, management, and multiagency collaboration, the evaluation concluded.

Establish appropriate juvenile drug testing policies. JAIBG also encouraged States to establish substance abuse testing for juvenile offenders. States could decide which testing policies

were appropriate for particular categories of young offenders. Most States (43) had such policies at the program's inception. By the January 1999 deadline, all States had complied with this objective, although they allocated relatively small amounts of funds to it.

Promote parental responsibility for juvenile supervision. The program required States to certify that no law prevented juvenile courts from holding parents, guardians, or custodians responsible for supervising their delinquent children and ensuring that they obey court orders, such as curfews and reporting requirements. In 1998, no State had a law that infringed on the court's authority in this area. Subsequently, New Hampshire enacted legislation affirmatively establishing this responsibility. By the study's end, all States permitted judges to hold parents accountable for their delinquent children.

Suggestions for improving JAIBG

The evaluation recommended improvements in JAIBG, including continuing emphasis on and expansion of regional coalitions where feasible. The study also recommended extending the deadline for spending grant funds, which was cited as a problem in interviews with program staff. Recent legislation has addressed some of these issues in changes to the JAIBG program.[1]

Block grant programs such as JAIBG present challenges to evaluation because projects cannot be compelled to participate in impact evaluations, nor can a small number of program models be identified for intensive evaluations. Government monitoring of the program, on the other hand, typically provides data on how projects were administered rather than on their results. To improve future assessments of JAIBG, evaluators recommended performance measurement,

which falls between monitoring and impact evaluation. Such a system could yield benchmarks to inform policy choices and indicate strategies to improve performance.

JAIBG has assisted States in upgrading juvenile justice management information systems. Thus, States are the logical entities to obtain more useful data from grant recipients and use performance reports to ensure effective use of juvenile justice resources.

Notes

1. Department of Justice Authorization Act for FY 2003 (Public Law 107–273). See also Andrews, C., and L. Marble, *Changes to OJJDP's Juvenile Accountability Program*, Juvenile Justice Bulletin, Washington, DC; U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, June 2003, NCJ 200220.

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Research in Brief





Public Law 280 and Law Enforcement in Indian Country—Research Priorities

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Public Law 280 and Law Enforcement in Indian Country—Research Priorities

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ABOUT THIS REPORT

Enacted in 1953, Public Law 83–280 (PL 280) shifted Federal jurisdiction over offenses involving Indians in Indian country to six States and gave other States an option to assume such jurisdiction. Affected tribes and States have faced obstacles in complying with the statute, including jurisdictional uncertainty and insufficient funding for law enforcement. Yet, scant research exists on this issue. In 1998 the National Institute of Justice (NIJ) sponsored a review that identified significant gaps in data concerning crime and law enforcement on PL 280 reservations.

What did the researchers find?

Data collection difficulties may hamper future research: Some States and localities may not document response times to reservation-initiated crime reports, and PL 280 data needed from the Bureau of Indian Affairs may be inseparable from statistics for non-PL 280 jurisdictions. Because crime may be unreported or underreported in PL 280 jurisdictions, victimization surveys may be needed to supplement available data on reported-crime rates in these jurisdictions. Research is also needed on:

- Measurable aspects of the quality of State law enforcement under PL 280, such as police response times to crime reports from reservations.
- Documentation of Federal funding and services to tribes in PL 280 jurisdictions, including such factors as jurisdictional vacuums.
- Concurrent tribal jurisdiction and enhancement of State/tribal relationships through cooperative agreements.

Who should read this report?

Federal, State, and local elected officials and policymakers; tribal officials and advocates; law enforcement and other criminal justice professionals, including researchers.

12f-000068

Carole Goldberg and Heather Valdez Singleton

Public Law 280 and Law Enforcement in Indian Country—Research Priorities

This summary is based upon: Goldberg, Carole, and Heather Valdez Singleton, "Research Priorities: Law Enforcement in Public Law 280 States," unpublished paper, Washington, DC: U.S. Department of Justice, National Institute of Justice, October 14–15, 1998, NCJ 209926, available at www.ncjrs.org/pdffiles1/nij/grants/209926.pdf.

States lack criminal jurisdiction over crimes committed by or against Indians in Indian country unless Federal legislation expressly grants such authority. Absent that legislation, tribal and Federal law enforcement generally share authority over those crimes, although a realm of exclusive tribal jurisdiction also exists. A significant number of Indian tribes fall under State jurisdiction under Public Law 83–280 (PL 280).[1]

What is Public Law 280?

Congress passed PL 280 in 1953. The statute mandated shifting Federal criminal jurisdiction over offenses involving Indians in Indian country to certain States and gave other States an option to assume such jurisdiction in the future. State jurisdiction over Indians outside Indian country was unchanged.

Retrocession. A 1968 amendment to PL 280[2] contained a retrocession provision enabling a State that had previously assumed jurisdiction over Indians under the law to return all or some of its jurisdiction to the Federal Government, contingent on approval from the U.S. Department of the Interior. The amendment did not permit Indians either to veto State initiatives to retrocede or to impose retrocession

"Indian country" is defined at 18 U.S.C. 1151 as follows:

. . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the rights-of-way through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through the same.

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on unwilling States. Subsequent bills to allow tribally initiated retrocession have failed in Congress and State legislatures.

Need for more research. Tribes and States have voiced concerns about some of PL 280's consequences, including perceived jurisdictional uncertainty and insufficient funding for law enforcement. Despite these concerns and the law's importance to Federal Indian policy and law enforcement, little research has been done to determine the law's impact. The authors identified some key areas for future research:

- Quantitative research comparing reported-crime rates in Indian country affected by PL 280 with rates in reservations not so affected and with rates in other parts of PL 280 States.
- Quantitative research bearing on the quality of State law enforcement services under PL 280.
- Documentation and evaluation of Federal law enforcement funding and services

A Current Assessment of Law Enforcement in Indian Country

The National Institute of Justice (NIJ) is currently supporting an investigation of the experiences of Indian tribes and local law enforcement agencies under PL 280. Researchers are studying 17 reservations in 10 States with and without PL 280 jurisdiction. Project objectives are to—

- Compare crime rates on reservations subject to PL 280 with rates on reservations not subject to PL 280.
- Determine the quality and availability of law enforcement and criminal justice under PL 280.
- Evaluate Federal law enforcement and criminal justice funding and services to PL 280 tribes.
- Evaluate retrocession, concurrent jurisdiction, and cooperative agreements as options to alleviate problems in PL 280 jurisdictions.
- Explore possible administrative and legislative responses to PL 280.

The researchers will produce a final report to NIJ and will disseminate relevant data and findings to study participants through teleconferences and written summaries of findings relevant to particular sites. Services will be offered to tribes that request help in drafting documents such as cooperative agreements. Study results are expected by 2006.

to tribes subject to PL 280 jurisdiction.

- Qualitative assessment of law enforcement under PL 280, e.g., examining whether and to what extent jurisdictional vacuums exist.
- Evaluation of the impacts of retrocession and concurrent tribal jurisdiction.
- Review of cooperative agreements in PL 280 States, such as between tribe and State.

A major study sponsored by the National Institute of Justice is investigating some of these areas (see "A Current Assessment of Law Enforcement in Indian Country").

PL 280 highlights

Affected States and tribes. PL 280 transferred Federal criminal jurisdiction in Indian country to six States that could not refuse jurisdiction, known as "mandatory" States (see exhibit 1). The law did not provide for the consent of affected tribes. Thus, criminal laws in those States became effective over Indians within as well as outside Indian country. PL 280 provided no financial support for the newly established State law enforcement responsibilities.

Exhibit 1. States affected by PL 280

Mandatory States[a]	Optional States[b]
Alaska	Arizona
California	Florida
Minnesota[c]	Idaho[c]
Nebraska[c]	Iowa
Oregon[c]	Montana[c]
Wisconsin[c]	Nevada[c]
	North Dakota[c]
	South Dakota
	Utah
	Washington[c]

a. Tribes excluded from State jurisdiction by PL 280 were Confederated Tribes of the Warm Springs Reservation in Oregon and the Red Lake Band of Chippewa Indians in Minnesota.

b. Some of the optional States made their acceptance of PL 280 jurisdiction contingent on tribal or individual Indian consent that was never forthcoming. Other optional States accepted jurisdiction over very limited subject areas.

c. Contains some tribes that have retroceded.

The law also permitted other States, at their option and without consulting tribes, to choose to assume complete or partial jurisdiction over crimes committed by or against Indians in Indian country. Ten States chose to do so; these are referred to as "optional" States (see exhibit 1). In 1968, an amendment to PL 280 required tribal consent before additional States could extend jurisdiction to Indian country. Since 1968, no tribe has consented.

Through PL 280's retrocession provision, several mandatory and optional States have returned jurisdiction over nearly 30 tribes to the Federal government, thereby reinstating tribal/Federal responsibility for law enforcement.

PL 280's scope in terms of affected tribes and Indian population is put into perspective once the broad contours of Indian country are sketched. Federally recognized tribes are spread across 56 million acres in the contiguous 48 States and millions of additional acres in Alaska. Of the 562 federally recognized tribes, more than 330 live in the contiguous 48 States. The U.S. Census Bureau estimates an Indian population of about 2,786,652 (including Alaska Natives), or 0.9 percent of the estimated U.S. population in 2003.[3] All but an estimated 106,450 live in the contiguous 48 States. Almost half of this population does not live on a reservation and is therefore subject to State authority independent of PL 280.

About 23 percent of the reservation-based tribal population in the contiguous 48 States and all Alaska Natives[4] fall under PL 280. The statute covers 28 percent of all federally recognized tribes in the contiguous 48 states and 70 percent of all federally recognized tribes (including Alaska Native villages).

Criminal jurisdiction. Many unusual challenges confront policing in Indian country (see "Overview of Policing in Indian Country"). One is determining criminal jurisdiction, which may lie with Federal, State, or tribal agencies depending on such considerations as the identity of the alleged offender and victim and the nature and location of the offense.

Overview of Policing in Indian Country

Aside from jurisdictional issues, policing on Indian reservations faces many difficulties that law enforcement elsewhere generally need not confront, at least to the same extent. Data collected by the Bureau of Justice Statistics, for example, suggest that violent victimization among American Indians and Alaska Natives exceeds that of other racial or ethnic subgroups by about 2.5 times the national average.[a]

According to a National Institute of Justice-supported study, a typical police department in Indian country serves a population of 10,000 residing in an area about the size of Delaware patrolled by no more than 3 officers at any one time.[b] Even so, many reservation residents live in areas with characteristics of suburban and urban locales. Researchers found that the overall workload of Indian country police departments has been increasing significantly in intensity and range of problems—driven by rising crime, heightened police involvement in social concerns related to crime, and increased demand for police services.

The study reported that most police departments in Indian country are administered by tribes under contract with the Bureau of Indian Affairs (BIA). The second most common type of department management is direct BIA administration. Under the former arrangement, law enforcement personnel are tribal employees; under the latter, they are Federal employees. State and local authorities supply police services to tribes not affected by retrocession in PL 280 States.

Of Indian country police departments surveyed, the researchers found:[c]

Officers that were Native American	66%
Officers that were women	12%
Native American officers who were members of the tribe they serve	56%
Officers who were unable to speak the language native to the community they serve	87%

Notes

a. Perry, Steven W., *American Indians and Crime*, Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, December 2004, NCJ 203097: iii; 4–6. Violent victimization comprises rape/sexual assault, robbery, and aggravated/simple assault. The report (p. 10) notes that of Indian victims of violent crime who could perceive whether offenders had used alcohol and/or drugs, 71 percent indicated that such usage was a factor in the crimes. That compares to 51 percent for violent crimes against all races.

b. Wakeling, Stewart, Miriam Jorgensen, Susan Michaelson, and Manley Begay, *Policing on American Indian Reservations*, Washington, DC: U.S. Department of Justice, National Institute of Justice, July 2001, NCJ 188095: vi; available at www.ncjrs.org/pdffiles1/nij/188095.pdf.

c. Ibid.: 25.

Exhibit 2 shows how those considerations pertain to criminal jurisdiction in PL 280 States. For example, law enforcement often must consider such questions as: Is the alleged perpetrator or victim Indian or non-Indian? Is the crime major or minor; victimless or not? Did the offense occur in a PL 280 mandatory or optional State?

Court decisions have attempted to define the jurisdictional contours of PL 280; however, they have also raised some areas of uncertainty:

- *Regulatory versus prohibitory laws.* The U.S. Supreme Court has declared that "regulatory" rather than "prohibitory" State criminal laws are outside the scope of jurisdiction conferred by PL 280.[5] This distinction eludes clear definition and has generated considerable litigation.
- *Local versus State laws.* Some judicial decisions reject application of local law to residents of Indian reservations under PL 280.[6] The U.S. Supreme Court

Exhibit 2. Indian country criminal jurisdiction as conferred by PL 280

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of Federal and tribal jurisdiction.
Non-Indian	Indian	Mandatory State has jurisdiction exclusive of Federal and tribal jurisdiction. Optional State and Federal Government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	Mandatory State has jurisdiction exclusive of Federal Government but not necessarily of the tribe. Optional State has concurrent jurisdiction with the Federal courts.
Indian	Indian	Mandatory State has jurisdiction exclusive of Federal Government but not necessarily of the tribe. Optional State has concurrent jurisdiction with tribal courts for all offenses and concurrent jurisdiction with the Federal courts for those offenses listed in 18 U.S.C. 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although Federal jurisdiction may attach in an optional State if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent State, tribal, and in an optional State, Federal jurisdiction. There is no State regulatory jurisdiction.

Source: U.S. Department of Justice, "Jurisdictional Summary," *U.S. Attorneys' Manual,* Title 9, Criminal Resource Manual 689. Retrieved October 24, 2004, from the World Wide Web: www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

has not ruled on this question.

- *Concurrent tribal jurisdiction.* Most Federal and tribal justice systems that have addressed the issue of concurrent tribal jurisdiction in PL 280 States have determined that such jurisdiction exists. PL 280 contains no language removing tribal jurisdiction. The U.S. Supreme Court has not ruled on this matter either. But the Office of Tribal Justice, U.S. Department of Justice, concluded in 2000 that "Indian tribes retain concurrent criminal jurisdiction over Indians in PL 280 States."[7]

- *Gaming offenses.* Language in the Indian Gaming Regulatory Act of 1988 suggests that Federal criminal jurisdiction will supersede State jurisdiction in PL 280 States with respect to gaming offenses. That has been contested by several States, including California.[8]

PL 280 did not provide for the consent of affected tribes and did not provide financial support for the newly established State law enforcement responsibilities. It also did not expressly abolish tribal justice system jurisdiction, diminish the Federal Government's overall trust responsibility to tribes, or reject Federal obligations to provide services to tribes other than Federal law enforcement.

Tribal and State concerns

Some tribes have voiced complaints that Federal funding was reduced for decades as a result of PL 280. In recent years, the U.S. Department of Justice has provided funding to tribes in PL 280 States, including funds for victims of crime, violence against women, community-based policing, and court development. Other concerns voiced by PL 280 tribes include the absence of effective law enforcement, infringement of tribal sovereignty, and confusion about jurisdiction when criminal activity has occurred or presents a threat.

State and local law enforcement agencies' criticisms of PL 280 typically focus on the absence of Federal funding for State law enforcement

services within Indian country or on difficulties in carrying out State law enforcement obligations because of uncertainty about the scope of State jurisdiction and officers' unfamiliarity with tribal communities.

Why more research is needed

Empirical research in the criminal justice field tends to focus on Indians as ethnic groups or on Indians in non-PL 280 States.[9] But the shortage of research on PL 280 has not gone unnoticed. A 1998 study funded by NIJ noted the absence of research concerning crime in Indian country in PL 280 States and recommended "a DOJ study devoted to the unique problems of law enforcement on reservations subject to PL 280."[10] Another NIJ-supported study cited "limited research on policing in Indian country" and suggested comprehensive research on law enforcement under PL 280.[11]

Qualitative studies of PL 280's impact. Two major studies that focused on PL 280 have been completed—a 1974 survey of Indians in Washington, an optional State, and a 1995 survey of Indians in the mandatory State of California.[12] Neither study exhausted the research potential of PL 280.

The Washington study's main purpose was to document Indian residents' perceptions of State jurisdiction.[13] About half of the Indians surveyed felt they were treated poorly or indifferently by State, county, or local police. Juvenile matters were of greatest concern to most interviewees. Their next greatest concerns were violent crimes, traffic laws, narcotics, trespass, and theft. Respondents expressed an unusually high degree of uncertainty about the agencies responsible for law enforcement in their tribal territories, and State and local law enforcement personnel seemed equally concerned by the confusion. Whether the problems identified by the study continue to plague Indian country in Washington State is unknown, however, and its single-State focus limits its general applicability to other States.

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Part of the questionnaire used in the more recent California-based survey probed tribes' experience and satisfaction with State law enforcement. Tribal concerns about jurisdictional confusion, inadequate or untimely response, and insensitive or discriminatory treatment were evident. Mentioned frequently were problems with drugs and violent crimes. The researchers concluded that limited and uncertain State jurisdiction under PL 280, coupled with the absence of tribal justice systems and law enforcement,[14] created situations where no legal remedies existed. Consequently, tribal members sometimes engaged in self-help that erupted, or threatened to erupt, into violence.

The California study is not a definitive qualitative assessment of PL 280 because of its limited breadth of coverage. Factors affecting tribes in California may have rendered their PL 280 experience atypical and thus not representative of the law's overall impact on PL 280 States.

Quantitative research on PL 280's impact. No quantitative studies of the impact of PL 280 on tribes and local law enforcement exist. Federal, tribal, and State authorities do not compile data needed for such research.[15] For example, most tribes in PL 280 jurisdictions do not report crime data to the Bureau of Indian Affairs' Crime Analysis Division.

For many years, no tribal law enforcement agency under PL 280 jurisdiction responded to FBI requests for crime statistics. That began to change in the mid-1990s as tribes enhanced their law enforcement and justice systems with resources from the U.S. Department of Justice's Office of Community Oriented Policing Services. Still, reporting crime data to the FBI and accessing crime information systems remains a challenge for tribal law enforcement agencies.

The authors have tried with limited success to construct usable crime data for California Indian country. County-level data represent the best

source, but several county sheriffs' offices claim that crimes committed in Indian country often are not reported.

Research priorities

The lack of data on PL 280 presents a serious impediment to understanding the unique set of problems associated with State jurisdiction in Indian country. As noted earlier, there are several areas of concern.

Measuring crime rates. Serious policy analysis must begin by obtaining the best available data on reported-crime rates in Indian country affected by PL 280. To evaluate the impact of State criminal justice jurisdiction compared with the Federal and tribal jurisdiction applicable without PL 280, a desirable approach would be to document the experience in States (mandatory and optional) affected by the statute, States that assumed partial versus complete PL 280 jurisdiction, and States with and without tribal justice systems. These data should be compared with the best crime rate data available from similar reservations in States not affected by PL 280 and with crime rate data for other comparable parts of the PL 280 States.

For particular reservations, comparisons should be drawn between crime data before and after a State's assumption of PL 280 jurisdiction and before and after a State or tribe retroceded jurisdiction under the statute. If data sources are unavailable, documenting the current situation would lay the groundwork for future longitudinal studies.

Because crime may be underreported in a PL 280 State, research on crime victimization is needed. If relevant victimization data are not available, separate surveys should be undertaken.

Measuring State law enforcement response under PL 280. For the same States and time periods noted in the preceding recommendation, researchers should determine the time required for police to respond to crime reports. If State and local law enforcement do not already document response time, the Federal Government should support and fund research to provide the

data. To make appropriate comparisons, documentation of Federal and tribal response times in areas of their jurisdiction is necessary.

Another useful comparison would be the frequency of complaints filed against police by reservation residents in PL 280 States versus those by residents in other parts of those States or by residents of non-PL 280 reservations.

Documenting and evaluating Federal support. The Department of Justice provides direct block grant and formula funds to States. Tribes are eligible to access those resources for law enforcement services. A review of these awards to tribes in PL 280 jurisdictions as subgrantees should assess the degree to which they access those funds and whether funding under some law enforcement programs is systematically denied. For example, researchers at the University of California–Los Angeles (UCLA) conducting a survey of California tribes for the Advisory Council on California Indian Policy estimated that Bureau of Indian Affairs per capita funding for Indians in PL 280 jurisdictions within California was one-quarter to one-half the funding level for all other Indians served by the agency.[16]

Assessing the quality of law enforcement under PL 280. Ideally, the UCLA survey should be replicated and its content amplified for a sample of additional tribes in California, a sample of tribes in other PL 280 States, and a comparison sample of similar tribes in non-PL 280 States and retroceded tribes. Such a comparative assessment across States—administered in an interview format to allow for more open-ended responses—would identify existing strategies and arrangements that may offer more effective law enforcement solutions within the framework of PL 280.

Among the many topics that this survey could address are governmental provision of law enforcement services, the responsiveness of such services, the quality of investigations, the nature and extent of tribal members' understanding of PL 280, identification of jurisdictional vacuums, and views on retrocession.

The qualitative assessment should also interview State and local law enforcement officials involved in carrying out PL 280's mandate in order to determine patrol practices and response times, communication and interaction with tribal communities about law enforcement priorities and practices, funding associated with PL 280 jurisdiction, and how confusion about PL 280 may affect law enforcement practices.

These surveys would provide essential preliminary data and identify problems requiring more intensive study.

Evaluating the impact of retrocession and concurrent jurisdiction. Many tribes dissatisfied with State jurisdiction under PL 280 have responded with retrocession campaigns and development of tribal institutions that can exercise concurrent jurisdiction.[17] Evaluations could identify the reasons for retrocession campaigns; the perceived benefits and disadvantages of retrocession; changes in crime rates since retrocession; and policies and practices at the State, tribal, and Federal levels that contribute to successful retrocession.

Even without retrocession, some tribes have exercised criminal jurisdiction within the framework of PL 280 and limits imposed by the Indian Civil Rights Act. Unlike retrocession, this strategy does not require consent or initiative from the State, although it may require cooperation from Federal funding sources. If research determines that concurrent jurisdiction achieves many of the same objectives as retrocession, tribes in PL 280 States may already possess the means to rectify local problems associated with PL 280. But, apart from legal issues, questions arise about the effectiveness of this approach as an alternative to retrocession. For example, concurrent jurisdiction may engender conflict or competition between State and tribal institutions. Research is needed to determine best practices and methods of allocating law enforcement and prosecutorial responsibility and to identify effective models for cooperative agreements to facilitate concurrent jurisdiction.

Cooperative agreements. Jurisdictional conflicts between States and tribes have engendered bitterness and costly litigation.

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Tribal–State agreements may ease such conflicts while supplying needed services to tribal communities within a framework of mutual consent. Research is needed to identify and analyze existing agreements in PL 280 States, assess their value for law enforcement from tribal and Sate perspectives, and suggest possible modifications and improvements. Such agreements can allocate prosecutorial responsibility in a concurrent jurisdiction situation or provide for cross-deputization.

An evaluation of Federal–State agreements should also be included in any comprehensive assessment of potential benefits from cooperative agreements.

Summing up

The research suggested here not only could initiate more systematic and ongoing data collection for crime rates in Indian country subject to PL 280 jurisdiction, but also generate better understanding of the efficacy of State criminal jurisdiction in Indian country. Findings could, in turn, lead to further study to explore possible Federal policies to improve law enforcement within reservations affected by PL 280. Researchers also may want to review the responsibilities of the U.S. Departments of Justice and Interior as well as other Federal agencies that might assist tribes in developing their own justice systems.

Also recommended for review are possible congressional responses, such as legislation clarifying the grant of State jurisdiction, affirming concurrent tribal jurisdiction, encouraging voluntary inter-jurisdictional arrangements between tribes and States under PL 280, or authorizing tribally initiated retrocession.

Notes

1. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as 18 U.S.C. 1162, 28 U.S.C. 1360, and other scattered sections in 18 and 28 U.S.C.). Other Federal statutes, enacted before and after PL 280, provided for State criminal jurisdiction over some tribes in some States. Those statutes are not within the scope of this Research in Brief. In addition to granting the affected States criminal jurisdiction over Indian country, PL 280 opened their courts to civil litigation previously possible only in tribal or Federal courts.

2. Act of April 11, 1968, Public Law 90–284, § 403, 82 Stat. 79 (codified at 25 U.S.C. 1323).

3. Population Division, U.S. Census Bureau, Table 4: "Annual Estimates of the Population by Race Alone and Hispanic or Latino Origin for the United States: July 1, 2003" (SC–EST2003–04). Retrieved October 26, 2004, from the World Wide Web: www.census.gov/popest/states/asrh/tables/SC-EST2003-04.pdf.

4. As a result of the U.S. Supreme Court decision in *Alaska* v. *Native Village of Venetie Tribal Government* 522 U.S. 520 (1998), little Indian country remains in Alaska. Consequently, little territory is left in Alaska where the State requires Federal authorization to exercise Indian country jurisdiction.

5. *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 209 (1987).

6. For example, in *Santa Rosa Band of Indians* v. *Kings County,* 532 F.2d 655 (9th Cir. 1975), the Ninth Circuit held that the county could not apply zoning and building codes to tribal land.

7. Office of Tribal Justice, U.S. Department of Justice, "Concurrent Tribal Authority Under Public Law 83–280," position paper, November 9, 2000, available at www.tribal-institute.org/lists/concurrent_tribal.htm.

8. *Sycuan Band of Mission Indians* v. *Roache,* 38 F.3d 402, 407 (9th Cir. 1994), *amended* 54 F.3d 535 (1995).

9. See "American Indian Criminality: What Do We Really Know?" in *American Indians: Social Justice and Public Policy,* Donald E. Green and Thomas V. Tonneson, eds., Madison, WI: The University of Wisconsin System, 1991; Green, Donald E., "The Contextual Nature of American Indian Criminality," *American Indian Culture and Research Journal* 17(2)(1993); and *Native Americans, Crime, and Justice,* Marianne Nielson and Robert Silverman, eds., Boulder, CO: Westview Press, 1996.

10. Lujan, Carol C., James Riding In, and Rebecca Tsosie, "Justice in Indian Country: A Process Evaluation of the U.S. Department of Justice Indian Country Justice Initiative—Final Evaluation Report," Final report for the National Institute of Justice, grant number 96–IJ–CX–0097, 1998, NCJ 181048: 23.

11. Wakeling, Stewart, Miriam Jorgensen, Susan Michaelson, and Manley Begay, *Policing on American Indian Reservations,* NIJ Research Report, Washington, DC: U.S. Department of Justice, National Institute of Justice, 2001, NCJ 188095: 1, 3. Law enforcement under PL 280 was not addressed by this study.

12. Johnson, Ralph W., *Justice and the American Indian,* vol. 1, *The Impact of Public Law 280 Upon the Administration of Justice on Indian Reservations,* Rapid City, SD: National American Indian Court Judges Association, 1974; Goldberg-Ambrose, Carole, and Duane Champagne, "A Second Century of Dishonor: Federal Inequities and California Tribes," unpublished report for the American Advisory Council on California Indian Policy, March 27, 1996 (on file with the UCLA American Indian Studies Library). This study is discussed in Goldberg-Ambrose, Carole, "Public Law and the Problem of Lawlessness in California Indian Country," *UCLA Law Review* 44(1997): 1405, 1437–41;

and in Goldberg-Ambrose, Carole, and Timothy Carr Seward (translator), *Planting Tail Feathers: Tribal Survival and Public Law 280 (Contemporary American Indian Issues No. 6),* Los Angeles, CA: UCLA American Indian Studies Center, 1997. Other studies and assessments have focused on tribal policing but do not address issues associated with State jurisdiction under PL 280 and include a very limited number of PL 280 tribes.

13. The study's staff interviewed approximately 250 members of 20 Washington tribes and Federal, State, and local judicial and law enforcement personnel in the State.

14. Jimenez, Vanessa J., and Soo C. Song, "Concurrent Tribal and State Jurisdiction Under Public Law 280," *American University Law Review* 47(1998): 1627. From pages 1660–61: "With the enactment of Public Law 280, legislators withdrew a significant aspect of the Federal Government's responsibility for law enforcement in Indian country and took their financial support with them."

15. Federal Government studies also have emphasized difficulties in collecting crime data for reservations outside PL 280 States. See U.S. Department of Justice, Office of the Inspector General, *Criminal Justice in Indian Country,* Audit Report 96–16, Washington, DC: U.S. Department of Justice, 1996; also see Wakeling et al., *Policing on American Indian Reservations*: 13–15.

16. See Goldberg-Ambrose and Champagne, "A Second Century of Dishonor." Collecting comparable data for other PL 280 States is difficult because Bureau of Indian Affairs funding is typically distributed by area office, which may cover several States and may not separate data by tribe, even in PL 280 States.

17. See, for example, Bozarth, Bonnie, "Public Law 280 and the Flathead Experience," *Journal of the West,* 39(3)(2000): 46.

The National Institute of Justice is the research, development, and evaluation agency of the U.S. Department of Justice. NIJ's mission is to advance scientific research, development, and evaluation to enhance the administration of justice and public safety.

NIJ is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

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Hurricane Katrina Fraud Task Force

A Progress Report to the Attorney General

February 2006

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LETTER FROM ASSISTANT ATTORNEY GENERAL ALICE S. FISHER TO THE ATTORNEY GENERAL

The Honorable Alberto R. Gonzales
Attorney General

Dear Attorney General Gonzales:

I am pleased to submit the second report on the progress of the Hurricane Katrina Fraud Task Force. We have strived to meet the mission and achieve the results you set out when creating the Task Force in the wake of the devastation caused by Hurricanes Katrina, and later Rita and Wilma. The work of the Task Force is continuing at a brisk and aggressive pace.

Since the establishment of the Task Force in September 2005, 23 United States Attorneys across the country have charged 212 people with various hurricane fraud-related crimes, including charity fraud, benefit fraud and political corruption, and have obtained 40 guilty pleas to date.

The zero-tolerance policy you set forth in establishing the Task Force has been responsible for a great number of those prosecutions, and has resulted in a significant deterrent effect. Those who seek to profit from the misfortunes of others are seeing that their conduct can result in swift prosecution and punishment. The Task Force, under your leadership, is doing everything in its power to ensure that disaster resources will flow only to those who are entitled to receive them. The Task Force has already seen evidence that benefits being received – money to which some individuals may not be legally entitled – are being returned to organizations such as the Federal Emergency Management Agency (FEMA) and the American Red Cross.

The establishment of the Task Force has led to exemplary interagency cooperation. The Department of Justice, investigative agencies, and Inspectors General are coordinating and cooperating in a wide range of operational and investigative matters. Together, we are tracking the disbursement of disaster-related funds in the affected areas, and working to identify significant fraud schemes as quickly as possible and to pursue these cases efficiently. The potential for fraud is ripe, with FEMA estimating that more than 2.5 million people have applied for Hurricane Katrina or Rita benefits, so it is essential that we continue our efforts of cooperation, coordination and aggressive investigation.

The cooperation by the government across the board is most evident at the Task Force's Joint Command Center in Baton Rouge, Louisiana. The Command Center is now fully operational due to the tireless efforts of United States Attorney David R. Dugas, the Command Center's Executive Director, and the FBI. The FBI, in particular, has devoted substantial resources, personnel and logistical support to establish and operate the Command Center. Many

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other investigative agencies and United States Attorneys' Offices are now making use of the Command Center's growing capabilities. We have established standard hotline complaint forms for the more than 4,000 complaints received, and created training programs on fraud-related issues for agents and prosecutors. We have developed an innovative database and procedures for deconfliction and referral of cases. I have personally visited the Command Center twice, and I have been highly impressed by the professionalism and the commitment of the agents and prosecutors I have met there. I deeply appreciate the dedication of federal investigative agencies, federal Inspectors General, and state and local law enforcement to the investigations they are pursuing.

It is my privilege to work with so many dedicated and resourceful law enforcement representatives, at all levels of government, in this important endeavor. We will continue to carry out the vital mission with which you have entrusted us, and will strive to sustain the level of accomplishment that all of our law enforcement partners have made possible.

Sincerely,



Chairman
Hurricane Katrina Fraud Task Force

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TASK FORCE MEMBERS

The Hurricane Katrina Fraud Task Force includes the following members:

- The Federal Bureau of Investigation (FBI);
- The Criminal Division of the Department of Justice;
- The Executive Office for United States Attorneys;
- United States Attorneys' Offices in the Gulf Coast region and throughout the country;
- The Antitrust Division of the Department of Justice;
- The Civil Division of the Department of Justice;
- The Internal Revenue Service Criminal Investigation Division;
- The United States Postal Inspection Service;
- The United States Secret Service;
- The Department of Homeland Security (DHS);
- The Federal Trade Commission (FTC);
- The Securities and Exchange Commission (SEC);
- The President's Council on Integrity and Efficiency, the Executive Council on Integrity and Efficiency, and numerous Inspectors General, including –

    - the Department of Agriculture;
    - the Department of Commerce;
    - the Department of Defense;
    - the Department of Education;
    - the Department of Energy;
    - the Department of Health and Human Services;
    - the Department of Homeland Security;
    - the Department of Housing and Urban Development;
    - the Department of Justice;
    - the Department of Labor;
    - the Department of Transportation;
    - the Department of the Treasury (for Tax Administration);

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- the Environmental Protection Agency;
- the Federal Deposit Insurance Corporation (FDIC);
- the General Services Administration;
- the National Aeronautics and Space Administration;
- the Small Business Administration;
- the Social Security Administration;
- the United States Postal Service;
- the Veterans Administration; and

- Representatives of state and local law enforcement, including –

  - the National Association of Attorneys General; and
  - the National District Attorneys Association.

The Task Force also operates in close partnership with the American Red Cross and a variety of private-sector organizations that have been assisting law enforcement in identifying new hurricane-related fraud schemes.

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TASK FORCE BACKGROUND AND MISSION STATEMENT



"We cannot allow the kindness of Americans to be exploited in this time of disaster and crisis. The Hurricane Katrina Fraud Task Force is helping to ensure that those offering a helping hand do not themselves become the victims of fraud, and that the money and support so generously being offered goes to the intended recipients."

Attorney General Alberto R. Gonzales

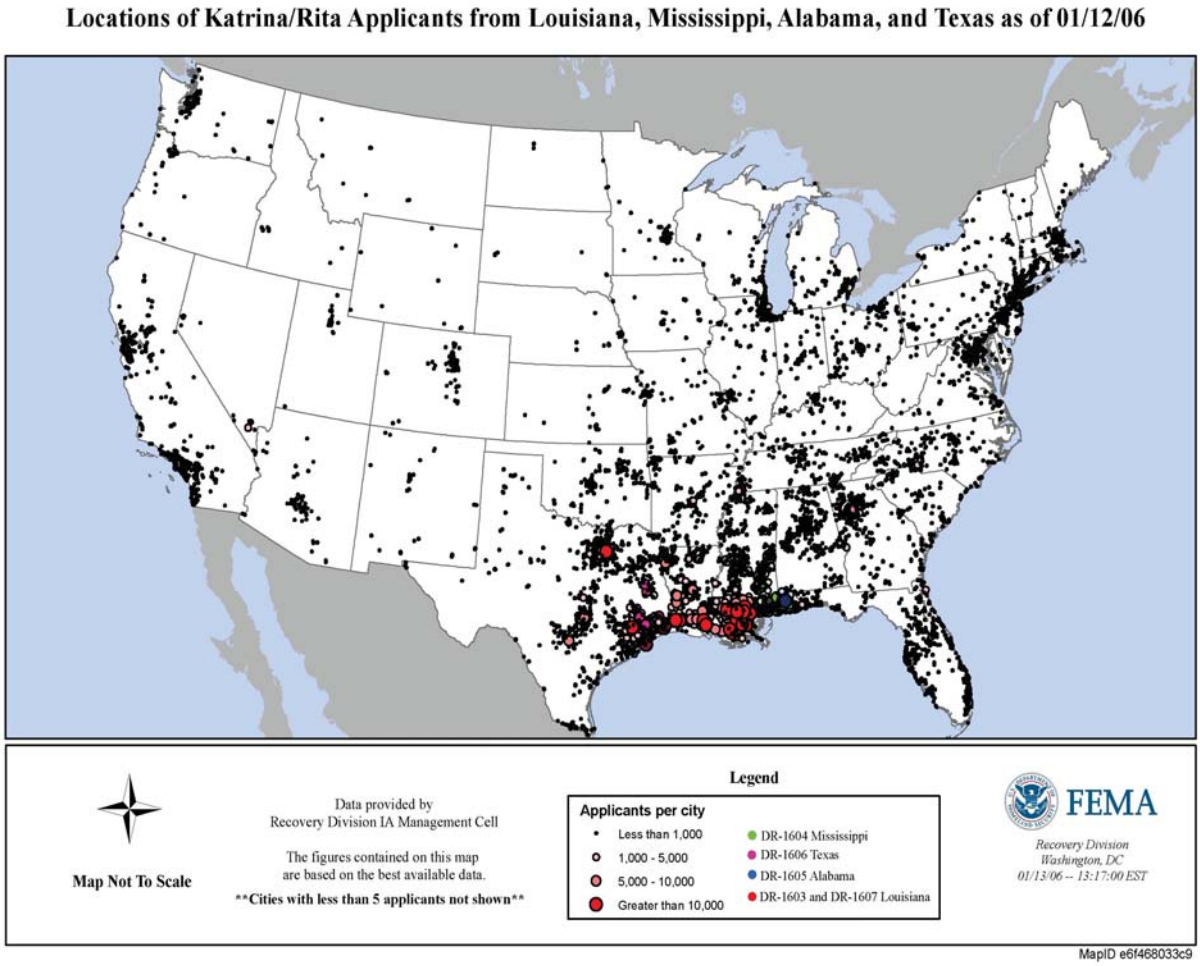
On September 8, 2005, in the immediate aftermath of Hurricane Katrina, United States Attorney General Alberto R. Gonzales established the Hurricane Katrina Fraud Task Force. The Task Force is charged with deterring, detecting, and prosecuting unscrupulous individuals who try to take advantage of the Hurricane Katrina and Hurricane Rita disasters. The overall goal is to stop people who seek to illegally take for themselves the money that is intended for the victims of the hurricanes and the rebuilding of the Gulf Coast region.

The Task Force has mobilized to send a strong message of deterrence by bringing prosecutions as quickly as possible. The Task Force tracks referrals of potential cases and complaints, coordinates with law enforcement agencies to initiate investigations, and works with the appropriate United States Attorneys' Offices to ensure timely and effective prosecution of Hurricane Katrina- and Rita-related fraud cases. By casting a broad net and using the investigative assets of federal law enforcement agencies, federal Inspectors General, and state and local law enforcement – together with the prosecution resources of the 93 United States Attorneys' Offices – the Task Force is positioned to act quickly and aggressively to bring to justice those who would further victimize the victims of these natural disasters.

Since Hurricane Katrina made landfall last August 29, it has become clear that vast numbers of people have needed help from government and private-sector entities. Throughout the Gulf Coast region hundreds of thousands of people have been displaced, hundreds of thousands of homes have been destroyed or damaged, and residents have suffered tens of billions of dollars in losses because of storm damage.[1] As of January 4, 2006, FEMA had received more

[1] *See* John LaPlante, *Numbers show magnitude of problem*, Baton Rouge Advocate, January 15, 2006, *available at* http://www.2theadvocate.com/opinion/2202407.html and FEMA, Press Release, January 11, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=22403.

Figure 1



[Source: FEMA]

than 2.5 million applications for disaster assistance relating to Hurricanes Katrina and Rita.[2] (See Figure 1 above.)

The vast majority of these applicants have legitimate need for the assistance they are seeking. The Task Force's work to date, however, has shown that numerous people have committed fraud in seeking benefits to which they are not entitled. Disaster-relief organizations have reported to law enforcement that they have identified thousands of questionable or possibly

[2] *See* FEMA, Press Release, January 4, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=22199.

fraudulent payments to purported hurricane victims. In addition, the Task Force is already seeing clearcut instances of contract fraud and public corruption.

The Task Force is combating all types of fraud relating to private-sector and government efforts to help victims of Hurricanes Katrina and Rita to rebuild their lives and their communities.[3] The Task Force will adapt to combat whatever fraudulent schemes criminals may create to exploit the hurricanes' effects on the Gulf Coast region. The principal types of fraud on which the Task Force is now concentrating include:

- *Fraudulent Charities*: Cases in which individuals falsely hold themselves out as agents of a legitimate charity or create a "charity" that is in fact a sham;

- *Identity Theft*: Cases in which the identities of innocent victims are "stolen" and assumed by criminals who convert the funds of, or otherwise defraud, the victims;

- *Government- and Private-Sector Benefit Fraud*: Cases in which individuals file false applications seeking benefits to which they are not entitled, and file fraudulent claims for insurance;

- *Government-Contract and Procurement Fraud*: Cases in which individuals and companies engage in fraud relating to federal funds for the repair and restoration of infrastructure, businesses, and government agencies in the affected region; and

- *Public Corruption*: Cases in which public officials participate in bribery, extortion, or fraud schemes involving federal funds for the repair and restoration of infrastructure, businesses, and government agencies in the affected region.

The Task Force has ongoing investigations in each of these areas.

The Task Force is committed to ensuring the integrity of relief and reconstruction efforts and guarding against the unlawful diversion of federal and charitable funds intended to rebuild the region and help its residents. Task Force members are working to keep the public informed about fraudulent schemes, and to give them the information they need to avoid becoming victims of fraud. Similarly, the Task Force is widely publicizing its criminal prosecutions, so that would-be fraudsters think twice about engaging in this type of criminal activity.

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[3] The Task Force does not generally have jurisdiction to address price-gouging, since there is no general federal statute that makes price-gouging a federal criminal violation. Of course, where the price-gouging also evidences price-fixing or has an element of fraud, federal jurisdiction may exist for the Department to pursue such a case. A number of state statutes address price-gouging, and some states have been actively enforcing those statutes in the wake of apparent price-gouging related to the Katrina relief effort.

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ACCOMPLISHMENTS OF THE TASK FORCE

SUMMARY OF ACCOMPLISHMENTS

A. Prosecution and Enforcement

Since the first progress report in October 2005, the Task Force has made significant strides in achieving full-scale regional and nationwide coordination among law enforcement agencies pursuing fraud investigations, and in increasing the number of Hurricane Katrina- and Rita-related prosecutions. United States Attorneys in 23 districts have now charged 212 individuals in schemes involving fraud, identity theft, theft of federal funds, and public corruption.

While the FBI and the Department of Homeland Security Office of Inspector General (DHS-OIG) have taken the lead in many of the Task Force's current investigations, a wide array of investigative agencies and Inspectors General has also been conducting disaster-related investigations, and a substantial number of these are joint investigations by two or more agencies. In addition, federal investigative agencies and private-sector entities cooperated closely in identifying and shutting down websites that appeared to be engaging in fraudulent solicitations of charitable donations for hurricane victims. The FBI Cyber Division reports that as a result of agent interviews and FBI coordination with private-sector entities, 44 questionable websites have been shut down. The Secret Service reports that it has shut down 16 "phishing" websites (i.e., websites that purport to be operated by legitimate corporate or nonprofit entities, but which are created to harvest personal data from individuals for identity theft and fraud).

B. Deterrence and Returned Funds

The Task Force's prosecutions, coupled with the intensive public-education campaigns that Task Force members conducted in the first six weeks after the Task Force was established, appear to be having a noticeable effect in deterring criminal conduct. According to FEMA and the American Red Cross, a total of $8,016,417.62 in disaster-assistance funds has been voluntarily returned to those organizations. While some individuals may have returned some of these funds because they concluded the funds had been provided by mistake, there are indications that other individuals have returned funds because they believed they were not entitled to the funds under any circumstances and wanted to avoid possible prosecution. These indications include letters confessing the fraud, anonymous returns of checks and money orders, and contacts by persons who wanted to arrange time-payment plans to pay back the money they had taken.

C. Increased Coordination

Investigative agencies and federal Inspectors General have expanded their cooperation and coordination on hurricane-related investigations. Beginning with the Task Force Conference

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in New Orleans on October 20, 2005, the Task Force has made great strides toward full and effective coordination among federal, state, and local law enforcement agencies and United States Attorneys' Offices.

A vital component of coordination is the Task Force's Joint Command Center, which is now in full operation in Baton Rouge, Louisiana. The Command Center, to which the FBI has provided personnel and logistical support, promises to be a major source of support for hurricane-related investigative efforts throughout the country. Already, the Department and investigative agencies are making sound use of the Command Center for receipt, deconfliction, and referral of complaints; review and analysis of potentially fraudulent applications for disaster-related benefits; and timely information-sharing with relevant law enforcement agencies. The Department is also working closely with federal Offices of Inspectors General to advise them of systemic weaknesses and vulnerabilities that agents are identifying through their criminal investigations.

D. Training and Proactive Detection

The New Orleans Conference served not only to forge closer working ties among law enforcement agencies throughout the Gulf Coast region, but to initiate the Task Force's efforts to provide agents and prosecutors with training on fraud-related and public corruption-related issues. The Command Center has since hosted training of Inspector General auditors by Department of Justice prosecutors, and is planning more extensive training for Gulf Coast-based Assistant United States Attorneys and other agencies at the Command Center. The Department of Justice also has taken the lead in coordinating and expediting proactive responses by various agencies to potential disaster-related fraud. The Command Center is also playing a significant role in proactively identifying patterns of potentially fraudulent activity in applications for disaster-related benefits.

E. Public Education and Prevention

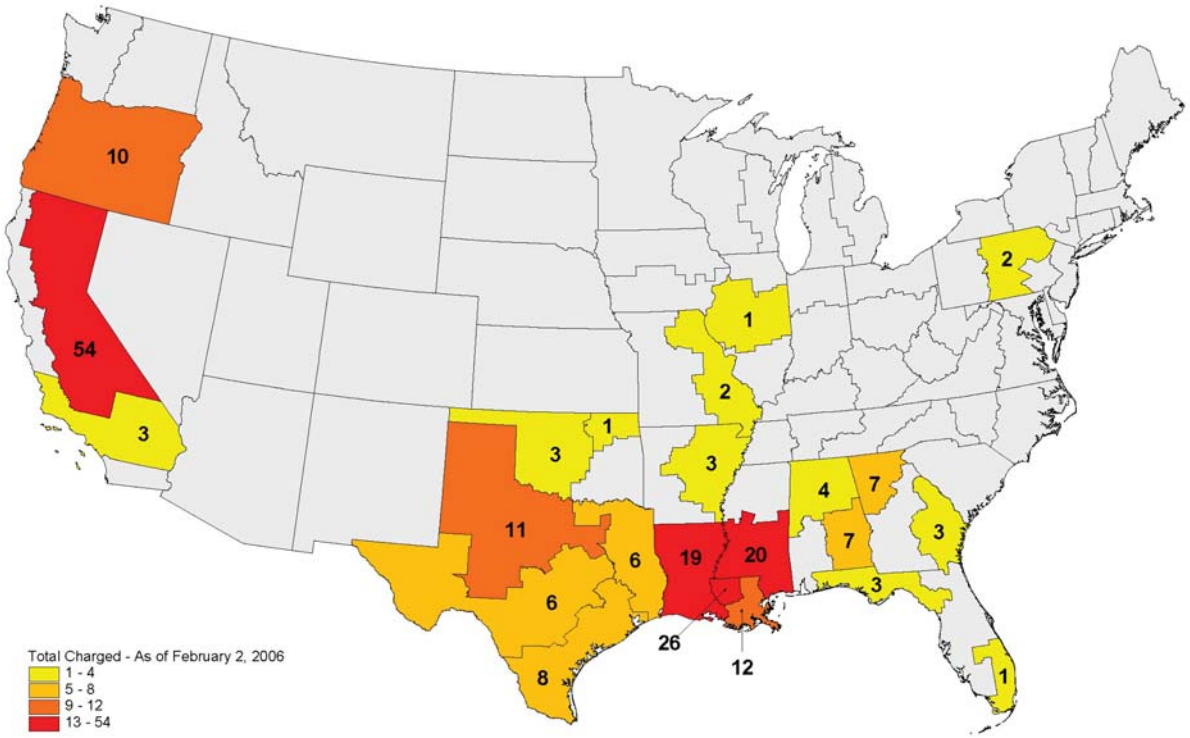
Since October 2005, various agencies – including the Department of Justice, the Federal Trade Commission (FTC), the Postal Inspection Service, and FEMA – have continued to provide members of the public with information about hurricane-related crimes and prevention issues. The techniques being used include websites, public-service advertisements, distributions of publications and flyers, and press releases.

PROSECUTION AND ENFORCEMENT

Since the first progress report in October 2005, the Task Force has continued to carry out the strategy of zero tolerance for hurricane-related fraud. Task Force members have recognized the value of pursuing swift and visible prosecutions to effect maximum deterrence and prevent future violations. Accordingly, investigative agencies and United States Attorneys across the country have worked together in close collaboration to make the zero-tolerance policy a top priority.

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Figure 2: Federal Criminal Prosecutions, September 1, 2005 - February 2, 2006



Note: Totals represent 212 persons charged in 23 districts. [Source: U.S. Department of Justice]

The most tangible proof of their commitment is the dramatic increase in the number of prosecutions stemming from Hurricanes Katrina and Rita. As of October 17, 2005, the date of the last progress report, the Task Force had charged 36 people in 17 separate cases with hurricane-related fraud. As of February 2, 2006, 212 people have been charged in 173 separate cases with hurricane-related fraud. (See Figure 2 above.) To date, 40 of these defendants have pleaded guilty to one or more charges. These prosecutions span 23 federal districts in all regions of the United States. State and local prosecutors' offices have also continued to bring criminal cases involving hurricane-related fraud.

From the criminal investigations and prosecutions that the Task Force has already initiated, federal law enforcement has seen several patterns of criminal behavior in disaster-related benefit fraud schemes. These include:

- Persons living outside the disaster areas – often two or three states away – who falsely claimed to have primary residences within the disaster areas;

- Persons using Social Security numbers other than their own on multiple applications;
- Prison and jail inmates, incarcerated at facilities outside the disaster areas, who falsely claimed their primary residences in the disaster areas had been damaged; and
- Persons misrepresenting themselves to be agents of bona fide charitable organizations.

The majority of hurricane-related prosecutions brought since October 17, 2005 involve fraud to obtain emergency benefits from FEMA and the American Red Cross. The sample list of cases reflects a broad range of cases ranging from benefit fraud to identity theft to corruption. We have selected samples from a variety of United States Attorneys' Offices to provide a flavor of the fraudulent schemes.

Alabama - Middle District (United States Attorney Leura Garrett Canary) [7 Persons Charged]

- On November 15, 2005, a federal grand jury in the Middle District of Alabama indicted four individuals residing in Montgomery, Alabama, alleging they fraudulently sought disaster-assistance benefits from FEMA. The defendants allegedly included in their FEMA applications false claims that they had suffered damage to their primary residence in Harvey, Louisiana. The DHS-OIG, with assistance from the Montgomery Police Department, investigated the case.[4]

- On January 20, 2006, a federal grand jury in the Middle District of Alabama indicted three individuals residing in Montgomery, Alabama, alleging they fraudulently sought disaster-assistance benefits from FEMA. The defendants allegedly included in their FEMA applications false claims that they had suffered damage to their primary residence in Louisiana. The DHS-OIG, with assistance from the Montgomery Police Department, investigated the case.[5]

Alabama - Northern District (United States Attorney Alice H. Martin) [4 Persons Charged]

- On November 30, 2005, a federal grand jury in the Northern District of Alabama indicted four individuals on charges relating to filing false claims with FEMA. Two women claimed to have suffered disaster-related damage to their home in Slidell, Louisiana when in fact they were residents of Alabama. A third defendant reportedly was assisted by private citizens, church volunteers, and the American Red Cross while posing as a hurricane evacuee. The DHS-OIG – in cooperation with the FBI, the Alabama Attorney

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[4] *See* United States Attorney's Office, Press Release, November 15, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/11-15-05USAOMDAL.pdf.

[5] *See* United States Attorney's Office, Middle District of Alabama, Press Release, February 6, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/2-6-06USAOMDAL.pdf.

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General's Office, the Tuscaloosa County Sheriff's Office, and the Jasper, Northport, and Attalla Police Departments -- investigated the cases.[6] On January 24, 2006, one of the individuals pleaded guilty to the charges in her indictment.

California - Eastern District (United States Attorney McGregor W. Scott) [54 Persons Charged]

- The United States Attorney's Office for the Eastern District of California and the FBI have aggressively continued their ongoing investigation into a scheme to defraud the American Red Cross of funds intended for Hurricane Katrina victims by submitting or causing others to submit a fraudulent claim through the American Red Cross call center located in Bakersfield. To date, 53 persons have been federally charged in this investigation. According to the indictment, when a person contacted the call center to request assistance, call-center employees allegedly verified their personal information, including an address within the area affected by the hurricane. Once that information was verified, the caller was given instructions on how to obtain financial assistance from the American Red Cross and, on approval of financial assistance, how to obtain that assistance at the closest Western Union branch. The indictments further allege that a number of temporary contract employees at the Bakersfield call center, and some close associates of those temporary contract employees, obtained false claim information and, using that information, obtained payment from Western Union.[7] In a separate case, one defendant was charged with fraudulently applying for and receiving thousands of dollars in hurricane assistance from the American Red Cross and other organizations. The FBI investigated the cases.

Florida - Southern District (United States Attorney R. Alexander Acosta) [1 Person Charged]

- On January 30, 2006, a defendant pleaded guilty in the United States District Court for the Southern District of Florida to wire fraud in connection with his fraudulent solicitation of charitable donations supposedly intended for Hurricane Katrina relief. According to the indictment, the defendant falsely claimed in conversations on the Internet, and ultimately via the website www.AirKatrina.com, that he was piloting flights to Louisiana to provide medical supplies to the areas affected by Hurricane Katrina and

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[6] *See* United States Attorney's Office, Norther District of Alabama, Press Release, November 30, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/11-30-05USAOUSAOMDAL.pdf.

[7] *See, e.g.,* United States Attorney's Office, Eastern District of California, Press Releases, October 27, 2005, and February 2, 2006, *available at* http://www.usdoj.gov/usao/cae/PRESS/pdf_2005/10-27-05katrinarelease.pdf and http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/2-2-06USAOEDCA.pdf.

to evacuate children and others in critical medical condition. He further claimed that he had organized a group of Florida pilots to assist him in his supposed relief efforts. In just two days, the defendant received almost $40,000 in donations from 48 different victims from around the world. The FBI investigated the case.[8]

Georgia - Northern District (United States Attorney David Nahmias) [7 Persons Charged]

- On December 6, 2005, a federal grand jury in the Northern District of Georgia returned separate indictments against five individuals for mail fraud, making false statements to FEMA in order to obtain Hurricane Katrina victim assistance, and stealing FEMA funds. The DHS-OIG, the Postal Inspection Service, and the FBI investigated the cases.[9]

Georgia - Southern District (United States Attorney Lisa Godbey Wood) [3 Persons Charged]

- On November 3, 2005, a federal grand jury in the Southern District of Georgia indicted three individuals for falsely and fraudulently representing themselves to be agents of the American Red Cross for the purpose of soliciting and receiving money from persons in the Dublin, Georgia area, purportedly to aid victims of Hurricane Katrina. The three defendants were also charged in a related gambling operation involving the solicitation of persons to buy tickets in an illegal lottery or raffle that was supposedly sponsored by the American Red Cross. The FBI investigated the case.[10]

Louisiana - Eastern District (United States Attorney Jim Letten) [12 Persons Charged]

- On December 16, 2005, a federal grand jury for the Eastern District of Louisiana returned an indictment charging a St. Tammany Parish Councilman with extortion under the Hobbs Act and with money laundering. The indictment alleges that the defendant used his official position as a councilman to obtain inside information about a debris removal contract resulting from Hurricane Katrina, and to influence a prime contractor in St. Tammany Parish to enter into a contract with another company. It further alleges that the defendant pressured the owners of the second company to pay him 50 percent of the funds that the company received from the prime contractor. The FBI, the Internal

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[8] *See* United States Attorney's Office, Southern District of Florida, Press Release, January 30, 2006, *available at* http://www.usdoj.gov/usao/fls/060130-01.html.

[9] *See* United States Attorney's Office, Northern District of Georgia, Press Release, December 13, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/12-13-05USAONDGA.pdf.

[10] *See* United States Attorney's Office, Southern District of Georgia, Press Release, November 3, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/threeIndicted_KatrinaScam110305.pdf.

Revenue Service Criminal Investigation (IRS-CI), and the DHS-OIG investigated the case.[11]

- On February 3, 2006, a federal grand jury for the Eastern District of Louisiana indicted two FEMA officials working in New Orleans for soliciting bribes as public officials. According to the criminal complaint by which they were first charged on January 27, the two officials approached a local contractor and solicited a bribe from the contractor in exchange for inflating the headcount for a $1 million meal service contract at the Algiers, Louisiana base camp. During this meeting, the two officials allegedly told the contractor that they could inflate the "headcount" for meals served and that they would require the contractor to kick back to them (the two FEMA officials) $20,000. During a subsequent meeting on January 19, 2006, one of the FEMA officials demanded $20,000 from the contractor to be split evenly between him and the other FEMA official, and indicated that the other official would continue to intentionally inflate the occupancy number at the base camp falsely.

  During a subsequent meeting on January 24, 2006, the $20,000 bribe that had been demanded was further discussed, and during the same meeting, the two officials allegedly discussed various ways and means that the contractor could use to inflate the meal service count. During the same meeting and a subsequent one on the same day, both charged defendants allegedly continued to discuss various ways and means to inflate the invoices for meal service counts, and made a further bribery demand for $2,500 per week for each of them. Finally, on the morning of January 27, 2006, the officials each took one envelope containing $10,000 from the contractor, after confirming that these two payments were for the inflated meal service count from December 3, 2005 through January 15, 2006. Thereafter, according to the complaint, both defendants and the contractor continued to discuss the mechanics of how to continue to fraudulently inflate the meal service count numbers. Federal agents arrested both immediately thereafter on the scene. The FBI and the DHS-OIG investigated the case.[12]

Louisiana - Middle District (United States Attorney David Dugas) [26 Persons Charged]

- On January 20, 2006, a federal grand jury in the Middle District of Louisiana returned a 16-count indictment against a resident of Villa Rica, Georgia, charging him with fraudulently obtaining 51 disaster unemployment compensation debit cards from the

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[11] *See* United States Attorney's Office, Eastern District of Louisiana, Press Release, Dec. 16, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/12-16-05-USAOEDLA.pdf.

[12] *See* United States Attorney's Office, Eastern District of Louisiana, Press Release, January 27, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/1-27-06USAOEDLA.pdf.

Louisiana Department of Labor (LDOL). Also on January 20, 2006, a grand jury returned indictments against four individuals residing in Baton Rouge for fraudulently applying for FEMA disaster benefits. The United States Secret Service, the DHS-OIG, the Social Security Administration - Office of Inspector General (SSA-OIG), the FBI, and the East Baton Rouge Parish Sheriff's Office investigated the cases.[13]

Louisiana - Western District (United States Attorney Donald W. Washington) [19 Persons Charged]

- On October 27, 2005, a federal grand jury in the Western District of Louisiana indicted two individuals, incarcerated at the Avoyelles Women's Correctional Facility in Cottonport, Louisiana, for claiming to be hurricane victims in order to fraudulently obtain FEMA relief funds. The DHS-OIG, the Postal Inspection Service, and the FBI investigated the cases.[14]

Mississippi - Southern District (United States Attorney Dunn Lampton) [20 Persons Charged]

- On December 6, 2005, the United States Attorney's Office for the Southern District of Mississippi filed a criminal complaint charging a subcontractor with paying an Army Corps of Engineers employee multiple bribes to create false load tickets for debris that the subcontractor never dumped at a dumpsite in Perry County, Mississippi. The FBI, the Department of Defense - Defense Criminal Investigative Service (DOD-DCIS), and the United States Army Criminal Investigation Division investigated the case.[15]

Oklahoma - Western District (United States Attorney John C. Richter) [3 Persons Charged]

- On October 27, 2005, two individuals were arrested, based on a criminal complaint in the Western District of Oklahoma, for filing a false claim for hurricane disaster assistance. According to the complaint, both individuals, in separate applications to FEMA, falsely claimed that their primary residences in Metairie, Louisiana had been destroyed. In fact,

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[13] *See* United States Attorney's Office, Middle District of Louisiana, Press Release, January 20, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/KatrinaPR_FEMA_chrgs102006.pdf.

[14] *See* United States Attorney's Office, Western District of Louisiana, Press Release, October 27, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/10-27-05USAOWDLA.pdf.

[15] *See* United States Attorney's Office, Southern District of Mississippi, Press Release, Dec. 6, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/12-06-2005-USAOMS.pdf.

both defendants resided in Lawton, Oklahoma. The Oklahoma Economic Crime and Identity Theft Task Force and the DHS-OIG investigated the case.[16]

Oregon (United States Attorney Karin Immergut) [10 Persons Charged]

- On January 25, 2006, a federal grand jury in the District of Oregon returned separate indictments against nine individuals on charges relating to fraudulent applications for FEMA disaster-relief funds. The Postal Inspection Service, the FBI, and the DHS-OIG investigated the cases.[17]

Texas - Eastern District (United States Attorney Matthew D. Orwig) [6 Persons Charged]

- On January 12, 2006, a federal grand jury in the Eastern District of Texas indicted two individuals on charges relating to filing false claims with FEMA. The DHS-OIG investigated the case.[18] On January 18, 2006, a federal grand jury in the Eastern District of Texas returned indictments against two individuals on charges relating to filing false claims with FEMA. The DHS-OIG investigated one case, and the DHS-OIG with the assistance of the Bureau of Immigration and Customs Enforcement investigated the other case.[19]

Texas - Northern District (United States Attorney Richard Roper) [11 Persons Charged]

- On January 11, 2006, a federal grand jury in the Northern District of Texas indicted three Dallas-area residents and two Meyersville, Mississippi, residents, with various offenses related to their role in a FEMA fraud scheme. According to the indictment, the defendants – who include a 35-year-old Dallas resident as the lead defendant and her 61-year-old mother – made numerous fraudulent claims for hurricane disaster relief by filing them over the telephone and online with FEMA and the LDOL. The lead defendant reportedly submitted more than 50 fraudulent online applications to FEMA and the

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[16] *See* United States Attorney's Office, Western District of Oklahoma, Press Release, October 27, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/KatrinaPR10-27-05.pdf

[17] *See* United States Attorney's Office, District of Oregon, Press Releases, January 26 and 27, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/1-26-06USAOOR.pdf and http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/1-27-06USAOOR.htm.

[18] *See* United States Attorney's Office, Eastern District of Texas, Press Release, January 12, 2006, available at http://www.usdoj.gov/usao/txe/news/newton_blake.pdf.

[19] *See* United States Attorney's Office, Eastern District of Texas, Press Release, January 18, 2006, *available at* http://www.usdoj.gov/usao/txe/news/harris_henderson.pdf.

LDOL, and filed most of the fraudulent claims on behalf of family members who lived in two areas not affected by Hurricane Katrina. They allegedly provided FEMA and LDOL with current mailing addresses they controlled, caused the disbursement of disaster assistance funds and disaster unemployment assistance funds to them via debit cards, checks and/or electronic transfers, and used the funds for their own personal use. The lead defendant allegedly received approximately $65,000 in fraudulently obtained Hurricane Katrina disaster benefits and there is no evidence to indicate that she ever lived in New Orleans. The Department of Labor Office of Inspector General (DOL-OIG), the Postal Inspection Service, the DHS-OIG, and the LDOL investigated the case.[20]

- On December 21, 2005, a federal grand jury in the Northern District of Texas indicted an individual for conspiring to defraud the United States. The defendant allegedly obtained and aided one or more individuals to obtain disaster relief funds from FEMA by submitting false claims representing that their primary residences, located in hurricane-damaged areas, suffered property damage as a result of the hurricanes. The defendant also allegedly used the addresses of multiple UPS stores in Texas to receive and forward mail from FEMA, and hired a man at a homeless shelter in Dallas to stay at a hotel to which the defendant had mail forwarded from UPS stores or other commercial-mail receiving agencies and inform him about mail that was delivered to the hired man at the hotel. The Postal Inspection Service and the DHS-OIG investigated the case.[21]

Texas - Southern District (United States Attorney Chuck Rosenberg) [8 Persons Charged]

- On January 18, 2006, a federal grand jury in the Southern District of Texas indicted an individual on charges of filing a false claim with FEMA for disaster assistance and for mail fraud. The individual was arrested on January 24, 2006. The DHS-OIG investigated the case.[22]

- On January 20, 2006, the United States Attorney's Office filed a criminal complaint charging an individual with mail fraud in connection with his obtaining a Louisiana Department of Labor Disaster Unemployment Assistance (DUA) debit card in the name of another individual who was not a hurricane evacuee. The individual allegedly

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[20] *See* United States Attorney's Office, Northern District of Texas, Press Release, January 17, 2006, *available at* http://www.usdoj.gov/usao/txn/PressRel06/hall_lakietha_etal_katrinafraud_indict_pr.html.

[21] *See* United States Attorney's Office, Northern District of Texas, Press Release, December 21, 2005, *available at* http://www.usdoj.gov/usao/txn/PressRel05/mcclain_fema_indict_pr.html.

[22] *See* United States Attorney's Office, Southern District of Texas, Press Release, January 25, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/1-26-06USAOSD_2.pdf.

evacuated from Louisiana to the Conroe, Texas area and obtained a DUA card in his own name. Thereafter, he allegedly conducted a scheme in which he paid certain Conroe-area residents in cash or in drugs to obtain their identification information, which he then used to file for DUA benefits in their names listing a false prior place of employment in Louisiana. The defendant was also allegedly involved in assisting others in fraudulently obtaining DUA debit cards, resulting in his involvement in fraud totaling hundreds of thousands of dollars during the course of the scheme. The DOL-OIG with the DHS-OIG investigated the case.[23]

Texas - Western District (United States Attorney Johnny Sutton) [6 Persons Charged]

- On November 16, 2005, a federal grand jury in the Western District of Texas indicted an individual for false representation of a Social Security number. The defendant, who was arrested on December 21, 2005, allegedly falsely used a number, which he alleged to be his Social Security number, for the purpose of obtaining Hurricane Katrina related emergency assistance from the American Red Cross, for which he was not eligible. The SSA-OIG, with the Midland Police Department, investigated the case.[24]

Other United States Attorneys' Offices that have brought hurricane-related criminal prosecutions include the Eastern District of Arkansas (3 persons charged); the Central District of California (3 persons charged); the Northern District of Florida (3 persons charged); the Central District of Illinois (1 person charged); the Eastern District of Missouri (2 persons charged); the Northern District of Oklahoma (1 person charged); and the Middle District of Pennsylvania (2 persons charged).

Two aspects of these cases are worth noting. First, many of these cases are the direct result of interagency working groups that have been established in the judicial districts directly affected by the storms. These working groups are located in Baton Rouge (Middle District of Louisiana), Covington (Eastern District of Louisiana), Jackson (Southern District of Mississippi), Lafayette and Shreveport (Western District of Louisiana), and Mobile (Southern District of Alabama). The working groups provide day-to-day coordination of investigative activities by the line agents who are working on the cases. This coordination is critically important, because the working groups provide the means for teaming the agents and prosecutors who live in and are most familiar with the region with agents and inspectors from around the country who have been sent to augment the investigative resources in the most heavily affected regions. The working groups also directly facilitate the multi-agency investigations that the

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[23] *See* United States Attorney's Office, Southern District of Texas, Press Release, January 26, 2006, *available at* http://www.usdoj.gov/usao/txs/releases/January2006/060126-Good.pdf.

[24] *See* United States Attorney's Office, Press Release, December 21, 2005, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/12-21-05USAOWDTX.pdf.

Task Force is coordinating.

Second, much of the Task Force's work is being performed by United States Attorneys' Offices and agency field offices that were themselves victims of the hurricanes' devastation. Many of the prosecutors and agents in the affected areas were displaced from their homes and offices, but have continued to carry out their duties despite suffering significant personal losses. For example, the United States Attorney for the Eastern District of Louisiana and his staff only returned to their office in New Orleans a few weeks ago, and the FBI field office in New Orleans is still out of commission. Both agencies have been working from temporary office space, and many of their people have not yet been able to return to their homes. In addition, the Internal Revenue Service (IRS), the Postal Inspection Service, the Secret Service, the DOL-OIG, the Housing and Urban Development Office of Inspector General (HUD-OIG), and the Social Security Administration (SSA) had offices and people in New Orleans that were affected by the storms.

Examples of state and local prosecutions reported to the Task Force include the following:

Louisiana

- The Insurance Fraud Unit of the Louisiana State Police (LSP) reports that it has arrested nine individuals on various charges concerning hurricane-related insurance fraud, and has 54 other cases under investigation. The LSP Insurance Fraud Unit reports that the fraud-related activities of the individuals arrested included the following:

    - An out-of-state contractor purported to remove mold contamination but had his cleaning crews begin work without finishing it or performed the work poorly, then submitted bills three to four times higher than normal for such work.

        - When some homeowners challenged the bills, the contractor allegedly threatened to place liens on their property and turn them over to collection agencies to ruin their credit if they failed to pay within a short time frame. Witnesses also said that in some instances, they were threatened with losing their houses completely.
        - In one case where a family arranged with the contractor to remove a tree from their house, a family member agreed to pay the contractor $1,000 by credit card over the phone from his temporary housing in Shreveport, but declined any further work. The family allegedly later learned that the contractor forced entry into their home without their consent and gutted the home's interior, which was not flooded, removed interior wallboard and belongings, and later demanded payment from them for this service. When they refused to pay, he reportedly took the money from their credit card account.

    - In two separate cases, an individual allegedly claimed that Hurricane Katrina had damaged his residence, but subsequent investigation found that the individual had

claimed the same damage on at least two prior occasions and had received payment in each instance.

- An individual initiated an insurance claim by reporting that her vehicle was stolen from a New Orleans housing project after she evacuated the area due to Hurricane Katrina. Investigation disclosed that the individual was still in possession of the vehicle when it was recovered in an apartment complex in Texas, where she was residing.

In addition, the Insurance Fraud Unit reports that, working in conjunction with the National Insurance Crime Bureau, it has indexed 246,712 vehicle identification numbers on vehicles damaged by Hurricanes Katrina and Rita in Louisiana. During this indexing initiative, the LSP recovered 84 stolen vehicles from the New Orleans metro area. The stolen vehicles were turned over to the New Orleans Police Department for storage. To date, the Unit reports that there have been no significant investigations as a result of the fraudulent sale of flood vehicles. The LSP is working with the Louisiana Office of Motor Vehicles to place registration stop flags on all flood vehicles considered missing. This will prevent any title activity without LSP Insurance Fraud Unit approval.

- Louisiana Attorney General Charles C. Foti, Jr., announced the arrests of a Louisiana police chief and police officer. Both were charged with two counts of looting, two counts of felony theft, and malfeasance in office. They were booked into Acadia Parish Jail as fugitives, subsequently transported to New Orleans, and booked for the above charges.

In addition, state Attorneys General continue to pursue civil actions in hurricane-related matters involving alleged consumer deception and price-gouging. As reported to the Task Force, Alabama Attorney General Troy King, Florida Attorney General Charlie Crist, Louisiana Attorney General Charles C. Foti, Jr., New York Attorney General Eliot Spitzer, Texas Attorney General Greg Abbott, and former Virginia Attorney General Judith Williams Jagdmann, among others, have brought civil enforcement actions for activity ranging from alleged gasoline and hotel price gouging to home improvement fraud and other schemes to defraud. United States Attorney's Offices are coordinating with state Attorneys General and other state and local law enforcement as appropriate.[25]

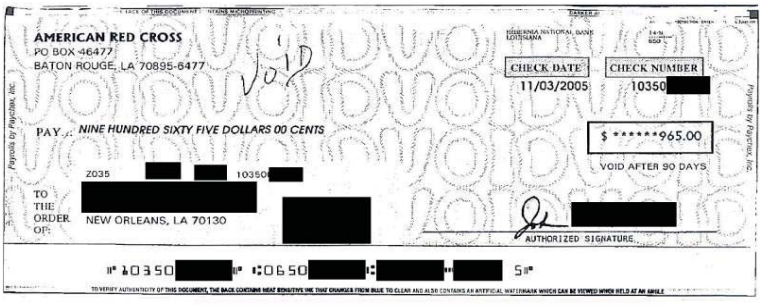
Deterrence and Returned Funds

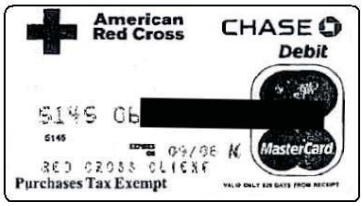
It is worth noting that, according to FEMA and the American Red Cross, a total of

[25] The subject of gasoline price-gouging remains a focus of interest for state Attorneys General. In November 2005, Arizona Attorney General Terry Goddard, New Jersey Attorney General Peter Harvey, and South Carolina Attorney General Henry McMaster testified on the issue before a joint hearing by the United States Senate Committee on Commerce, Science, and Transportation, and the United States Senate Committee on Energy and Natural Resources.

$8,016,417.62 in disaster-assistance funds has been voluntarily returned to those organizations. (See Figure 3 at right for examples of payments returned to the American Red Cross.) As of January 24, 2006, FEMA had $6,126,433.42 in disaster-assistance checks and money orders returned to it. As of the end of December, 2005, the American Red Cross had received $1,889,984.20 in returned disaster-assistance funds, including 2,358 checks, 96 client-assistance cards, and 24 debit cards.

Figure 3 - Examples of Check and Debit Card Returned to American Red Cross





In some cases, individuals may have returned some of these funds because they concluded the funds had been provided by mistake. In other cases, however, there are indications that individuals have returned funds because they believed they were not entitled to the funds under any circumstances and wanted to avoid possible prosecution. These indications include letters confessing the fraud, anonymous returns of checks and money orders, and contacts by persons who wanted to arrange time-payment plans to pay back the money they had taken.

Increased Coordination

A. The New Orleans Conference

From the outset, the Task Force recognized the importance of ensuring full and effective coordination among law enforcement agencies at the national, regional, and local levels of government. To expedite this process, the Task Force organized and conducted a training and information-sharing conference in New Orleans, Louisiana, on October 20, 2005. This conference brought together more than 100 senior-level and working-level representatives of federal and state law enforcement, including United States Attorneys, the FBI, the Secret Service, the Postal Inspection Service, numerous federal Inspectors General, and the Louisiana State Police. (See Figure 4 below.)

Figure 4 - New Orleans Conference, October 20, 2005



"Fraud will not go unpunished. Every dollar that is directed for Hurricane relief should be used in affected communities, not to pad the bank accounts of fraudsters and criminals."

Attorney General Alberto R. Gonzales, speech at Hurricane Katrina Fraud Task Force Conference, New Orleans, Louisiana, October 20, 2005.

This conference included remarks by Attorney General Alberto R. Gonzales, FBI Assistant Director Chris Swecker, Department of Homeland Security Inspector General Richard Skinner, and Louisiana Attorney General Charles C. Foti, Jr. It also featured panel discussions, working groups, and practical guidance on investigating and prosecuting Katrina- and Rita-related fraud cases. (See Figure 5 below.)

Figure 5 - Interagency Cooperation at New Orleans Conference



"We have a responsibility to ensure that government relief efforts are not undermined by unscrupulous individuals. It is very unfortunate that natural disasters, such as Hurricane Katrina, while bringing out the best in most people also draw out criminal elements who would take advantage of the federal government's relief efforts."

Assistant Director Chris Swecker, FBI Criminal Investigative Division, September 15, 2005 statement.

Assistant Director Swecker (at right) speaks at the New Orleans Conference (Louisiana Attorney General Charles C. Foti, Jr. and Attorney General Alberto R. Gonzales at left).

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Participants in the conference found it highly effective in identifying key issues and concerns in hurricane-related investigations, facilitating networking and cooperation among agency representatives, and underscoring the importance of rapid coordination and response by law enforcement to the growth of fraud and corruption.

B. The Joint Command Center

Since its creation in October 2005, the goal of the Joint Command Center has been to facilitate a fully integrated and coordinated nationwide law enforcement response to fraud and corruption associated with the unprecedented destruction of Hurricanes Katrina and Rita. The Joint Command Center operations over the past three months have steadily grown in scope and complexity, as federal law enforcement agencies and Inspectors General have dedicated investigative and analytical resources to the mission of the Task Force. In this regard, the FBI deserves particular mention for its consistent provision of personnel and logistical support to the Command Center.

The following 32 agencies and Department of Justice components currently have representatives assigned to the Joint Command Center or designated as Points of Contact for the Joint Command Center:

- Department of Justice, Criminal Division
- Department of Justice, Civil Division
- Department of Justice, Antitrust Division
- Department of Justice, Office of Inspector General
- FBI
- Department of Homeland Security Office of Inspector General (DHS-OIG)
- United States Secret Service
- Social Security Administration, Office of Inspector General
- Department of Housing and Urban Development, Office of Inspector General
- Department of Labor, Office of Inspector General
- U. S. Postal Inspection Service
- Internal Revenue Service, Criminal Investigation
- Treasury Inspector General for Tax Administration
- Department of Health and Human Services, Office of Inspector General
- Environmental Protection Agency, Office of Inspector General
- Environmental Protection Agency, Criminal Investigative Division
- Department of Agriculture, Office of Inspector General
- Department of Commerce, Office of Inspector General
- Department of Defense (Office of Inspector General (OIG) and Defense Criminal Investigative Service (DCIS))
- Department of Energy, Office of Inspector General
- Department of Transportation, Office of Inspector General
- National Aeronautics and Space Administration, Office of Inspector General
- General Services Administration, Office of Inspector General

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- Small Business Administration, Office of Inspector General
- Department of Veterans Affairs, Office of Inspector General
- United States Attorney's Office for the Eastern District of Louisiana
- United States Attorney's Office for the Middle District of Louisiana
- United States Attorney's Office for the Western District of Louisiana
- United States Attorney's Office for the Eastern District of Texas
- United States Attorney's Office for the Southern District of Texas
- United States Attorney's Office for the Southern District of Mississippi
- United States Attorney's Office for the Southern District of Alabama

Significant Joint Command Center operational developments over the past three months include:

- The appointment of United States Attorney David R. Dugas to serve as the Executive Director of the Joint Command Center. Mr. Dugas currently serves as the United States Attorney for the Middle District of Louisiana and has assumed responsibility for the day-to-day coordination of the Joint Command Center activities. (See Figure 6 below.)

- The establishment of a Hurricane Katrina Fraud Task Force (HKFTF) Special Interest Group (SIG) on the Law Enforcement Online (LEO) website. The HKFTF SIG allows the Joint Command Center to collect information from and disseminate information to Task Force members around the country in a secure electronic environment. The HKFTF SIG currently has 127 participating members from 23 federal agencies and Inspectors General offices.

Figure 6 - Hurricane Katrina Fraud Task Force Command Center



"It's easier to work together when everyone is under one roof. With this Joint Command Center, Task Force representatives from federal law enforcement, the federal community of Inspectors General, and United States Attorneys Offices can better pool their resources to ensure a coordinated attack on procurement fraud and public corruption."

Attorney General Alberto R. Gonzales, speech at Hurricane Katrina Fraud Task Force Conference, New Orleans, Louisiana, October 20, 2005.

United States Attorney David R. Dugas (at right), Executive Director of the Command Center, leads a discussion at a Command Center meeting.

12f-000110

- The development of a standard Task Force Complaint Referral Form that is used to transmit fraud complaints and investigative leads to the Joint Command Center for screening, deconfliction, and referral to appropriate law enforcement agencies and Task Force working groups for investigation. The Complaint Referral form is accessible from the general membership section of LEO and may be used by any law enforcement officer in the country with access to LEO.

- The deployment of an interagency complaint index to collect, screen, deconflict, and refer the Task Force Complaint Referral forms received by the Joint Command Center. The information contained on the Complaint Referral forms is posted on the LEO HKFTF SIG and is accessible to designated agency representatives.

- The development, in conjunction with Department of Justice technical personnel, of an innovative Referral and Deconfliction Database (RADD) that will allow automatic deconfliction of complaints and leads, merger of duplicate complaints, referral of complaints to appropriate agencies and working groups, and tracking of complaints and referrals.

- The preliminary analysis of fraud trends revealed by the information contained in the complaints received by the Joint Command Center and investigative information developed by the Task Force members and shared through their Joint Command Center representatives.

- The consolidation of complaints received by the Task Force hotlines into the Complaint Index. To date, more than 4,000 complaints have been received by the Task Force hotlines operated by the FBI and the PCIE Homeland Security Working Group. These complaints are transmitted to the Joint Command Center for entry into the Complaint Index.

- The establishment of Points of Contact between the United States Attorney's Offices in the affected areas and the Joint Command Center to facilitate coordination of Joint Command Center operations with the Task Force working groups in the affected districts.

- The onsite interagency exchange of information and trends, through regular Joint Command Center meetings and day-to-day interaction of the Joint Command Center staff and agency representatives. This interaction has been particularly valuable in alerting participating agencies to fraud indicia revealed by ongoing investigations, such as (1) unexplained grouping of benefit claims from areas that were unaffected by the disasters, (2) the types of information that can lead to the discovery of individuals making multiple fraudulent benefit claims, and (3) methods for obtaining information and leads that could reveal other fraudulent activity. In addition, agency representatives share information on the programs used by their departments to disburse disaster relief assistance and discuss appropriate investigative methods to detect criminal activity related to those programs.

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As the relief, recovery, and reconstruction efforts continue, the Joint Command Center is building a more complete information-gathering and data analysis capability that will allow real-time trend analysis and lead generation. As part of that effort, the LEO Support Center, located in the same building as the Joint Command Center, provides invaluable support and technical assistance to the Joint Command Center operations. In addition, the FBI has assigned full-time support staff to the Joint Command Center. The FBI, the DHS-OIG, and the Postal Inspection Service have agreed to assign full-time analysts to the Joint Command Center to ensure that information gathered by the Joint Command Center is properly screened, analyzed, and reported to investigative agencies on a timely basis. The Joint Command Center analysts will also review information obtained from ongoing investigations and prosecutions in order to detect trends or patterns of fraudulent activity and possible systemic weaknesses.

C. Other Investigative Coordination and Assistance

- **Antitrust Division**

  - The Antitrust Division is actively training agents and procurement officials in the prevention and detection of collusive conduct in the post-Katrina marketplace. The Division created an antitrust primer for agents, auditors, and procurement officials titled, "Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-disaster Rebuilding Projects." The Division has widely distributed more than a thousand copies of this primer to federal agents and investigators, United States Attorneys' and FBI offices in the affected judicial districts, all federal Inspector General offices in the Southeast region, state Attorneys General, and state purchasing, Department of Transportation (DOT), and emergency management officials in Louisiana, Florida, Alabama, and Mississippi. The Division also electronically distributed the primer to the National Institute of Government Purchasing and its regional chapters. The primer can be found at www.usdoj.gov/atr/public/guidelines/disaster_primer.htm and is electronically posted on the LEO and Task Force websites.

  - Antitrust Division representatives made a presentation on the training and assistance the Division could provide in identifying and preventing collusion for Task Force members at the Joint Command Center and will be involved in more extensive future training of task force members. Division attorneys met with representatives from various federal agency inspector general's offices, including DHS and the General Services Administration (GSA), and are arranging for training sessions for agents, auditors, and procurement officials at these agencies.

  - The Antitrust Division also launched its public Disaster Recovery and Katrina websites at www.usdoj.gov/atr/disaster.htm containing educational materials and contact information for reporting anticompetitive activity. The Antitrust Division is prepared to devote resources to investigating and criminally prosecuting collusion wherever it occurs.

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- **Federal Bureau of Investigation**

  - To date, the FBI has initiated approximately 127 investigations related to Katrina, Rita, and Wilma fraud. Of these investigations, approximately 60 subjects have been indicted or charged by information, and 18 subjects have been arrested. Both the Criminal Investigative Division and the Cyber Division of the FBI remain actively involved in overseeing and coordinating the FBI's nationwide response to the hurricanes.

  - The FBI Cyber Division reports that as a result of agent interviews and FBI coordination with private-sector entities, 44 questionable websites have been shut down since August 2005.

- **Postal Inspection Service**

  - As of January 11, 2006, the Postal Inspection Service had conducted 22 criminal investigations, resulting in 24 arrests, related to false claims submitted to FEMA and state government agencies. In addition, the Houston Division of the Inspection Service opened a National Coordination Case because of the scope, complexity and long-term commitment of the Postal Inspection Service to Hurricane Katrina fraud-related investigations. The national coordination of these investigations being conducted by the Postal Inspection Service will facilitate the tracking of cases and the resolution of any conflicting issues with the numerous other agencies involved. This will also provide a focal point for coordination with the Hurricane Katrina Fraud Task Force, including its Joint Command Center.

- **United States Secret Service**

  - In conjunction with other federal, state, and local agencies, the United States Secret Service has continued to investigate numerous cases related to Hurricanes Katrina and Rita. It has also continued to work in cooperation with the private sector to shut down numerous fictitious websites. With the assistance of a private-sector company, it was able to detect and effectively shut down websites that were victimizing Hurricane Katrina victims, the American Red Cross, and Red Cross donors. These shutdowns included 16 "phishing" websites (i.e., websites that purport to be operated by legitimate corporate or nonprofit entities, but that are created to harvest personal data from individuals for identity theft and fraud). Nine of those phishing sites were shut down within a few days of initial posting.

- **Internal Revenue Service-Criminal Investigation (IRS-CI)**

  - IRS-CI continues to be an active participant in the Task Force, with agents assigned to the Baton Rouge, Louisiana, Covington, Louisiana, and Hattiesburg, Mississippi

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task forces. IRS-CI agents are working closely with representatives from local, state and federal agencies and lending their expertise in analyzing suspicious financial transactions related to the recovery efforts. In addition, the agency has expedited the clean up efforts in the New Orleans Field Office and has returned to full staffing and operations.

- **Inspectors General**

The federal Inspectors General community continues to make vital contributions to the work of the Task Force, as reflected in the recent 90-Day Progress Report to Congress by the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE).[26] In recognition of the need to enhance the already substantial coordination and communication between the Department of Justice and the Inspectors General, Department of Justice representatives of the Task Force are attending the regular meetings of the PCIE Homeland Security Roundtable and the Roundtable's Contract Audit Task Force and Individual Assistance Subgroup, as well as special meetings with Inspectors General on specific issues. Department of Justice attorneys also conducted a briefing of DHS-OIG auditors at the Command Center on criminal fraud issues that they may encounter in performing their audits. Finally, the Department of Justice is working closely with several Offices of Inspector General to streamline processes for analyzing disaster-benefit applications and identifying significant cases of potential benefit fraud.

Various Inspectors General have reported the following fraud-related activities to the Task Force:

- **Department of Homeland Security Office of Inspector General (DHS-OIG)**

  - The DHS-OIG has hired or assigned 79 personnel to the newly established Office of Special Inspector General for Gulf Coast Hurricane Recovery Oversight and is in the process of hiring additional staff at the FEMA headquarters and the Joint Field Offices (JFOs) in Louisiana, Mississippi, and Alabama. The DHS-OIG continues to work closely with other OIGs and the Government Accountability Office (GAO) in conducting oversight and investigative activities, including active participation in the PCIE Homeland Security Roundtable.

  - Audit Initiatives: DHS-OIG auditors continue to provide oversight of operations related to hurricane relief efforts. DHS-OIG auditors continue to monitor operations at the FEMA JFOs and Emergency Operations Center and other DHS headquarters efforts to remain current on all disaster relief operations, while providing oversight and on-the-spot technical assistance to FEMA, state, local, and other federal

[26] *See* PCIE and ECIE, Oversight of Gulf Coast Hurricane Recovery: A 90-Day Progress Report to Congress (December 30, 2005) [hereinafter PCIE 90-Day Report].

officials. Reviews are complete or in process for more than 50 percent of contracts awarded to date. One hundred percent of purchase card transactions have been data mined and anomalies will be reviewed in more detail. More than 300 referrals have been made to DHS-OIG investigators related to possible fraud in eligibility for individual assistance. DHS-OIG financial statement auditors continue to provide oversight of the agency's financial operations and coordinate closely with the DHS-OIG hurricane office auditors.

- Investigative Initiatives:

  - Task Force: DHS-OIG continues to provide investigative support to agents involved in the Hurricane Katrina Fraud Task Force, including the FBI, HUD, DOL, USDA and several local law enforcement departments. DHS-OIG has also received information requests from several state law enforcement agencies. The DHS-OIG continues to work closely with the Postal Inspection Service in pursuit of possible fraudulent claims filed by unaffected individuals for disaster assistance.
  - Investigations: DHS-OIG continues to conduct investigative activity on open investigations, to review and process voluminous amounts of complaints and hotline reports as they are received, and to conduct National Emergency Management Information System (NEMIS) checks where necessary on above identified complaints.
  - Liaison: DHS-OIG continues to conduct Fraud Awareness Briefings and Law Enforcement liaison with state, local and federal law enforcement and prosecutors and to work in close association with the agencies involved in the Gulf Coast Hurricane Oversight Office, i.e., Long Term Recovery Center (LTRC), and the Task Force to develop criminal investigations for prosecution by the United States Attorney's Offices; and is working to establish a permanent office in Biloxi, Mississippi and preparing to transition to a permanent office there.
  - Debris Removal: DHS-OIG continues to conduct several debris-removal investigations, as well as proactive efforts regarding debris-hauling contracts.
  - Other Actions: DHS-OIG remains in daily contact with FEMA personnel at the LTRC regarding the analysis of applications.

- Fraud Hotline: To streamline the reporting of allegations of fraud associated with the recovery effort, the DHS-OIG established the DHS Hurricane Katrina Relief Fraud Hotline that is managed by the DOD-OIG. In addition to the toll-free telephone number for the Hotline (see page 32 below), complaints are received by fax, mail, and email at katrinafraud@dodig.mil.

- **Department of Defense - Office of Inspector General (DOD-OIG)/Defense Criminal Investigative Service (DCIS)**

  - The DCIS, the criminal investigative arm of the DOD-OIG, has received 10 allegations related to Hurricane Katrina that involved theft, false claims, bribery,

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kickbacks, product substitution, and procurement fraud. DCIS agents reviewed the allegations, and seven were determined to be unfounded. The remaining three allegations were developed into criminal investigations of bribery, kickbacks, and possible product substitution. One DCIS investigation resulted in the filing of a criminal complaint by the United States Attorney's Office for the Southern District of Mississippi against two individuals for conspiracy to commit bribery in violation of 18 U.S.C. § 371. [See page 11 above.]

- DCIS continues to educate industry, government contracting personnel, and regulators, and has conducted 31 mission and fraud awareness briefings since October 2005. DCIS agents are providing support to the joint law enforcement and United States Attorney's Offices Working Group in Covington, Louisiana, and the Joint Criminal Investigative Task Force headquartered in Mississippi. Furthermore, DCIS participates in the PCIE Homeland Security Roundtable.

- **Environmental Protection Agency Office of Inspector General (EPA-OIG)**

  - Since September 2005, EPA-OIG has deployed six Special Agents on several missions to the affected Gulf States to participate in Hurricane Katrina Fraud Task Force efforts, has met with EPA officials, government contractors, federal prosecutors, and state and local law enforcement officials, and has conducted a variety of investigative steps in addressing allegations of fraud. EPA-OIG Agents are also participants at the Joint Command Center. These Special Agents have access to Task Force databases, intelligence, and staff for operational support during investigations conducted in the affected Gulf States, and are engaged in periodic meetings with Task Force members to discuss investigative operations.

  - The EPA-OIG has coordinated with the Louisiana State Police, Troop B Headquarters, Kenner, Louisiana, and several New Orleans Police Department officers assigned to the Fifth District, Lower Ninth Ward, in order to discuss potential fraud scenarios and criminal complaints that would be of interest and within the jurisdiction of the EPA-OIG.

  - The EPA-OIG Financial Fraud Directorate has conducted fraud awareness briefings with EPA Incident Response Teams, on-scene coordinators, and senior procurement officials within the EPA Office of Acquisition Management with expectations to continue such briefings with several EPA procurement teams in the field. Weekly meetings are held with EPA-OIG auditors to discuss audit findings, potential fraud indicators, and progress in audit support of active investigations.

  - EPA-OIG has been aggressively pursuing tips and leads in several investigations concerning allegations of labor and equipment cost mischarging in the performance of EPA contracts, and con artists posing as EPA officials in fraud schemes. Task Force members have supported investigative efforts.

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- **Department of Housing and Urban Development Office of Inspector General (HUD-OIG)**

  - The response by the Department of Housing and Urban Development (HUD) to Hurricanes Katrina and Rita falls into three separate categories: (1) use of existing appropriations on the ground just before hurricane impact; (2) new appropriations for hurricane relief; and (3) FEMA funds administered by HUD in support of mission-critical assignments. HUD was provided $1.525 million to provide personnel to assist FEMA as part of the housing task force in Baton Rouge, Louisiana. HUD is also administering the Katrina Disaster Housing Assistance Payments (KDHAP) that has been previously funded to a level of $79 million, as well as new appropriations of $390 million in housing vouchers for families displaced by Hurricanes Katrina and Rita.

  - HUD has new appropriations of $11.5 billion in emergency Community Development Block Grants for recovery expenses associated with Hurricane Katrina and Rita. HUD is preparing to administer the new funds, which will be grants made directly to the respective five Gulf States impacted by the hurricanes. The Governors of Louisiana, Mississippi, Alabama, Florida and Texas will identify the appropriate state agency to receive the funds and will submit a plan to HUD detailing how the block grant funds will be used. HUD officials have conferred with Hurricane Katrina Fraud Task Force Chairman Alice S. Fisher and her staff about ensuring that appropriate monitoring and antifraud measures will be in place as these funds are provided to the states.

  - HUD-OIG has created a far-reaching fraud prevention program designed to: (1) create a training course for agents/auditors and program officials to teach how to identify fraud in Community Planning and Development (CPD) grant programs; (2) provide for fraud prevention meetings between HUD-OIG and the major programs of HUD; and (3) hold fraud prevention meetings between HUD-OIG and industry groups, private insurance companies, multi-family owners, public housing Executive Directors, state governments, and economic development agencies. As part of its fraud-prevention program, HUD-OIG has created a Suspicious Activity Report (SAR) that will be given to HUD grantees, sub-grantees and others associated with delivering disaster funds. The SAR is a method of informing HUD-OIG of suspected irregularities in the delivery of HUD program money. HUD-OIG forensic auditors have been assigned to review temporary housing programs and FEMA payments to HUD assisted housing residents. OIG plans to use forensic auditors to review all programs that are not audited by the Office of Audit.

  - The Office of Audit has created a new entity to address audit issues in the Gulf States. Auditors are currently reviewing real estate owned properties used to place FEMA designated evacuees and are monitoring contract awards made by HUD.

- HUD-OIG has created: (1) a Gulf States Region, based in New Orleans, staffed with an investigative manager, four special agents, and an administrative officer (as well as six forensic auditors, based in Arlington, Texas, who have been assigned to the Gulf States Region); and (2) an Office of Hurricane Relief Oversight in Washington, D.C. with an investigative manager, a Special Agent desk officer, and a management analyst. Both of the newly created offices report to a Deputy Assistant Inspector General.

- **Department of Justice Office of Inspector General (DOJ-OIG)**

  - DOJ-OIG has opened three cases concerning hurricane-related benefit fraud, including a Department employee who allegedly submitted a false application for unemployment benefits under a Hurricane Katrina-related program.[27] It also has conducted oversight of the Department of Justice's expenditures related to Hurricane Katrina, and plans to issue an audit of the Department's hurricane-related purchase card transactions, as described in the PCIE 90-Day Report.[28]

- **Department of Labor Office of Inspector General (DOL-OIG)**

  - According to the PCIE 90-Day Report, DOL-OIG "initiated four investigations involving potential Unemployment Insurance or Disaster Unemployment Assistance fraud and mail fraud. One of the cases involved circumvention of [DOL's] processes for issuing employment-based foreign labor certifications."[29] DOL-OIG investiga-tions have already resulted in federal criminal charges against seven individuals.

- **Social Security Administration Office of Inspector General (SSA-OIG)**

  - The SSA-OIG Office of Audit has initiated a review to report on the status of SSA service delivery to individuals affected by Hurricanes Katrina and Rita. As part of this review, it will assess SSA's plans to ensure that payments made under emergency procedures were appropriate and properly safeguarded.

  - SSA's service delivery to recipients and beneficiaries is vital to the region's recovery. As part of its immediate response to the disaster, SSA temporarily changed or eliminated several existing control procedures to ensure continued benefit payments in the affected area. SSA-OIG will assess SSA's plans to ensure that payments made

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[27] *See* PCIE 90-Day Report at 66.

[28] *See id.* at 43.

[29] *Id.* at 66.

are proper and that controls are sufficient to safeguard against fraud, waste, and mismanagement.

- The SSA-OIG Office of Investigations Hotline has received 20 allegations of potential fraud related to Hurricanes Katrina and Rita (18 of the 20 were received between September 12 and October 7, 2005). The Office of Investigations is actively pursuing allegations of fraud involving SSA's programs and operations, including allegations of Social Security number misuse. To date, the Office of Investigations has opened nine cases. There have been two indictments and arrests.

- **Federal Trade Commission (FTC)**

  - The FTC receives consumer complaints about fraud, including hurricane-related fraud, through its toll-free hotline (1-877-FTC-HELP) and online complaint forms, as well as from external database contributors. FTC staff developed a code for hurricane-related complaints in Consumer Sentinel, the FTC's online fraud complaint database, to make it easy for FTC staff, Task Force members, and more than 1,400 other law enforcement agencies to identify these post-hurricane scam complaints. Between October 16, 2005 and January 12, 2006, the FTC received 108 hurricane-related fraud complaints and 259 hurricane-related identity theft complaints. The most common type of identity-theft complaints related to imposters applying for government benefits in the victim's name. To provide law enforcement with better access to the hurricane-related complaints, the FTC developed specialized data reports based on complaints related to post-hurricane scams and identity theft. It posted links to these custom reports on Consumer Sentinel, thus facilitating law enforcement access to these case leads. Finally, the FTC reviews all complaints received to identify trends and possible targets for investigation or referral to criminal authorities.

Training and Proactive Detection

The New Orleans Conference in October 2005 was the first opportunity for the Task Force to provide training for federal agents and prosecutors on legal and practical issues stemming from disaster-related fraud. Experienced Department of Justice prosecutors highlighted key criminal offenses that could be applied in various fraud schemes, and Postal Inspectors from the Postal Inspection Service and Special Agents from the FBI and the Secret Service offered practical guidance on how to investigate these offenses. Audience participation was high, and the audience, which included the Inspector General community, state and local law enforcement, and United States Attorneys, made good suggestions. Since the conference, the Command Center has hosted a training session by Department of Justice prosecutors for Inspector General auditors. The Command Center is also planning more extensive training for Gulf Coast-based Assistant United States Attorneys and other agencies at the Command Center.

As one of its proactive initiatives to identify potential emerging types of fraud, the

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Department of Justice has taken the lead in coordinating and expediting responses by various agencies to potential disaster-related fraud. Recently, for example, Hurricane Katrina Fraud Task Force Chairman Alice S. Fisher met with an Assistant Secretary at HUD to discuss fraud-prevention and fraud-detection measures that HUD is establishing in connection with the disbursement of $11.5 billion to the affected Gulf Coast states. The Joint Command Center is also playing a significant role in proactively identifying patterns of potentially fraudulent activity in applications for disaster-related benefits.

Public Education and Prevention

Various agencies have continued to provide the public with information about hurricane-related crimes and prevention issues, including websites, public-service advertisements, distribution of publications and flyers, and press releases:

- ***Websites***

  - The Department of Justice maintains a constantly updated website on the Task Force, including continuing reports of prosecutions, at http://www.usdoj.gov/katrina/Katrina_Fraud/index.html. The FTC has a Hurricane Recovery website at http://www.ftc.gov/bcp/conline/events/katrina/index.html. This website (in English and Spanish) was created to provide important information to families and businesses affected by the hurricanes. It has been accessed more than 45,000 times since its launch in September 2005. Agencies and organizations linking to the site include: MyMoney.gov; the Federal Reserve Board; the Federal Deposit Insurance Corporation; Consumers Union; and the JumpStart Coalition for Personal Financial Literacy.

- ***Public-Service Advertisements***

  - The FTC also distributed a series of live-read public service advertisements (PSAs) to radio stations across the country. Two sets of PSAs were distributed. One set was e-mailed to 584 radio stations in the states affected by Hurricanes Katrina and Rita, including the following three messages in 30-second and 15-second formats, in both English and Spanish: (1) Beware of charity fraud; (2) Beware of home repair fraud; and (3) Protect yourself against identity theft. The other set was mailed to 5,712 stations in the states that were not directly impacted by either hurricane. This package contained 30-second and 15-second PSAs in English and Spanish, cautioning consumers to beware of charity fraud.

    Based on responses from radio stations as of January 5, 2006, there were more than 17,900 reported airings of the English-language spots. The average number of airings per station was 89, and the total audience impressions exceeded 38 million. The Spanish-language spots saw more than 6,270 reported airings; the average number of airings per station was 118; the total audience impressions exceeded 11 million.

- ***Publication and Flyer Distribution***

  - In December 2005, the Postal Inspection Service issued a publication, *Crime Watch - Avoiding Hurricane Fraud*, which was distributed nationwide to 204 newspapers with a readership of more than 6.7 million.

  - In addition, at a workshop for hurricane evacuees sponsored by the University of Houston Law School's Center for Consumer Law, the FTC provided 850 pre-stuffed bags of hurricane-related fraud alerts that were distributed to the evacuees.

- ***Press Releases***

  - FEMA has recently issued a series of press releases asking the public in various parts of the Gulf Coast region to be watchful for fraud and providing information about possible fraud to law enforcement.[30]

[30] *See* FEMA, Press Release, January 13, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=22438; FEMA, Press Release, January 11, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=22380; FEMA, Press Release, January 10, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=22358.

REPORTING HURRICANE-RELATED FRAUD

- Government Fraud and Public Corruption:
  - Call the FBI's tipline at 1-800-CALL FBI (1-800-225-5324)
  - Call the DHS Katrina Hurricane Relief Fraud Hotline (operated by the Department of Defense OIG), at 1-866-720-5721
- Charity Fraud, Emergency-Benefit Fraud, and Other Types of Consumer Fraud:
  - Call the FTC's Consumer Response Center, toll-free, at 1-877-FTC-HELP (1-877-382-4357), or
  - File an online complaint with the Internet Crime Complaint Center (a joint project of the FBI and the National White Collar Crime Center) at http://ic3.gov
- Identity Theft:
  - Call the FTC's Identity Theft Hotline, toll-free, at 1-877-ID-THEFT (1-877-438-4338), or
  - File an online complaint with the FTC at http://www.consumer.gov/idtheft/

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BASE REDEVELOPMENT AND REALIGNMENT MANUAL

March 1, 2006

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE
(INSTALLATIONS AND ENVIRONMENT)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

March 1, 2006

FOREWORD

This Manual is reissued under the authority of DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L))," December 9, 2005 (reference (a)). It prescribes the procedures on how to reuse and redevelop bases. DoD 4165.66-M, "Base Reuse Implementation Manual," December 1, 1997, is hereby canceled.

This Manual applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components.")

This Manual is effective immediately and is mandatory for use by all the DoD Components.

Send recommended changes to this Manual to the following address:

Office of the Deputy Under Secretary of Defense
(Installations and Environment)
3400 Defense Pentagon, Room 5C646
Washington, DC 20301-3400

This Manual is approved for public release under unlimited distribution. Copies are available on the World Wide Web at: http://www.dtic.mil/whs/directives.

Philip W. Grone
Deputy Under Secretary of Defense
(Installations and Environment)

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(b) DoD 4165.66-M, "Base Reuse Implementation Manual," December 1, 1997 (hereby canceled)
(c) Title 10, United States Code 2687, "Defense Base Closure and Realignment Act of 1990" (Public Law 101-510), as amended
(d) Title 42, United States Code 7401 - 7661, "Clean Air Act"
(e) Title 32, Code of Federal Regulations, Parts 174 and 176, current edition, "Revitalizing Base Closure Communities and Addressing Impacts of Realignment"
(f) Title 42, United States Code 9601 - 9675, "Comprehensive Environmental Response, Compensation and Liability Act," as amended
(g) Title 42, United States Code 9620, "Community Environmental Response Facilitation Act"
(h) Title 40, United States Code 102, "Public Buildings, Property, and Works," "Federal Property and Administrative Services: Purpose and Definitions"
(i) Title 41, Code of Federal Regulations Part 102-71.20, "Public Contracts and Property Management - Definitions"
(j) Title 49, United States Code 47151 - 47153, "Authority to Transfer Interest in Surplus Property"
(k) Title 42, United States Code 11411(i)(4), "Stewart B. McKinney Homeless Assistance Act"
(l) Title 16, United States Code 668, "Bald and Golden Eagle Protection Act"
(m) Title 33, United States Code 251 - 1387, "Clean Water Act"
(n) Title 16, United States Code 1451 - 1464, "Coastal Zone Management Act"
(o) Title 16, United States Code 1531 - 1544, "Endangered Species Act"
(p) Title 7, United States Code 136, "Federal Insecticide, Fungicide and Rodenticide Act"
(q) Title 42, United States Code 4801 - 4846, "Lead-Based Paint Poisoning Prevention Act"
(r) Title 16, United States Code 703 - 712, "Migratory Bird Treaty Act"
(s) Title 25, United States Code 3001 - 3013, "Native American Graves Protection and Repatriation Act"
(t) Title 42, United States Code 4321 - 4370a, "National Environmental Policy Act"
(u) Title 16, United States Code 470(h), "National Historic Preservation Act"
(v) Title 42, United States Code 6901, "Resource Conservation and Recovery Act"
(w) Title 42, United States Code 300f - 300j, "Safe Drinking Water Act"
(x) Title 15, United States Code 2601 - 2671, "Toxic Substances Control Act"
(y) Title 20, Code of Federal Regulations Parts 652, 660 - 671, "Workforce Investment Act"
(z) Department of Defense, "Base Closure and Realignment Report," May 2004
(aa) "Responding to Change: Communities and BRAC," Office of Economic Adjustment
(ab) Title 41, Code of Federal Regulations Parts 102 - 75, "Real Property Disposal"
(ac) "Organizing for BRAC," Office of Economic Adjustment

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[1] For most United States government documents, including United States Code and the Code of Federal Regulations, go to the U.S. Government Printing Office (GPO) Web site database: http://www.gpoaccess.gov/databases.html

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(ad) Section 2915 of Public Law 103 - 160, "National Defense Authorization Act for Fiscal Year 1994," "Transition Coordinators for Assistance to Communities Affected by Closure of Installations"
(ae) Joint Travel Regulations, Volume 2
(af) Federal Acquisition Regulation, Part 52.207 - 3, "Right of First Refusal of Employment"
(ag) Title 5, United States Code 9902(j), "DoD National Security Personnel System (NSPS)"
(ah) Title 5, United States Code 3341, "Details, within Executive or Military Departments"
(ai) Section 1013 of Public Law 89 - 754, "Demonstration Cities and Metropolitan Development Act of 1966"
(aj) General Services Administration Form 1334, "Request for Transfer of Excess Real and Related Personal Property"
(ak) Department of Defense Form 1354, "Transfer and Acceptance of Military Real Property"
(al) Title 43, Code of Federal Regulations 2372, "Restoration and Revocations"
(am) Title 24, Code of Federal Regulations 586, "Revitalizing Base Closure Communities and Community Assistance"
(an) Deputy Under Secretary of Defense Memorandum, "Defense Environmental Restoration Program Management Guidance," September 28, 2001
(ao) Title 10, United States Code 2694a, "Conveyance of Surplus Real Property for Natural Resource Conservation"
(ap) "Guidelines on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)__ Early Transfer Authority Guidance," Environmental Protection Agency
(aq) Title 10, United States Code 2869, "Conveyance of Property at Military Installations Closed or Realigned to Support Military Construction"
(ar) Title 36, Code of Federal Regulations 800, "Protection of Historic Properties"
(as) Title 36, Code of Federal Regulations 63, "Determinations of Eligibility for Inclusion in the National Register of Historic Places"
(at) Executive Order 13007, "Indian Sacred Sites"
(au) Title 10, United States Code 2692, "Storage, Treatment, and Disposal of Nondefense Toxic and Hazardous Materials"
(av) Title 16, United States Code 431 - 433, "Antiquities Act"
(aw) Title 16, United States Code 469, "Reservoir Salvage Act" and "Archaeological and Historic Preservation Act"
(ax) Title 16, United States Code 470aa - mm, "Archaeological Resources Protection Act"
(ay) Title 36 Code of Federal Regulations 79, "Curation of Federally-Owned and Administered Archaeological Collections"
(az) 41 Code of Federal Regulations 102-14 through 102-220, Personal Property, Donation of Personal Property
(ba) 41 Code of Federal Regulations 102-37, Donation of Surplus Personal Property
(bb) 41 Code of Federal Regulations 102-38, Sale of Personal Property
(bc) Title 15, United States Code 3701-3714, "Stevenson-Wydler Technology Innovation Act of 1980"
(bd) Executive Order 12999, "Educational Technology: Ensuring Opportunity for All Children in the Next Century"
(be) Executive Order 11988, "Floodplain Management"
(bf) Executive Order 11990, "Wetlands"

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(bg) Title 50, Code of Federal Regulations 402, "Interagency Cooperation - Endangered Species Act of 1973," as amended
(bh) Title 50, Code of Federal Regulations 17.11, 17.12, 17.95, 17.96, "Endangered and Threatened Wildlife and Plants"
(bi) Title 36, Code of Federal Regulations 800.5, "Protection of Historic Properties"
(bj) Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property," Department of Defense, October 2004
(bk) Title 10, United States Code 2667, "Leases: Non-Excess Property of Military Departments"
(bl) Title 40, Code of Federal Regulations Code 264, "Hazardous Waste at Permitted Facilities," 265, "Hazardous Waste at Interim Status Facilities," and 280, "Regulated Substances Subject to the Underground Storage Tank Provisions"
(bm) Office of the Under Secretary of Defense (AT&L), Memorandum "Asbestos Cleanup," October 31, 1994
(bn) Title X, United States Code 2667, "Residential Lead-Based Paint Hazard Reduction Act"
(bo) Office of the Under Secretary of Defense (AT&L), Memorandum, "Lead-Based Paint," January 7, 2000
(bp) Lead-Based Paint Guidelines for Disposal of DoD Residential Real Property: A Field Guide (Interim Final - December 1999)
(bq) Title 40, Code of Federal Regulations 761.1, "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions"
(br) Public Law 109-163, "National Defense Authorization Act for Fiscal Year 2006"
(bs) DoD Directive 4165.6, "Real Property," October 13, 2004
(bt) DoD Directive 4165.63, "DoD Housing," January 8, 2005
(bu) National Defense Authorization Act for Fiscal Years 1992 and 1993 (NDAA 92/93), Pub. L. 102-190 §§ 334(a), 2821, 2827
(bv) National Defense Authorization Act for Fiscal Year 1993 (NDAA 93), Pub. L. 102-484
(bw) National Defense Authorization Act for Fiscal Year 1995 (NDAA 95), Pub. L. 103-337
(bx) National Defense Authorization Act for Fiscal Year 2005 (Section 2400 of Public Law 108-375, as amended)
(by) Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Redevelopment Act), Pub. L. 103-421
(bz) National Defense Authorization Act for Fiscal Year 1996 (NDAA 96), Pub. L. 104-106
(ca) National Defense Authorization Act for Fiscal Year 1997 (NDAA 97), Pub. L. 104-201
(cb) Federal Property Management Regulations, 41 CFR Part 101-47 (Real Property) and 41 CFR Parts 101-43–101-45 (Personal Property)
(cc) Surplus Property Act (SPA), 50 U.S.C. App. § 1622(d) and 49 U.S.C. §§ 47151–47153
(cd) Act of May 19, 1948, 16 U.S.C. § 667b-d
(ce) Indian Self-Determination Act, 25 U.S.C. §§ 450f–450n
(cf) Indian Reorganization Act, 25 U.S.C. §§ 461–479
(cg) Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h-6
(ch) Rehabilitation Act of 1973, 29 U.S.C. §§ 701–709, 720–724, 730–732, 740, 741, 750, 760–764, 770–776, 780–787, 790–794
(ci) Public Buildings Cooperative Use Act (PBCUA), 40 U.S.C. §§ 490, 601a, 606, 611, and 612a
(cj) 10 U.S.C. § 2391 (Military Base Reuse Studies and Community Planning Assistance)

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(ck) Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641–2655; 40 CFR Part 763
(cl) American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996
(cm) Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 661–666
(cn) Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1421
(co) Watershed Protection and Flood Prevention Act (WPFPA), 16 U.S.C. § 1001 et seq.; 33 U.S.C. § 701-1
(cp) Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 et seq
(cq) Executive Order 12088, "Federal Compliance with Pollution Control Standards," May 23, 1995
(cr) Executive Order 12372 (as amended by Executive Order 12416), "Intergovernmental Review of Federal Programs," July 14, 1982
(cs) Executive Order 12580, "Superfund Implementation," January 23, 1987
(ct) Executive Order 12788, January 15, 1992, as amended by Executive Order 13378, "Defense Economic Adjustment Program," May 12, 2005
(cu) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations," February 11, 1994
(cv) Executive Order 13089, "Coral Reef Protection," June 15, 1998
(cw) DoD Directive 3030.1, "Office of Economic Adjustment," November 12, 2004
(cx) DoD Instruction 4715.4, "Pollution Prevention," June 18, 1996
(cy) DoD Directive 4500.34, "DoD Personal Property Shipment and Storage Program," May 6, 2004
(cz) DoD Directive 5410.12, "Economic Adjustment Assistance to Defense-impacted Communities," December 22, 1987
(da) DoD Instruction 4165.68, "Revitalizing Base Closure Communities and Community Assistance - Community Redevelopment and Homeless Assistance," May 27, 1997
(db) 32 CFR Part 651 (Army Regulation 200-2), Department of the Army Environmental Analysis of Army Actions
(dc) 32 CRF Part 775, Department of Navy Procedures for Implementing the National Environmental Policy Act
(dd) 32 CFR Part 989, Department of the Air Force Environmental Impact Analysis Process
(de) DLA Regulation 1000.22, Environmental Considerations in DLA Actions in the United States, November 2002

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DEFINITIONS

D1.1. DEFINED TERMS:

D1.1.1. Base Closure Law. The provisions of Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526, 102 Stat. 2623, 10 U.S.C. 2687 note), and the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101-510, Part A of Title XXIX of 104 Stat. 1808, 10 U.S.C 2687 note) (reference (c)).

D1.1.2. Base Realignment and Closure (BRAC). The process that the Department of Defense uses to reorganize its installation infrastructure to more efficiently and effectively support its forces, increase operational readiness, and facilitate new ways of doing business. The Department of Defense anticipates that BRAC 2005 will build upon processes used in previous BRAC efforts. [Source: OSD Web site (http://www.dod.gov/brac/docs/definitions012004.pdf)]

D1.1.3. Clean Air Act (reference (d)). This Act provides the nation's air pollution control program. The program is carried out by the Environmental Protection Agency and state regulatory programs.

D1.1.4. Closure. An action that ceases or relocates all current missions of an installation and eliminates or relocates all current personnel positions (military, civilian, and contractor), except for personnel required for caretaking, conducting any ongoing environmental cleanup, or property disposal. Retention of a small enclave, not associated with the main mission of the base, is still a closure. [See: 32 CFR 174 (reference (e))]

D1.1.5. Commission. The Commission established by section 2902 of the Defense Base Closure and Realignment Act, also referred to as the BRAC Commission. [See: http://www.dod.gov/brac/docs/definitions012004.pdf]

D1.1.6. Communities in the vicinity of the installation. The communities that constitute the political jurisdictions (other than the State in which the installation is located) that comprise the redevelopment authority for the installation. [Source: Section 2905(b)(7)(O) of reference (c)]

D1.1.7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (reference (f)). Also known as the "Superfund Act," CERCLA is the legal framework for the identification and restoration of contaminated property.

D1.1.8. Community Environmental Response Facilitation Act (reference (g)). This Act amends reference (f) to require identification of uncontaminated parcels at closing bases and allows clean parcels to be transferred while long-term cleanup of contaminated parcels continues.

D1.1.9. Consultation. Explaining and discussing an issue, considering objections, modifications, and alternatives; but without a requirement to reach agreement. [See

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reference (e)]

D1.1.10. Cost of Base Realignment Actions (COBRA). An analytical tool for calculating the costs, savings, and return on investment of proposed realignment and closure actions. [Source: OSD Web site (http://www.dod.gov/brac/docs/definitions012004.pdf)]

D1.1.11. Date of Approval. The date on which the authority of the Congress to disapprove a recommendation of closure or realignment, as the case may be, of such installation under reference (c) expires. [See reference (e)]

D1.1.12. Economic Development Administration (EDA). The EDA, which is a part of the Department of Commerce, provides economic development grants to help communities implement their economic development plans.

D1.1.13. Excess property. Property under the control of a Federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities. [See 40 U.S.C. 102(3) (reference (h))].

D1.1.14. Highest and Best Use. The most likely use to which a property can be put, which will produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social and environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (e.g., zoning, physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access, roads, location, and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural. [See: 41 CFR Part 102-71.20 (reference (i))]

D1.1.15. Installation. A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense. [See reference (e)]

D1.1.16. Local Redevelopment Authority (LRA). Any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan. [See reference (e)]

D1.1.17. Military Departments. The Departments of the Army, Navy, and Air Force.

D1.1.18. Office of Economic Adjustment. An organization within the Department of Defense that is in charge of helping communities plan for base closure and realignments. The agency also provides planning grants to impacted communities.

D1.1.19. Other Interested Parties. Includes any parties eligible for the conveyance of

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property of the installation under section 550 of title 40, United States Code, or sections 47151 through 4717153 of title 49, United States Code, whether or not the parties assist the homeless.

D1.1.20. Private nonprofit organization. An organization, no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual, that has a voluntary board, an accounting system, or designated an entity that will maintain a functioning accounting system for the organization according to generally accepted accounting procedures, and practices nondiscrimination in the provision of assistance. [See reference (e)]

D1.1.21. Public benefit conveyance. The transfer of surplus military property for a specified public purpose at up to a 100 percent discount. [See 49 U.S.C. 47151-47153 (reference (j))]

D1.1.22. Realignment. Any action that both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.

D1.1.23. Redevelopment authority. See "Local Redevelopment Authority" above.

D1.1.24. Redevelopment plan. A plan, agreed to by the LRA with respect to the installation, which provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment because of the closure or realignment of the installation.

D1.1.25. Representative of the homeless. A State or local government agency or private nonprofit organization, including a homeless assistance planning board, that provides or proposes to provide services to the homeless. [See section 501(i)(4) of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411(i)(4) (reference (k))].

D1.1.26. Surplus property. Excess property that the Administrator or the Secretary concerned determines is not required to meet the needs or responsibilities of all Federal agencies. [See 40 U.S.C. 102(10) (reference (h))]

ACRONYMS

Acronym	Definition
ACHP	Advisory Council on Historic Preservation
ACM	Asbestos containing material
AQCR	Air quality control region
BGEPA	Bald and Golden Eagle Protection Act, 16 U.S.C. 668 (reference (l))
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOQ	Bachelor Officer's Quarters
BRAC	Base Realignment and Closure
BTC	Base transition coordinator
CAA	Clean Air Act, 42 U.S.C. 7401, as amended (reference (d))
CAAA	Clean Air Act Amendments of 1990
CARE	Civilian Assistance and Re-Employment Program
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, as amended (reference (f))
CFR	Code of Federal Regulations
CMP	Coastal Management Programs
CWA	Clean Water Act, 33 U.S.C. 251–1387, as amended (reference (m))
CZMA	Coastal Zone Management Act, 16 U.S.C. 1451–1464 (reference (n))
DBCRA 90	Defense Base Closure and Realignment Act of 1990, Public Law 101-510, as amended (reference (c))
DEIS	Draft Environmental Impact Statement
DoD	Department of Defense
DoEd	Department of Education
DOI	Department of the Interior
DOL	Department of Labor
DORS	Defense Outplacement Referral System
DRMO	Defense Reutilization and Marketing Office

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Acronym	Definition
EA	Environmental assessment
EAC	Economic Adjustment Committee
EBS	Environmental baseline survey
ECP	Environmental condition of property
EDA	Economic Development Administration
EDC	Economic development conveyance
EIS	Environmental Impact Statement
EO	Executive Order
EPA	Environmental Protection Agency
ERC	Emission reduction credit
ESA	Endangered Species Act, 16 U.S.C. 1531–1544 (reference (o))
EUL	Enhanced Use Leasing
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FEHB	Federal employee health benefits
FEIS	Final Environmental Impact Statement
FHA	Federal Housing Authority
FHWA	Federal Highway Administration
FIFRA	Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 (reference (p))
FONSI	Finding of No Significant Impact
FOSL	Finding of Suitability to Lease
FOST	Finding of Suitability to Transfer
GSA	General Services Administration
HAP	Homeowners Assistance Program
HR	Human resources
HRO	Human resources office
HRMA	Housing Requirement Market Analysis
HUD	Department of Housing and Urban Development

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Acronym	Definition
IAG	Interagency Agreement
ICTAP	Interagency career transition assistance plan
LBPPPA	Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4801–4846 (reference (q))
LRA	Local Redevelopment Authority
MARAD	Maritime Administration
MBTA	Migratory Bird Treaty Act, 16 U.S.C. 703–712 (reference (r))
MWR	Morale Welfare and Recreation
NAF	Non-appropriated fund
NAGPRA	Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001—3013 (reference (s))
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. 4321, as amended (reference (t))
NHPA	National Historic Preservation Act, 16 U.S.C. 470 (reference (u))
NOA	Notice of Availability
NPDES	National Pollutant Discharge Elimination System
NPL	National Priorities List
OEA	Office of Economic Adjustment
OPM	Office of Personnel Management
OPS	Operating properly and successfully
OSD	Office of the Secretary of Defense
PBC	Public Benefit Conveyance
PCBs	Polychlorinated biphenyls
PCS	Permanent change of station
PPP	Priority Placement Program
Pub. L.	Public Law
RAB	Restoration Advisory Board
RCRA	Resource Conservation and Recovery Act (reference (v))
RIF	Reduction in Force
ROD	Record of Decision

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Acronym	Definition
RPL	Reemployment Priority List
SDWA	Safe Drinking Water Act, 42 U.S.C. 300f–300j-26 (reference (w))
SIP	State Implementation Plan
TCP	Traditional Cultural Properties
TSCA	Toxic Substances Control Act, 15 U.S.C. 2601–2671 (reference (x))
U.S.C.	United States Code
VA	Department of Veterans Affairs
VERA	Voluntary Early Retirement Authority
VRIF	Voluntary Reduction in Force
VSIP	Voluntary Separation Incentive Program
WIA	Workforce Investment Act (reference (y))

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C1. CHAPTER 1

INTRODUCTION

C1.1. PURPOSE

This Manual, which has been prepared by the Deputy Under Secretary of Defense (Installations and Environment), in cooperation with the DoD Components, has several objectives:

C1.1.1. Supersede DoD 4165.66-M, "Base Reuse Implementation Manual," December 1997.

C1.1.2. Provide a common set of guidelines for BRAC 2005 and remaining incomplete actions from prior BRAC rounds that allow flexibility for base redevelopment implementation.

C1.1.3. Provide supplemental guidance for carrying out the laws and regulations for closing installations and revitalizing base closure communities and community assistance (e.g., Public Law 101-510 as amended and 32 CFR Parts 174 and 176 (references (c) and (e)).

C1.1.4. Identify common-sense approaches and general practices to follow during base closure and redevelopment implementation.

C1.2. APPLICABILITY

This Manual applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components"). The provisions of this Manual are subject to, and should be interpreted in accordance with, 32 CFR parts 174 and 176 (reference (e)).

C1.3. POLICY

For over 4 decades, the Department of Defense has recognized its responsibility to assist the communities that have hosted its installations. Consistent with that responsibility, the Department of Defense Base Closure and Realignment Report, May 2005 (reference (z)), established the following policy guidance:

C1.3.1. Act expeditiously, whether closing or realigning. Relocating activities from installations designated for closure will, when feasible, be accelerated to facilitate the transfer of real property for community reuse. In the case of realignments, the Department of Defense will pursue aggressive planning and scheduling of related facility improvements at the receiving locations.

C1.3.2. Fully utilize all appropriate means to transfer property. Federal law provides the Department of Defense with an array of legal authorities, including public benefit transfers,

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economic development conveyances at cost and no cost, negotiated sales to State or local government, conservation conveyances, and public sales, by which to transfer property on closed or realigned installations. Recognizing that the variety of types of facilities available for civilian reuse and the unique circumstances of the surrounding communities does not lend itself to a single universal solution, the Department of Defense will use this array of authorities in a way that considers individual circumstances.

C1.3.3. Rely on and leverage market forces. Community redevelopment plans and military conveyance plans should be integrated to the extent practical and should take account of any anticipated demand for surplus military land and facilities.

C1.3.4. Collaborate effectively. Experience suggests that collaboration is the linchpin to successful installation redevelopment. Only by collaborating with the local community can the Department of Defense close and transfer property in a timely manner and provide a foundation for solid economic redevelopment.

C1.3.5. Speak with one voice. The Department of Defense, acting through the DoD Components, will provide clear and timely information and will encourage affected communities to do the same.

C1.3.6. Work with communities to address growth. The Department of Defense will work with the surrounding community so that the public and private sectors can provide the services and facilities needed to accommodate new personnel and their families. The Department of Defense recognizes that installation commanders and local officials, as appropriate (e.g., State, county, and tribal), need to integrate and coordinate elements of their local and regional growth planning so that appropriate off-base facilities and services are available for arriving personnel and their families.

C1.4. KEYS TO SUCCESSFUL DISPOSAL OF CLOSING MILITARY INSTALLATIONS

C1.4.1. This Manual was developed based on the following themes:

C1.4.1.1. Consultation. The Military Department, Office of Economic Adjustment (OEA), and Local Redevelopment Authority (LRA) should be in constant contact throughout the base closure and redevelopment process. They should resolve any problems through consultation.

C1.4.1.2. Cooperation. The Military Department(s), OEA, and LRA should work together to achieve mutual goals.

C1.4.2. In embracing these themes, the Manual also stresses adoption of the following characteristics:

C1.4.2.1. Work cooperatively**.** Effective and extensive communication will make the process smoother over the long run.

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C1.4.2.2. Consider community needs**.** Accomplish the mission, but consider the impact to local communities.

C1.4.2.3. Be innovative**.** Do not limit creativity. Decisions, within applicable laws and regulations, can be new and different.

C1.4.2.4. Exercise common sense. Solutions should fit within the overall guidance, but they also should be site-specific.

C1.4.2.5. Delegate. Allow front-line employees to make as many decisions as possible, especially when an issue is routine or when the policy has already been formulated. Establishing layers of approval only creates delays.

C1.4.2.6. Apply growth management principles. When realignments cause a significant influx of missions and personnel, growth management planning will be necessary to ensure public facilities and services are available when personnel arrive.

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C2. CHAPTER 2

BASE CLOSURE AND REALIGNMENT PROCESS OVERVIEW

C2.1. GENERAL

C2.1.1. This chapter describes the Department of Defense's overall process for base closure and realignment. Prior rounds provide examples and lessons learned that can assist those now facing similar situations. Implementing BRAC creates challenging tasks related to four possible scenarios:

C2.1.1.1. Realignment and drawdown of an installation that includes property disposal.

C2.1.1.2. Closure of a base.

C2.1.1.3. Drawdown of personnel at a realigned base that does not involve property.

C2.1.1.4. Growth at gaining installations.

C2.1.2. Much of this Manual focuses on the first two scenarios—situations involving base closures and realignments that result in reductions of personnel and property. For installations experiencing personnel and mission drawdown, but no property involved, Chapter 4 will be of primary interest. At gaining installations, Chapter 9 provides general guidance, while Chapter 8 provides direction for both property disposal situations as well as installations gaining missions and personnel.

C2.1.3. For closures or realignments that result in reduction of personnel and property, many of the required tasks are often unique to specific locations. However, the overall process is similar from locale to locale. It involves the drawdown of the military mission, base redevelopment planning, and property disposal.

C2.2. MILITARY MISSION DRAWDOWN

C2.2.1. While local communities begin planning for redevelopment, the order to close an installation creates for military commanders a significant new mission that entails closing the functions and units that are being inactivated. For closures and realignments that involve relocations, the order creates a second mission: Support the efforts of those units relocating to other installations. Many installation commanders rank these two missions on par with their operational or training missions.

C2.2.2. Military Departments will organize their staffs to support these new missions. A project management approach and a special task force—a base closure team—can be very effective. Although many variations of these two initiatives have been used, the following activities by local commanders are common to the more successful approaches:

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C2.2.2.1. Publish revised written mission statements to reflect the new drawdown mission(s).

C2.2.2.2. Create core teams that handle the planning, day-to-day administration, and oversight of the base closure.

C2.2.2.3. Prepare charters that spell out in detail the duties and authorities of the base closure teams. Charters establish the importance of the base closure effort, lend structure and strength to the closure team, and have a unifying effect on base closure efforts. They also prescribe deadline dates whenever possible.

C2.2.2.4. Establish and maintain Public Affairs plans to keep internal and external audiences informed about the closure and realignment mission and improve efforts to foster understanding and support for the drawdown process.

C2.2.2.5. Establish and chair standing groups that focus on closure policy, supervision, and information flow. These groups should also tackle major problems that require a quick response or extensive coordination. Typically composed of closure team members and representatives from all base entities, the groups meet only when necessary.

C2.2.2.6. Approve base closure-related documents. This practice reinforces the importance of the effort and fosters smoother coordination among staffs and subordinate commands.

C2.2.2.7. The commanders should also support the mission drawdown by planning for the drawdown, sustaining quality of life for the installation population during the process, and scheduling actions and key milestones throughout the process.

C2.2.3. Planning. Central to effective base closure planning is determining what to do, who will do it, and when it will be done. Answering these questions will result in the preparation of a comprehensive task list and a time-phased schedule that clearly defines the drawdown actions of installation units and activities, including tenants. Included on most task lists are the following three critical tasks:

C2.2.3.1. Mission relief. This is the end of mission drawdown and it defines the drawdown deadline. The commander should work closely with the major command or claimant to obtain early commitments on relief dates.

C2.2.3.2. Training drawdown. After receiving a fixed date for mission relief, the commander should develop plans for drawdown of unit training. Units should continue training while their strengths are sufficiently robust to make it worthwhile; training also helps to maintain individual proficiency and morale. Training should be stopped before it seriously conflicts with the command's preparation for relocation or inactivation. Balance is the key. Choose a date, but be flexible enough to change it if manning levels fluctuate from those projected.

C2.2.3.3. Relief of taskings and inspections. In developing a schedule, the routine taskings and inspections from higher headquarters or other agencies need to be considered.

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These requirements may become extremely taxing when an installation approaches mission cessation or drawdown. Close and frequent coordination is the key to minimizing this problem.

C2.2.4. Quality of Life Support. The term "quality of life" refers to medical care, commissary and exchange services, housing and barracks maintenance, community and family support services, and employment benefits, which are specific aspects of installation life that contribute to its support. During drawdown, commanders should strive to continue providing the appropriate levels of quality of life support for service members, their family members, and the civilian employees remaining at the installation. The drawdown of quality of life programs and services needs to be synchronized with that of personnel and training because they share a common linkage.

C2.2.5. Scheduling. An effective plan for the drawdown of a military mission must be based on a time-phased schedule. Some of the tasks included in such a schedule (not necessarily in chronological order as installation circumstances may vary) are listed below:

C2.2.5.1. Mission relief.

C2.2.5.2. Training drawdown.

C2.2.5.3. Relief of major command or claimant taskings and inspections.

C2.2.5.4. Unit readiness reporting for reorganized or inactivating units.

C2.2.5.5. Unit movements.

C2.2.5.6. Personnel actions (see Chapter 4).

C2.2.5.6.1. Key skills and positions (military and civilian) needed throughout the drawdown.

C2.2.5.6.2. Flow of inbound and outbound military personnel.

C2.2.5.6.3. Reduction of the civilian workforce through reduction in force (RIF) actions or alternatives.

C2.2.5.6.4. Job transition assistance and job placement programs.

C2.2.5.7. Personnel support.

C2.2.5.8. Closing of religious support facilities.

C2.2.5.9. Closing of morale, welfare, and recreation (MWR) facilities.

C2.2.5.10. Closing of exchanges and commissaries.

C2.2.5.11. Closing of installation museums.

C2.2.5.12. Housing plan for relocating families.

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C2.2.5.13. Base operations and support.

C2.2.5.13.1. Termination of fire protection, laundry, transportation services, flight operations, security, and housing.

C2.2.5.13.2. Disconnection, or transfer to local authorities, of steam, water, gas, and electric utilities.

C2.2.5.13.3. Termination of telephone, cable TV contracts, postal, and information services support.

C2.2.5.13.4. Caretaker and security requirements for property not sold or transferred by closure.

C2.2.5.14. Tenant activities.

C2.2.5.15. Interservice support responsibilities.

C2.2.5.16. Contracts analysis.

C2.2.5.17. Environmental compliance.

C2.2.5.18. Transfer, care, and custody of cemeteries.

C2.2.5.19. Personal property disposal disposition.

C2.2.5.20. Legal considerations, such as jurisdictional issues, if appropriate.

C2.2.5.21. Base closure protocol and briefing teams.

C2.3. BASE CLOSURE AND REDEVELOPMENT PROCESS OVERVIEW

C2.3.1. To achieve the optimum redevelopment potential of every installation closing or realignment, the Military Department and the LRA need to thoroughly understand the basic elements of the entire process. Each action in the process should be conducted with the whole process in mind.

C2.3.2. The base closure and redevelopment process is affected by many Federal real property and environmental laws and regulations, along with volumes of implementing guidance. Some of these laws (see Table AP1.T1 for a synopsis of the primary laws) were specifically enacted to govern specific parts of this process. Others were enacted to address more general government property transactions or specific problems such as environmental restoration. Collectively, they have a great effect on the process.

C2.3.3. For BRAC 2005, installations are selected for realignment or closure according to a process prescribed in the BRAC law (reference (c)). After an installation has been approved for closure or realignment, numerous laws and regulations shape the process that follows—base disposal and redevelopment implementation. The following excerpt illustrates just one small

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component of the BRAC law, while Figure C2.F1. shows the general sequence of events associated with BRAC 2005 disposal and redevelopment implementation.

> Public Law 101-510, section (b)(2)(D)—"Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned."

C2.3.4. Although Figure C2.F1. depicts a seemingly linear and sequential series of events, the base disposal and redevelopment process is a series of concurrent activities that can be subdivided into the following three principal phases following Federal property screening:

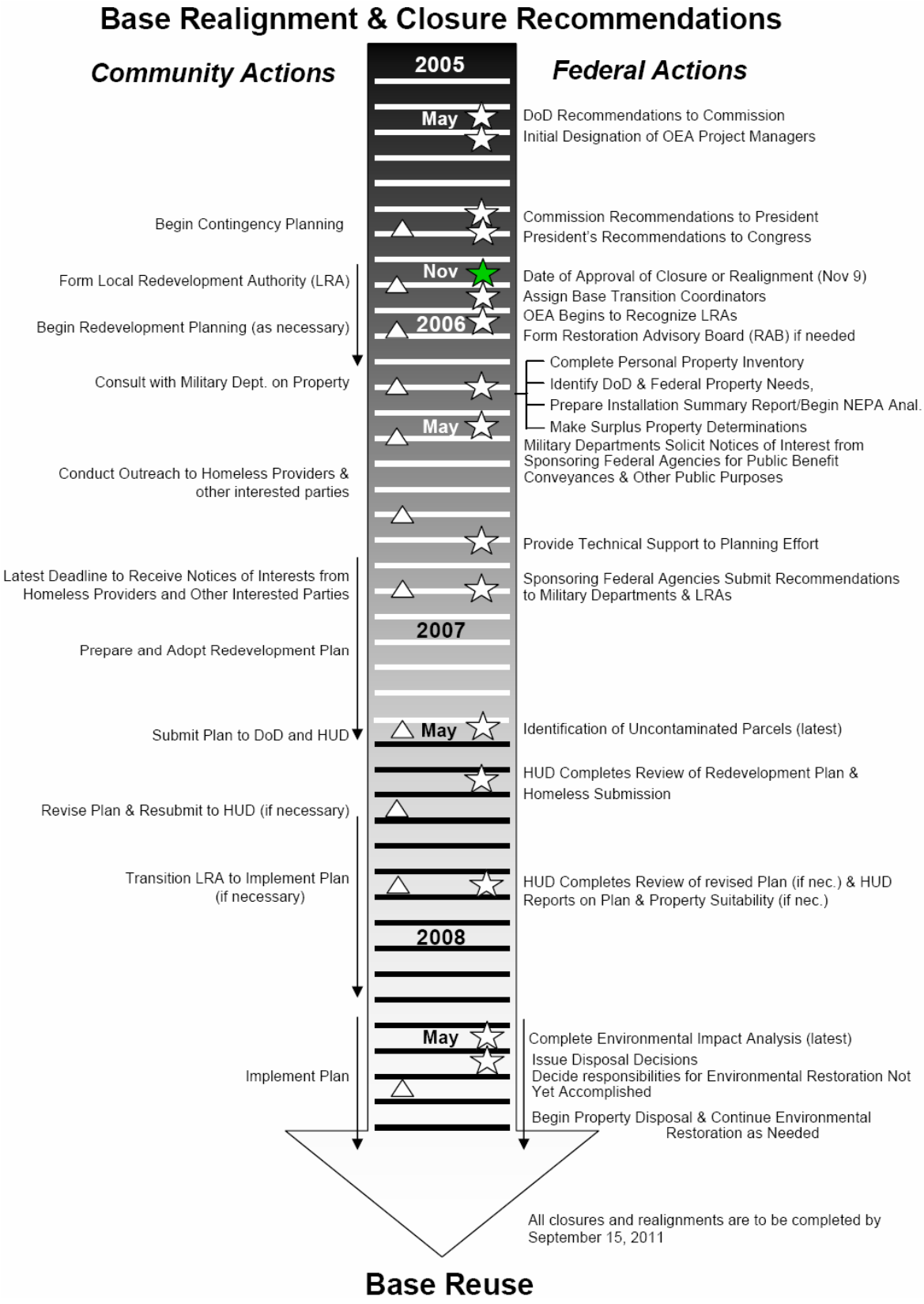
C2.3.4.1. Phase One, Base Redevelopment and Disposal Planning: This phase consists of the community's redevelopment planning, environmental impact analysis activities, natural and cultural resources determinations and consultations, identification of uncontaminated property, the Military Department's development of an Installation Summary Report that considers all property assets, market conditions, and potential disposal options, and many environmental restoration and compliance activities.

C2.3.4.2. Phase Two, Surplus Property Disposal Decision Making: The second phase consists of activities associated with the Military Department's surplus property disposal decision-making. This phase may include the issuance of one or more Disposal Records of Decision (RODs), or similar decision documents. It also may include the acceptance of applications submitted for property under various public benefit conveyance authorities (such as public airport, parks, and other public benefit conveyances) and economic development conveyance.

C2.3.4.3. Phase Three, Parcel-by-Parcel Disposal: After the Military Department has issued its final disposal decisions, the last phase, parcel-by-parcel decision implementation, occurs for each disposal parcel. This phase lasts until the property has been conveyed. There also may be continuing environmental cleanup activities conducted by either the Military Department or the new owner of the property.

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C2.F1. Notional Disposal and Redevelopment Process



C2.3.5. For this undertaking to be successful, all involved parties must work as a team. Representatives from the Military Department, the Base Transition Coordinator, the OEA Project Manager, the LRA, local and State governments, and many other Federal, state, and local organizations all could potentially have key roles. The document "Responding to Change: Communities and BRAC"[1] (reference (aa)) provides information intended for local and State officials, LRAs, and the public. It includes practical advice on organizing an LRA as well as developing and implementing a redevelopment plan. The three phases are expanded in the following sections.

C2.4. PHASE ONE: BASE REDEVELOPMENT AND DISPOSAL PLANNING

C2.4.1. Disposal and redevelopment planning requires the concurrent execution of numerous activities, most of which are specified by law. Generally, this phase begins at the approval date for the closure or realignment of the installation (see Figure C2.F1.). OEA is available to assist eligible LRAs with redevelopment planning when needed.

C2.4.2. In this phase, the Military Department is responsible for completing the following tasks:

C2.4.2.1. Relocate active mission elements (mission drawdown).

C2.4.2.2. Determine what property needs to be retained for military purposes.

C2.4.2.3. Prepare the Environmental Condition of Property (ECP) Report for use in redevelopment planning and due diligence by interested parties (see Chapter 8).

C2.4.2.4. Screen for DoD and Federal use of the property. It is important to remember that the closure or realignment of an installation (whether leased or owned) does not preclude any component of the Department of Defense (including the component currently utilizing the installation) from using that installation for missions or functions other than those that were the subject of the closure or realignment recommendations. The property screening process is the means by which the Department determines whether it has any other use for the property or it will make the property available for use by others.

C2.4.2.5. Identify and resolve legislative jurisdictional issues with State and local governments.

C2.4.2.6. Consult with the LRA on other Federal agency interests in property and with Federal sponsoring agencies for interest in public benefit conveyances.

[1] This document and other useful documents may be obtained by visiting OEA's home page at http://www.oea.gov.

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C2.4.2.7. Encourage other Federal agencies to consult with the LRA to determine public benefit conveyance opportunities.

C2.4.2.8. Consult with the LRA on the personal property that will be made available to the LRA for redevelopment.

C2.4.2.9. Identify installation real property that is surplus to the Federal government's needs that will be made available for redevelopment.

C2.4.2.10. Provide available facility and environmental data to the LRA.

C2.4.2.11. Submit uncontaminated parcel determinations to the appropriate environmental regulatory agencies.

C2.4.2.12. Initiate required National Environmental Policy Act (NEPA) (reference (t)) analysis.

C2.4.2.13. Undertake historic and cultural preservation consultations.

C2.4.2.14. Plan for and carry out protection and maintenance (caretaking) of installation property and facilities not conveyed or redeveloped at the time of active mission departure or base closure.

C2.4.2.15. Continue to perform installation management functions.

C2.4.2.16. Inventory property assets.

C2.4.2.17. Assess need for installation summary report that considers all property assets, market conditions, and potential disposal options (see paragraph C5.6.1 for more discussion on this report).

C2.4.3. Local redevelopment planning efforts must be well organized and effectively coordinated. To assure achievement of those objectives, the LRA generally will accomplish the following activities during redevelopment planning:

C2.4.3.1. Seek recognition from the Department of Defense as an LRA, and economic adjustment and other assistance as needed.

C2.4.3.2. Initiate and maintain a comprehensive and effective communication program with the public.

C2.4.3.3. Conduct outreach activities that focus on community needs, including homeless assistance, economic redevelopment and other development, and other development needs of communities in the vicinity.

C2.4.3.4. Conduct market research.

C2.4.3.5. Identify interests in acquiring available real and personal property.

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C2.4.3.6. Consider past use and current condition of the property, particularly for areas that may have ordnance and explosives, taking into account ongoing and planned environmental remediation activities when developing the redevelopment plan.

C2.4.3.7. Develop a comprehensive land-use plan in consultation with the Department of Defense.

C2.4.3.8. Prepare a comprehensive redevelopment plan and other essential redevelopment-related planning documents.

C2.5. PHASE TWO: SURPLUS PROPERTY DISPOSAL DECISION MAKING

C2.5.1. This phase includes the activities associated with the Military Department's disposal decisions and the LRA's redevelopment planning. After redevelopment planning activities are completed, the LRA submits its adopted redevelopment plan to the Military Department. It also includes the plan in an application to the Department of Housing and Urban Development (HUD), in accordance with the BRAC law. Following a review of the plan and the homeless accommodation submission, HUD will make a determination that the application is complete, that the LRA complied with all required procedures, and that the plan satisfies the review criteria or will provide the LRA comments on deficiencies.

C2.5.2. After completing the NEPA analysis and associated documentation, the Military Department issues its final disposal decisions. The decision document addresses the Military Department's decisions with respect to the property based on reasonably foreseeable uses and the potential mitigation actions that may be required for potential environmental impacts. Although the Military Departments may indicate the specific disposal decisions in these decision documents, these decisions do not represent a contractual commitment to a prospective transferee and can be amended as appropriate.

C2.5.3. This phase also includes the Military Department's decisions on requests for specific property conveyances. Applications for public benefit conveyances[2] are reviewed by the appropriate government agencies. For example, the Department of Education reviews and approves all applications for education public benefit conveyances before the Military Department acts on the application. Economic development conveyances (EDCs) also require an application.

C2.5.4. While the Military Department will give deference to the redevelopment plan in preparing the record of decision or other decision documents, it always retains ultimate responsibility and authority to make the final property disposal decisions. It also resolves any conflicting property interests when the final decisions are issued.

[2] See GSA site http://propertydisposal.gsa.gov/Property/PubBenefitProp/PBCBrochure.pdf

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C2.6. PHASE THREE: PARCEL-BY-PARCEL DISPOSAL

C2.6.1. After necessary applications have been submitted, reviewed, and accepted, and the Military Department has issued its final disposal decisions, the redevelopment process enters the decision implementation phase. This phase includes Military Department conveyance of installation property (or property "disposal"). In disposing of that property, the Military Department follows its documented disposal decisions, using conveyance authorities established by Titles 40 and 49 U.S.C. (references (h) and (j)), DBRCA 90(reference (c)), and other authorizing statutes, as implemented in the Federal Management Regulations (41 CFR Part 102-75) (reference (ab)), and elsewhere.

C2.6.2. The Military Department, in consultation with environmental regulators and the LRA, then makes parcel-by-parcel decisions on responsibilities for remaining remediation. Some remedial actions may be completed by the Military Department, either before or after property transfer. Others may be completed by the new owners as part of a property conveyance.

C2.6.3. Installation property should be transferred or conveyed as soon as possible for redevelopment. The Military Department may use a variety of property conveyance methods, and it may convey the property in multiple parcels to multiple future owners. Typical types of conveyances may include the following:

C2.6.3.1. Public benefit conveyances. A public benefit conveyance typically involves airports, education, health, historic monuments, ports, parks and recreation, and wildlife conservation areas. Generally, a Federal agency with specific expertise in a conveyance category (such as the National Park Service for parkland and recreation conveyances) is authorized to serve as a sponsoring or approving agency.

C2.6.3.2. Homeless assistance conveyances. This type of conveyance entails no cost consideration for the property, either to the LRA or to the representatives of the homeless. Personal property may be transferred to the LRA for use by the homeless assistance provider. Homeless conveyances require that the use of the property be limited to authorized programs that support the homeless, as determined by HUD. The LRA is responsible for monitoring implementation of the homeless assistance provisions of its redevelopment plan.

C2.6.3.3. Negotiated sale. A negotiated sale to public bodies or other entities requires payment of not less than the fair market value. Negotiated sales to public bodies can only be conducted if a benefit, which would not be realized from competitive sale or authorized public benefit conveyance, will result from the negotiated sale. Terms of negotiated sales are subject to review by Congress.

C2.6.3.4. Advertised public sale. Under an advertised public sale, the party that submits the highest bid, provided it is not less than the fair market value, may purchase the property.

C2.6.3.5. Environmental responsibilities conveyance. This type of conveyance is made to a party that enters into an agreement to perform all environmental responsibilities, including remediation for the property.

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C2.6.3.6. Economic development conveyance. An EDC is made to an LRA for purposes of generating jobs. A Military Department may approve an EDC, but it must seek to obtain fair market value for the property. There is also authority for no-cost EDCs.

C2.6.3.7. Depository institution facility. This type of conveyance involves the sale of a facility at fair market value to the operating depository institution that constructed or substantially improved the facility.

C2.6.3.8. Conservation. A Military Department can convey property that is suitable and desirable for conservation purposes to states, political subdivisions of states, or nonprofit organizations that exist for the primary purpose of conservation of natural resources.

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C3. CHAPTER 3

WORKING WITH COMMUNITIES AND STATES TO FACILITATE TRANSITION AND BASE REDEVELOPMENT

C3.1. GENERAL

C3.1.1. To ensure that the Department of Defense maximizes its savings and communities maximize their opportunities from BRAC actions, the Department of Defense works closely with affected jurisdictions and State agencies to achieve mutual goals of rapid disposal and redevelopment of installation property. In recognition of the impact that BRAC can have on local communities, the Department of Defense makes every effort to soften the effects of closures and realignments. It also recognizes that the jobs created through the economic redevelopment of facilities can be critically important to mitigating the impact of installation closures or reductions.

C3.1.2. Civilian redevelopment of a former military installation is often the single most important opportunity for a community to overcome the effects of a closure or realignment. To ease the economic effects on communities, the Department of Defense seeks rapid conveyance of property to new owners so they can achieve the community's redevelopment objectives, such as job creation, providing housing, increasing the local tax base, and improving the overall quality of life within the community. In addition, the Department of Defense recognizes the uniqueness of each community and is prepared to provide a combination of resources to respond to different circumstances. The Military Department provides detailed information on the condition of the installation's land and facilities so that redevelopment planners and potential users can take baseline conditions and environmental cleanup plans into account. While job creation and tax base expansion are common community redevelopment goals, public facilities are also often part of base redevelopment plans. Federal property laws provide a variety of property conveyance authorities to satisfy diverse redevelopment scenarios.

C3.1.3. This chapter outlines how the Department of Defense works with local communities and the States to effect a smooth transition of BRAC installations to alternative uses. For further information on property disposal, see Chapter 5, and for environmental actions, see Chapter 8.

C3.2. LOCAL ECONOMIC ADJUSTMENT RESPONSE

C3.2.1. The base closure and realignment notification will prompt community leaders to act, especially when the BRAC action is likely to have a direct and significantly adverse consequence for the community. Ideally, community leaders will quickly begin taking steps to develop a feasible plan for the future use of the installation's property. In accordance with the BRAC law reference (c), affected jurisdictions should quickly create an LRA and direct it to develop a redevelopment plan for the property that will foster long-term economic recovery for the community after the installation closes.

C3.2.2. The LRA, established by a State or local governments, is formally recognized by the Secretary of Defense, acting through the OEA. It serves as the primary link between DoD and the

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installation and the community and Federal and State agencies for all base closure matters. The LRA is the single entity responsible for identifying local redevelopment needs and preparing a redevelopment plan for the Military Department to consider in the disposal of installation property. In this context, the term "redevelopment plan" means a plan that (1) represents local consensus on the redevelopment with respect to the installation and (2) provides for redevelopment of the property that becomes available because of the installation closure or realignment. For further information, see the document "Organizing for BRAC" (reference (ac)).[1]

C3.2.3. Initially, the LRA should focus on crafting the base redevelopment plan. During the base closure process, it is not uncommon for one entity to be recognized as the LRA for reuse planning purposes, and a follow-on entity designated to coordinate and oversee implementation of the plan. In some cases, the LRA also may want to implement all or part of the redevelopment plan. Not all communities will choose to create an implementation LRA. Implementation responsibilities, including restructuring or dissolving the planning LRA, should await completion of the redevelopment plan and a financial feasibility analysis of alternative scenarios for actual redevelopment. OEA will formally recognize an implementation LRA only if the LRA pursues an EDC.[2]

C3.2.4. OEA will assign a project manager to work in cooperation with the Military Department in establishing a long-term working relationship with the LRA, to provide guidance on how to organize and proceed, and to coordinate provision of available Federal resources. In accordance with provisions of Section 2915 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160 (reference (ad)), the Military Department must appoint a Base Transition Coordinator (BTC) for each closing installation. The BTC assists in coordinating many of the installation closure actions that have implications for the LRA's redevelopment plan. The Military Department may designate one of its personnel, who already has other base closure and disposal responsibilities, to serve as the BTC.

C3.2.5. The Military Department representatives and the BTC should expect the LRA to often request information, consultation, and assistance. This relationship is vital to a successful transition of the surplus property. Cooperation and coordination are essential. In addition, providing complete, early, and accurate technical and environmental information about the surplus property and improvements to the LRA is essential to enable redevelopment plans to take realistic account of existing property conditions.

C3.2.6. There is no single approach or template that fits all aspects of every base realignment or closure situation. Just as each installation has unique aspects, so do the communities and States for economic adjustment activities and base redevelopment. Through close cooperation and coordination among the Military Department, OEA, and LRA, the best approach can be realized to suit each given situation.

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[1] It may be obtained by visiting OEA's home page at http://www.oea.gov.

[2] For more information on EDCs, go to the OEA website, http//www.oea.gov, or see Chapter 5.

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C3.3. DEFENSE ECONOMIC ADJUSTMENT PROGRAM AND OEA

The Defense Economic Adjustment Program was established in 1961 to help communities respond to economic impacts caused by significant defense program changes, including major base realignments and closures. OEA implements the provisions of this program in cooperation with the Military Departments. Direct technical assistance through the OEA project manager and planning grants may be provided to affected, eligible communities to help the LRA organize and develop economic adjustment strategies and base redevelopment plans. This assistance is coordinated through the President's Economic Adjustment Committee (EAC), which is composed of representatives from 22 Federal departments and agencies that administer assistance programs. OEA personnel serve as the staff of the EAC. Requests for OEA assistance can be made by local elected leaders, the LRA, members of Congress, or a governor. OEA maintains more specific guidance on all aspects of local economic adjustment through a series of written documents and on its Website.[3]

C3.4. BASE REDEVELOPMENT PLANNING PROCESS

C3.4.1. The opportunity to merge all or parts of former military installations into the community and to reuse or redevelop the facilities can provide communities with a unique opportunity to shape their physical, economic, and social future. While BRAC decisions usually present a negative economic effect in the short term, the assumption of responsibility for base property often provides opportunities to create new jobs and satisfy unmet public facility and service needs. In some cases, the installation offers a "once-in-a-lifetime" chance for a community to make major changes in local land use and economic redevelopment and other development strategies because of the unique character of the installation and its facilities. An effective redevelopment planning process is crucial to realize these opportunities.

C3.4.2. The BRAC law prescribes a tightly drawn timeline for LRAs to plan. The needs of the local homeless must be addressed during the planning process, and community consensus on base redevelopment is essential for success. The redevelopment plan is not only a vision and blueprint for the future, it also serves as a major decisional input for the Military Department's NEPA analysis.

C3.5. IDENTIFYING INTERESTS IN SURPLUS PROPERTY

After the Military Department identifies the real and personal property that is surplus to Federal needs, the LRA must quickly begin its outreach program for uses of that property. Within 30 days of the notice of surplus, the LRA must publish a notice in the local newspaper soliciting interest from representatives of the homeless. The LRA also should solicit interest from other interested parties that are eligible for conveyance of property under various public benefit conveyances. This solicitation must be accomplished within a subsequent 90 to 180 days. In parallel with this outreach, the LRA must determine feasible uses for the base that consider the

[3] (http://www.oea.gov).

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market attraction, physical and environmental conditions of the property, and public needs. The LRA shall consider requests for property from representatives of the homeless when preparing the redevelopment plan for the property and enter into legally binding agreements to provide property to assist the homeless, contingent upon Military Department decisions on property disposal. (See Chapter 5 for more information on the property disposal process, outreach and homeless accommodation requirements, and conveyance options.)

C3.6. PREPARING THE REDEVELOPMENT PLAN AND ACCOMMODATING HOMELESS ASSISTANCE NEEDS

C3.6.1. The redevelopment plan should address numerous factors, including the following:

C3.6.1.1. Sustainable redevelopment, supported by a coordinated management plan.

C3.6.1.2. Overall redevelopment of the installation in a comprehensive and coordinated manner.

C3.6.1.3. Proposed land uses, including development controls, such as zoning.

C3.6.1.4. Possible future property recipients or tenants.

C3.6.1.5. Public involvement and comments throughout the process.

C3.6.1.6. Current and projected market demand for different potential land uses.

C3.6.1.7. Balance between homeless-assistance needs and community and economic redevelopment needs of the community.

C3.6.1.8. Sources and uses of available funding or revenue.

C3.6.1.9. Personal property necessary to support redevelopment.

C3.6.1.10. How the redevelopment plan takes account of past land uses and current property conditions including environmental conditions.

C3.6.2. The redevelopment plan is to be completed not later than 270 days after the outreach process was completed. The LRA must submit an application containing the redevelopment plan and a homeless assistance submission to HUD and the Military Department. A copy also must be sent to the local HUD field office. (See Chapter 5 for further information.)

> Public Law 101-510, section 2905(b)(7)(K)(iii)—"The Secretary of Defense shall dispose of buildings and property under clause (i) in accordance with the record of decision or other decision document prepared by the Secretary in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). In preparing the record of decision or other decision document, the Secretary shall give substantial deference to the redevelopment plan concerned."

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C3.6.3. The redevelopment plan (see the above quote from the BRAC law) is important because the Military Department will use it to conduct the property disposal environmental analysis required by NEPA. The Military Department treats the plan as part of the proposed Federal action for the installation. (See Chapter 8 for a detailed discussion of the NEPA process.) The plan also will serve as a basis for consideration of public benefit conveyances or an EDC if the LRA or other entities seek to obtain property by those property disposal methods. As the LRA develops the redevelopment plan, it is critical that the environmental condition of the property be a factor considered in the redevelopment planning process. Planning reuses with all the information available can allow for LRAs to determine the most appropriate reuse for the property given environmental, economic, and other conditions and to avoid delays in the process.

C3.6.4. The LRA should participate in public scoping meetings during the NEPA environmental analysis process and in public meetings of the Restoration Advisory Board (RAB), which provides community input into the installation's environmental restoration efforts. (See Chapter 8 for a detailed discussion of environmental actions.)

C3.7. REALIGNMENTS THAT CAUSE SIGNIFICANT PERSONNEL REDUCTIONS OR EXPANSIONS

BRAC 2005 decisions that call for a major reduction in installation personnel, without surplus property being made available, can pose a significant challenge to communities. Other communities may need to absorb a significant influx of personnel associated with realignment actions that bring additional or expanded missions to an installation. Significant personnel increases also have the potential to stress the capacities of some off-base community services and facilities. (See Chapter 9 for detailed discussion of these realignment situations.)

C3.8. FEDERAL DOMESTIC AGENCY RESOURCES

In addition to OEA assistance, other Federal technical and financial assistance is available to communities for planning and implementing local economic adjustment strategies. This assistance is mainly provided by the Economic Development Administration (EDA) within the Department of Commerce; the Employment and Training Administration of the Department of Labor (DOL); and agencies with oversight of public benefit property disposal programs, such as for public airports, seaports, prisons, educational and healthcare facilities, and recreation and conservation projects. OEA coordinates the use of these resources in its role as the staff of the EAC. The following subsections outline some of the assistance available in three vital areas: personnel, property transfer, and planning and implementation.

C3.8.1. Personnel Assistance

C3.8.1.1. The closure of an installation will result in the loss of both military and civilian jobs. Military personnel will be transferred as their positions are eliminated, while the civilian employees may leave the area in search of work at any time after the initial BRAC announcement. In addition, their dependents also could transfer, potentially leaving major openings in the

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community labor force. The LRA should consider the impacts associated with personnel reductions during redevelopment planning.

C3.8.1.2. Both the Department of Defense and the DOL (Retraining and Readjustment Services for Dislocated Workers) offer placement assistance to affected workers through the DoD Priority Placement Program (PPP) and DOL's retraining and placement services through local Workforce Investment Boards. (See Chapter 4 for a detailed discussion of the Department of Defense's personnel assistance programs.)

C3.8.2. Property Transfer Assistance. Those Federal agencies—including the Federal Aviation Administration (FAA), the Maritime Administration (MARAD), and the Federal Highway Administration (FHWA) within the Department of Transportation, the Department of Housing and Urban Development, the Department of Education, the Department of Health and Human Services, and the National Park Service under the Department of the Interior—that have public benefit conveyance authorities provide assistance with the evaluation of property acquisition proposals under the respective public benefit programs and preparation of applications for property. Significant amounts of surplus property have been conveyed during prior BRAC cycles through these programs.

C3.8.3. Planning and Implementation Assistance.

C3.8.3.1. While the primary source for economic adjustment planning is OEA, the Department of Commerce's EDA can provide funds for more detailed economic adjustment planning, such as specialized analysis. Historically, EDA has been a primary source for implementation funding, including business development. Examples include infrastructure reengineering, building demolition, business development revolving loan funds, and local loan guarantee programs.

C3.8.3.2. Many military installations have airfields, which can be readily converted to civilian airports. The FAA's Airport Improvements Program and Military Airports Program can potentially provide substantial funding for airport feasibility studies, development of master plans, and airport conversion projects. Other agencies also may have assistance programs that can be applied to local economic adjustment needs. OEA project managers can help the LRA identify Federal assistance programs suited to meeting its planning and implementation needs.

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C4. CHAPTER 4

PERSONNEL MANAGEMENT

C4.1. GENERAL

C4.1.1. One of the biggest challenges for the commander of an installation facing realignment or closure actions is the fair and effective management of human resources. The purpose of this chapter is to review some of the human resource issues that commanders may face, describe some of the techniques that have been effectively used to address those issues, and highlight assistance programs designed to help employees affected by the realignment or closure. The programs presented in this chapter also are discussed at length in other publications and documents. In any cases of confusion or inconsistency with other documents, readers are encouraged to consult with their servicing human resources office (HRO) advisor for clarification.

C4.1.2. After the installation receives the order to close or realign, the commander and staff begin planning for the drawdown of personnel. In that planning, they must consider both the military and civilian workforce that remain after any unit relocates. Ideally, commanders will phase this drawdown of personnel to coincide with the transfer or inactivation of the installation's units and staff activities. This chapter highlights the actions and issues that should be considered in drawing down the military force and then addresses those related to the drawdown of civilian personnel. However, these actions must be taken in concert with the Military Department's policies, rules, and practices for closing or realigning installations and moving organizations. These Department-specific rules provide guidance for military personnel distribution and include well-tested management timelines that can be very useful.

C4.2. MILITARY PERSONNEL

C4.2.1. Preparation begins early. Commanders should identify critical people to remain on the installation to help plan, coordinate, and carry out the closure. Military personnel commands will assist to ensure that the critical people remain assigned to the installation. After preparation of the drawdown plan and schedule of deadlines for transfers and inactivation, commanders should continue to work closely with the local military personnel command. They should focus on managing the flow of replacements and reassignments, stemming the stream of replacements to units inactivating or relocating, and ensuring that the flow of departing personnel does not unduly sap the ability of remaining units to do their jobs before the installation's mission is formally terminated.

C4.2.2. Commanders also should be mindful of those people at the installation completing their military careers and entering civilian life. They, and their family members, should be encouraged to take advantage of the assistance available to them through the Military Department's transition program. These programs, which are also open to civilian employees, provide job search workshops, resume assistance, and career counseling.

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C4.2.3. Due to the nature of this BRAC, which involves significant realignment of existing military personnel, there will be a significant impact on military spouse employment as well. In addition to being an important indicator of quality of life for military families, military spouse employment plays a major role in retention. Frequent permanent changes of station (PCS) moves associated with the military lifestyle create challenges for spouses and family members to maintain stable careers and job tenure, and to obtain and receive training and education. Many resources have been developed by the Departments of Defense and Labor to help address the workforce challenges of military spouses. For example, www.Milspouse.org is an electronic tool detailing educational, employment and training, and other relevant community resources available to military spouses (e.g., child care and transportation). Militaryspousejobsearch.org is a job search tool that connects spouses of U.S. military members with employers committed to hiring military spouses. Local programs for helping military spouses also have been developed through ongoing collaboration between Family Support Centers and One-Stop Career Centers. Partnerships with these two entities will be a valuable resource for aiding military spouses impacted by BRAC.

C4.3. CIVILIAN PERSONNEL

C4.3.1. In contrast to military personnel management, civilian personnel are hired and separated at the installation level. However, one of the primary changes within the Department of Defense since previous BRAC rounds is that much of the human resource (HR) function for civilian personnel, such as processing personnel actions, maintaining records, recruiting for vacancies, and administering RIFs, now occur at regional service centers. HR specialists remain at Human Resources Offices to provide advisory services to management and employees. The Department of Defense is taking advantage of current technologies, such as the Internet, to ensure that HR guidance and information are readily available.

C4.3.2. In some base closures and realignments, it is impossible to avoid separating civilian employees. To ensure these separations occur in a considerate and effective manner, the Department of Defense uses a variety of placement and transition assistance programs. These include employee placement programs, civilian voluntary separation and early retirement incentives, retraining initiatives and outplacement assistance, and post-separation benefits and entitlements. In addition, installations may use hiring freezes and filling jobs on a temporary basis to reduce the impact of a RIF. Some of the key provisions of the Civilian Assistance and Re-Employment (CARE) Program, are summarized below. Also, a useful reference is the DoD BRAC HR website,[1] which contains links to the most current guidance on personnel actions at BRAC installations. This website also contains information on specific programs available to help DoD nonappropriated fund (NAF) employees who are affected by base closure that are not addressed elsewhere in this chapter.

[1] http://www.cpms.osd.mil/bractransition

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C4.3.3. Placement Programs.

C4.3.3.1. DoD Priority Placement Program. The DoD Priority Place Program, or PPP, is an automated system for the referral and mandatory placement of displaced employees when well qualified for other DoD vacancies. Registration is mandatory for employees entitled to severance pay during the RIF notice period and for 1 year following separation. For employees not entitled to severance pay, registration is voluntary. At the discretion of the installation commander, employees may voluntarily register prior to the RIF notice for up to 1 year before the effective date of the RIF or base closure. Installation commanders must carefully analyze the impact of early registration against the continuing needs of the installation's mission. PPP registrants are frequently picked up at other DoD installations within weeks of registration, so commanders need to have a plan for continuing to get the work done as installation employees accept PPP placements and other employment offers. The DoD CARE Office may approve up to 1 additional year of early registration at the request of the activity. Employees may be eligible to register outside the commuting area, and the downsizing organization will reimburse moving expenses within the limits allowed by the Joint Travel Regulations, Volume 2 (reference (ae)).

C4.3.3.2. Reemployment Priority List. The Reemployment Priority List (RPL) is a government-wide program that is required by law and subject to Office of Personnel Management (OPM) regulations. Career or career-conditional employees in receipt of a RIF separation notice or certificate of expected separation may voluntarily register in the RPL. Referral through this program, which is separate from the PPP, provides employees priority over certain non-DoD job applicants for DoD jobs within the commuting area.

C4.3.3.3. Defense Outplacement Referral System. The Defense Outplacement Referral System (DORS) is a voluntary referral system for DoD employees seeking positions at other installations. Unlike the PPP, DORS does not provide mandatory placement rights or guarantee reimbursement of moving expenses. Employees may not register in both PPP and DORS at the same time. However, the spouse of an employee registered in PPP also may register in DORS.

C4.3.3.4. Interagency Career Transition Assistance Plan. The Interagency Career Transition Assistance Plan (ICTAP) is a government-wide program available to employees separated by RIF, or because of declining relocation outside of the commuting area. Under this program, employees receive selection priority when they apply and are well qualified for vacancies in other Federal agencies. Eligibility for ICTAP begins on receipt of a specific separation notice or a notice of proposed removal for declining a management-directed reassignment or transfer of function outside the commuting area. It continues for up to 1 year after separation, or up to 2 years for those with veterans' preference if separated by RIF from a restricted position.

C4.3.3.5. Department of Labor One-Stop Career Centers. A wide array of services and training is available to civilian employees and military spouses who lose their jobs and must seek new employment due to BRAC. State Workforce Agencies along with local One-Stop Career Centers are positioned to coordinate, train, and provide outplacement services for displaced

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civilian employees. Any of the 3,400 nationwide One-Stop Career Centers can be located by calling the toll-free help line at 1-877-872-5627 (1-877-US2-JOBS) (TTY: 1-877-889-5627).[2]

C4.3.4. Separation Incentive Programs.

C4.3.4.1. Voluntary Separation Incentive Pay (VSIP). VSIP, commonly known as a "buyout," is a permanent DoD authority that may be used to encourage displaced employees to separate voluntarily by resignation or retirement as a way of avoiding an involuntary separation of another employee. Employees declining a transfer of function are not eligible for a buyout. Under this program, cash payments are made in lump sum or approved installments, and they are based on the severance pay formula and currently may not exceed $25,000 before taxes.

C4.3.4.2. VSIP Phase II. The VSIP Phase II program expands the use of buyouts beyond the boundaries of individual activities within the continental United States and authorizes managers at non-downsizing activities to use buyouts to create vacancies to place PPP registrants facing RIF separation at downsizing DoD activities. Operated through the PPP, VSIP Phase II buyout and relocation costs are paid by the downsizing activity where the eligible PPP registrant is displaced. This program is particularly effective when there are participating non-downsizing DoD activities in the same commuting area as the closing installation.

C4.3.4.3. Voluntary Early Retirement Authority (VERA). The VERA program is a permanent DoD authority that allows eligible employees to retire early and receive a reduced annuity. It may be used to reduce the number of personnel employed by the Department of Defense. The reasons for approving VERA include RIF or transfer of function. Eligible employees must be at least 50 years of age with 20 years of service, or at any age with 25 years of service.

C4.3.4.4. Voluntary Reduction in Force (VRIF). The VRIF program allows employees not affected by RIF to volunteer for separation to save another employee from being affected by RIF. VRIF volunteers may receive RIF separation benefits (such as severance pay or temporary continuation of Federal Employee Health Benefits (FEHB) coverage) if otherwise eligible, but they are not eligible for PPP registration or VSIP.

C4.3.4.5. Outplacement Subsidy. The Department of Defense has authorized activities discretionary authority to pay up to $20,000 Permanent Change of Station relocation expenses when another Federal agency hires and relocates a surplus employee in receipt of a RIF separation notice. Eligible employees are responsible for applying for vacant positions in other Federal agencies, and for advising those agencies of the available outplacement subsidy. Employees who decline valid job offers through the DoD PPP are ineligible for outplacement subsidies.

[2] Or at www.servicelocator.org. In addition, online services are available at www.careeronestop.org.

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C4.3.5. Retraining Initiatives and Outplacement Assistance.

C4.3.5.1. Workforce Investment Act Eligibility. Through the Workforce Investment Act (WIA), the DoL provides funding for retraining and readjustment assistance to displaced Federal employees, including nonappropriated fund (NAF) employees. This assistance, which includes retraining, counseling, testing, placement assistance, and other support activities, is available to employees through State Employment Security Agencies. Employees assigned to DoD installations approved for closure or realignment may apply for WIA assistance up to 24 months in advance of the effective date of the closure or realignment.

C4.3.5.2. Hiring Preference for Contractor Jobs. As required by Part 52-207-3, Federal Acquisition Regulation (reference (af)), employees at closing installations have the right of first refusal for certain jobs with private contractors hired to prepare the installation for closure or to maintain it after closure. The contractor must afford eligible and qualified DoD employees right of first refusal before hiring from any other source. Normally, these jobs are in areas of environmental restoration, utilities modification, roads and grounds work, security, and fire protection.

C4.3.5.3. Funds for Outplacement Assistance. The Department of Defense may authorize use of appropriated funds for outplacement (placement outside the Department of Defense including private industry) assistance when the outplacement benefits the Department and costs are reasonable. Installation commanders may authorize outplacement assistance for various activities, including the following:

C4.3.5.3.1. Career transition and remedial training.

C4.3.5.3.2. Contractor placement services, in which there is no job placement fee.

C4.3.5.3.3. Administrative support, such as use of computers, copiers, and other equipment.

C4.3.5.3.4. Clerical support to prepare job applications or resumes.

C4.3.6. Post Separation Benefits and Entitlements.

C4.3.6.1. Extended Employment for Retirement and Health Benefits Eligibility (FEHB). Downsizing organizations must retain eligible civilian employees in an annual leave status beyond their scheduled separation date (provided they have adequate annual leave balances) to attain first eligibility for immediate retirement or to become eligible for continued health benefit coverage during retirement. This provision also covers NAF employees to the extent they become eligible for their retirement and health benefits programs.

C4.3.6.2. Temporary Continuation of Federal Employee Health Benefits Coverage. Under the FEHB program, downsizing organizations will pay the government's share of an eligible employee's health insurance premium (and applicable administrative fees) for a period of up to 18 months after involuntary separation from a position or voluntary separation from a surplus position. This provision applies to employees enrolled in the FEHB Program at the time of separation and are separated by RIF, resign after receipt of a RIF separation notice, volunteer

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for RIF, or resign from a surplus position. Employees serving on temporary appointments receiving a government contribution to their FEHB coverage, and whose appointment terminates (or is allowed to expire) because of RIF, are also eligible. Employees declining a transfer of function are not eligible.

C4.3.6.3. Automatic Waiver of FEHB Minimum Participation Requirement. To continue FEHB coverage as a retiree, employees must normally be enrolled in the program for at least 5 years immediately prior to separation. However, OPM has granted pre-approved waivers of the 5-year requirement to DoD employees covered under the FEHB program who:

C4.3.6.3.1. Have been covered continuously since October 1 for each succeeding fiscal year;

C4.3.6.3.2. Retire during the DoD VERA and VSIP period; and

C4.3.6.3.3. Receive a VSIP; or

C4.3.6.3.4. Take early optional retirement; or

C4.3.6.3.5. Take discontinued service retirement based on an involuntary separation due to RIF, directed reassignment, reclassification to a lower grade, or abolishment of position.

C4.3.6.4. Unemployment Compensation. Most employees who become unemployed due to BRAC will have the protection of unemployment compensation. To file a claim, an employee should contact the nearest State Workforce Agency in the state in which they became unemployed to determine eligibility.[3] When separating a civilian from DOD employment, the HRO should provide the employee with Standard Form 8 ("Notice to Employees about Unemployment Insurance") and/or Standard Form 50 ("Notification of Personnel Action"). The information contained in these forms is necessary to process and pay unemployment compensation claims.

C4.3.6.5. Severance Pay. Severance pay is based on a formula that includes years of Federal service, basic pay at the time of separation, age, and previous severance pay. It also includes an adjustment for employees over age 40. Employees who receive a buyout and/or those who will be eligible for an immediate civil service or military annuity on or before their separation date are not eligible for severance pay. Severance pay eligibility also terminates if an employee declines a reasonable job offer prior to separation. A job offer is considered reasonable if it is from a DoD installation in the commuting area, has the same tenure and work schedule as the current position, and is no more than two grades or pay levels below the current position. Severance pay may be paid on a bi-weekly basis or in a lump sum.

[3] A link to all State Workforce Agencies can be found at http://workforcesecurity.doleta.gov/map.

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C4.3.7. Continuation of Operations.

C4.3.7.1. Reassignment or Promotion to Critical Vacancies. The Department of Defense has waived the applicable provisions of the PPP to permit the permanent reassignment or promotion of employees to vacancies that are critical to operations. See the section on "Drawdown Considerations" within this chapter for further information regarding critical vacancies.

C4.3.7.2. Job Exchanges. Job exchanges are concurrent reassignments excepted from the PPP to accommodate the placement of a displaced employee from a closing activity to a non-closing activity. Specifically, reassignments are authorized for a job exchange between an employee eligible for optional or discontinued service retirement at an activity not scheduled for closure and an employee (not eligible for retirement) at a closing activity. Both activities must agree to the exchange. Employees placed at the closing activity must agree to remain in the position until released by the installation, and they must forfeit PPP registration. The closing installation pays all permanent change of station relocation expenses for both reassigned employees.

C4.3.7.3. Annual Leave Restoration. Employees permanently assigned to an installation designated for closure may have the right to accumulate annual leave without regard to existing "use-or-lose" limitations. Leave in excess of the statutory limit is restored and placed in a separate leave account. This provision does not apply to employees assigned to organizations or functions located at closing installations, but designated to continue after closure or when such organizations or functions are relocating within the commuting area of the closing activity. Lump sum payment for this leave is required when the employee is assigned to a position in a Federal agency outside the Department of Defense or to another position at a DoD installation that is not being closed or realigned.

C4.3.7.4. Employment of Annuitants. 5 U.S.C. 9902(j) (reference (ag)) gives the Secretary of Defense authority to hire and set the salary of newly appointed annuitants, that is, individuals receiving an annuity from the Civil Service Retirement and Disability Fund, without a reduction in pay or of the annuity. According to DoD policy, this authority may be delegated to installation commanders and annuitants hired under this policy serve at the will of the appointing authority. Delegated officials may elect to reemploy annuitants in positions, including those at closing installations, subject to the following criteria:

C4.3.7.4.1. In positions that are hard to fill as evidenced by historically high turnover, a severe shortage of candidates, or other significant recruiting difficulty; or positions that are critical to the accomplishment of the organization's mission, or the completion of a specific project or initiative.

C4.3.7.4.2. Individuals with unique or specialized skills, or unusual qualifications that are generally not available.

C4.3.7.4.3. In positions for not more than 2,087 hours (e.g., 1 year full-time or 2 years part-time) to mentor less experienced employees or provide continuity during critical organizational transitions.

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C4.3.7.5. Temporary Appointment Time Limit Exception. Commanders at installations scheduled to close within 2 years may approve exceptions to the regulatory requirements regarding the 2-year maximum service limit for temporary appointments and to the restrictions on successive temporary appointments to the same or successor positions.

C4.3.7.6. Elimination of 120-Day Detail Limitation. As authorized by 5 U.S.C. 3341(b)(2) (reference (ah)), the 120-day limitation on details does not apply to those made in connection with the closure or realignment of a military installation pursuant to a base closure law.

C4.4. HOMEOWNERS ASSISTANCE PROGRAM

C4.4.1. In recognition of the importance of home ownership and financial security to military and civilian employees and their families, the Homeowners Assistance Program (HAP) provides some financial relief to military and civilian homeowners whose homes lose value as a result of an installation closure or realignment. This relief can be provided through a variety of methods after a program has been authorized for an impacted area.

C4.4.2. Eligibility.

C4.4.2.1. To qualify, applicants must be one of the following:

C4.4.2.1.1. A military member (including the Coast Guard) or Federal civilian employee assigned or employed at or near the installation announced for closure or realignment.

C4.4.2.1.2. A NAF employee who was assigned to the installation on the closure or realignment announcement date.

C4.4.2.1.3. Personnel transferred or terminated within 6 months prior to the announcement who were owner-occupants at the time of transfer.

C4.4.2.1.4. Civilian and military personnel on an overseas tour who transferred within 3 years prior to the announcement and are homeowners in the area.

C4.4.2.1.5. Civilian employee homeowners on an overseas tour with reemployment rights in the area affected by the closure.

C4.4.2.1.6. Any military member homeowner ordered into on-post housing within 6 months prior to the announcement.

C4.4.2.2. In addition, applicants must be relocating beyond commuting distance from the area. Commuting distance varies due to location, major highways, and other factors and is determined by a market impact study conducted by the U.S. Army Corps of Engineers. All applicants must have been the owner-occupant of the home for which assistance is being requested on the announcement date. These are the general eligibility requirements, but other qualifying criteria exist.

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C4.4.3. Description. HAP is authorized in Section 1013, Demonstration Cities and Metropolitan Development Act of 1966, Public Law 89-754 (reference (ai)), as amended. It provides for some monetary relief for eligible Federal personnel—both military (including Coast Guard) and civilian—faced with losses on the sale of their primary residence when, as a result of the actual or pending closing of such base or installation, in whole or in part, or if as the result of such action and other similar action in the same area, there is no present market for the sale of such property upon reasonable terms and conditions.

C4.4.3.1. HAP offers four general forms of assistance:

C4.4.3.1.1. Reimbursement for part of the loss from selling a home.

C4.4.3.1.2. Assistance if there are not enough proceeds from the sale of a home to pay off the mortgage.

C4.4.3.1.3. Purchase of a home by paying off the mortgage.

C4.4.3.1.4. Assistance if there has been a default on the mortgage.

C4.4.3.2. Military and civilian personnel should be aware that the program requires a lengthy timeframe to assess the impact of a base closure or realignment on a local real estate market. As a result, implementation of this program is often subsequent to the closure of an installation.[4]

C4.4.4. Process.

C4.4.4.1. Before HAP can be authorized, the Department of Defense must make an official announcement of a base closing or realignment action that affects a community. In addition, the Army Corps of Engineers must determine that real estate values have dropped as a direct result of the base closing or realignment. If these conditions are met, the local command may submit a request for approval and implementation of HAP.

C4.4.4.2. Individuals can help support the command's request with signed and dated statements describing their efforts to sell their homes, along with copies of listing agreements, newspaper ads, or other evidence. If a property was sold to another party, the owner should include one copy of the deed transferring the property to the buyer and one copy of the closing and settlement statement.

C4.4.4.3. If the mortgage is either a Department of Veterans Affairs (VA) guaranteed or Federal Housing Authority (FHA) insured and the house was transferred on a private sale by an assumption of the existing mortgage, the seller should request a release of liability from either VA or FHA. If the buyer is not acceptable to VA or FHA, the seller will not receive HAP benefits until a release of liability is obtained.

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[4] For more detailed information, go to http://www.hq.usace.army.mil/hap/.

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C4.4.5. Final Determination. The Army Corps of Engineers will analyze the community situation, conduct market surveys, and make recommendations to the Deputy Assistant Secretary of the Army (Installations & Housing) for final determination and program approval. If the conditions are met, and a program is approved, the Army Corps of Engineers will establish a HAP program that will be administered by real estate specialists within the Army Corps of Engineers in coordination with the installation commander.

C4.5. DRAWDOWN CONSIDERATIONS

C4.5.1. In summary, the following major concerns are paramount at closing and realigning installations:

C4.5.1.1. Providing equitable and humane treatment of employees.

C4.5.1.2. Maintaining high morale among the workforce.

C4.5.1.3. Keeping employees informed during every step of the process.

C4.5.1.4. Retaining key personnel as long as their services are needed.

C4.5.1.5. Meeting mission requirements as the size of the workforce decreases.

C4.5.1.6. Taking care of employees and their families.

C4.5.2. The programs and authorities described in this chapter are designed to help commanders and leaders through this process. Affected personnel who want more information are encouraged to visit the DoD BRAC Human Resources web site.[5]

[5] http://www.cpms.osd.mil/bractransition.

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C5. CHAPTER 5

REAL PROPERTY DISPOSAL

C5.1. INTRODUCTION It is in the best interest of the Department of Defense and the affected communities to complete the disposal of real property at closed or realigned installations as rapidly as possible to expedite its reuse. The Department of Defense is committed to using the most appropriate real property conveyance authorities to achieve rapid disposal.

C5.2. PREPARING FOR SCREENING AND DISPOSAL

C5.2.1. The Military Department must examine the installation's property records to determine the full extent of property interests and rights. There are often restrictions on property that will affect its disposal and future uses. Portions may be subject to long-term easements for utilities or access; other parts of the installation may be located on leased property. Property may be subject to reversionary interests, public trust doctrine, or public land withdrawal terms. In each case, the Military Department must determine the effect of such interests prior to initiating the property disposal process. It also must determine the legislative jurisdiction status of the property and, if appropriate, initiate prompt action to retrocede jurisdiction to the State.

C5.2.2. Contracts for privatization of housing and utilities, as well as other agreements such as cable television franchises, must be examined to evaluate the impact of closure and realignment on those contractual relationships. In addition, water, air, and mineral rights and other natural infrastructure assets at the installation must be identified because they may affect the value of the property.

C5.2.3. Reversionary Rights. In some cases, the deed for the government's acquisition of the property may contain a provision stating that the property will revert to the former owner in the event it ceases to be used for military purposes. The terms of the reversion clause in the deed will determine whether the property is available for use by another Military Department or Federal agency, reverts to the former owner upon the operational closure of the installation, or can be disposed of under other processes.

C5.2.4. Property Subject to the Public Trust Doctrine. Many installations are located in coastal areas and portions of the base may have been constructed on filled land. As long as the Federal Government owns such property, it can be used for any government purpose. If the Federal Government acquired the property from a State or local government (the trustee), it may be subject to the public trust doctrine. The property acquisition documentation must be examined to determine whether the State's interest was extinguished by Federal acquisition. This issue should be resolved before property is screened for other DoD or Federal interest.

C5.2.5. Property Subject to Legislative Disposal Provisions. Federal laws should be checked to determine if any law obligates the Department of Defense to dispose of the property to a specific recipient or in a specific manner.

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C5.3. IDENTIFYING DOD AND FEDERAL PROPERTY NEEDS

C5.3.1. The Military Department shall issue official notices of availability to other DoD Components and Federal agencies. The notices will generally describe the number of acres and the improvements on the property; the reservations or restrictions relating to the title; and provide available environmental information on the condition of the property. The notices will inform agencies that they:

C5.3.1.1. Will be required to pay fair market value (Military Departments and Coast Guard are eligible for no-cost transfers) as determined by the Secretary, and that the Department of Defense will not ordinarily agree to waive this requirement per FMR 41 CFR 102.75 (reference (ab));

C5.3.1.2. Must agree to accept custody of the property when offered; and

C5.3.1.3. Must agree to accept the property in "as-is" condition, and that the Military Department will not agree to retain continuing liability for the environmental condition of the property post-transfer or otherwise "indemnify" the receiving agency.

C5.3.2. Agencies will be informed that they must express initial interest in the property within 30 days of the date of the notice of availability and submit a completed General Services Administration (GSA) Form 1334, "Request for Transfer of Excess Real and Related Personal Property," reference (aj), signed by the head of the agency or department within 60 days of the date of the notice of availability. Other Military Departments must submit a completed DD Form 1354 (reference (ak)) within the same timeframe. Figure C2.F1. gives an overview of the entire process.

C5.3.3. Withdrawn Public Domain Lands.

C5.3.3.1. Withdrawn lands are public domain lands (usually in the western United States or Alaska) that are under the jurisdiction of the Department of the Interior (DOI) for which use for military purposes has been authorized for a period of time. The property may have been withdrawn for military use by an Executive Order (EO) or by an Act of Congress. For such lands, the Military Department responsible for the closing installation will provide the Bureau of Land Management (BLM) with the notice of availability, as well as information about which, if any, public domain lands will be affected by the installation's closing. Before the date of approval of the closure, the Department should request that BLM review its land records to identify any withdrawn public domain lands at the closing installation. Any property record discrepancies between BLM and the Military Department should be resolved during this time period. The BLM will notify the Military Department of the final agreed-upon description of the public domain lands.

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43 CFR 2372—"(a) Agencies holding withdrawn or reserved lands which they no longer need will file, in duplicate, a notice of intention to relinquish such lands in the proper office (see Sec. 1821.2-1 of this chapter). (b) No specific form of notice is required, but all notices must contain the following information: (1) Name and address of the holding agency. (2) Citation of the order which withdrew or reserved the lands for the holding agency. (3) Legal description and acreage of the lands, except where reference to the order of withdrawal or reservation is sufficient to identify them. (4) Description of the improvements existing on the lands. (5) The extent to which the lands are contaminated and the nature of the contamination. (6) The extent to which the lands have been decontaminated or the measures taken to protect the public from the contamination and the proposals of the holding agency to maintain protective measures. (7) The extent to which the lands have been changed in character other than by construction of improvements. (8) The extent to which the lands or resources thereon have been disturbed and the measures taken or proposed to be taken to recondition the property. (9) If improvements on the lands have been abandoned, a certification that the holding agency has exhausted General Services Administration procedures for their disposal and that the improvements are without value. (10) A description of the easements or other rights and privileges which the holding agency or its predecessors have granted over the lands. (11) A list of the terms and conditions, if any, which the holding agency deems necessary to be incorporated in any further disposition of the lands in order to protect the public interest. (12) Any information relating to the interest of other agencies or individuals in acquiring use of or title to the property or any portion of it. (13) Recommendations as to the further disposition of the lands, including where appropriate, disposition by the General Services Administration."

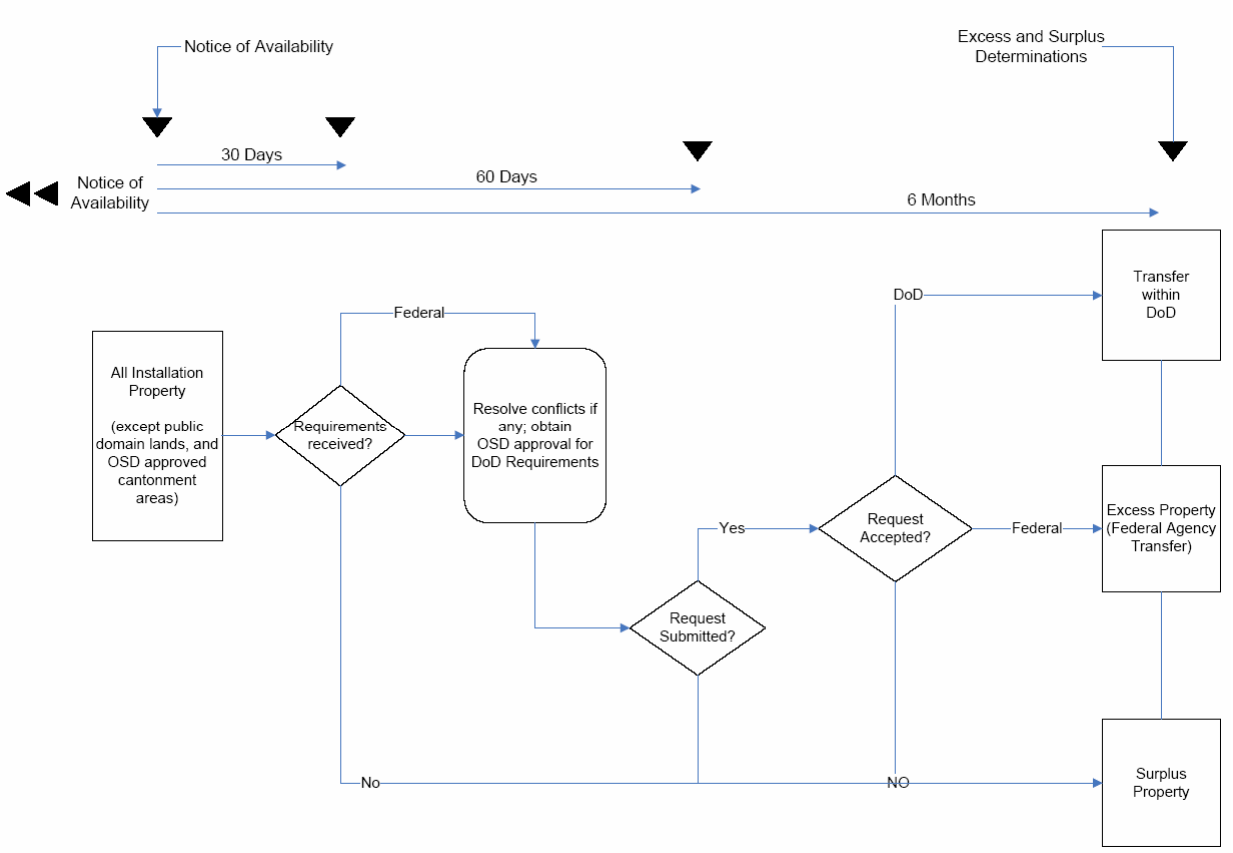
C5.3.3.2. When the Military Department agrees with BLM's findings, BLM will begin determining whether the lands are suitable for DOI programs. The Military Department will transmit a Notice of Intent to Relinquish (see above quote from 43 CFR 2372, reference (al)) to BLM as soon as the property is identified as excess to DoD needs. BLM will complete its suitability determination within 30 days of receiving the Notice of Intent to Relinquish. If public domain lands are to be used by a DoD Component, BLM will determine whether the existing authority for DoD use must be modified. If BLM determines that the land is suitable for return to the public domain, it notifies the Military Department that the Secretary of the Interior will accept the Military Department's relinquishment of the land. If the land is not found to be suitable for return to the public domain, BLM will so notify the Military Department, which will then dispose of the property pursuant to the applicable real property disposal authorities described in this chapter.

C5.3.4. Air Traffic Control and Air Navigation Equipment. Within 90 days of the notice of availability, FAA will survey any air traffic control and air navigation equipment at the installation to determine what is needed to support the continuing air traffic control, surveillance, and communications functions supported by the Military Department. FAA also will identify the facilities needed to support the National Airspace System. FAA requests for property to manage the National Airspace System are not subject to the application process described in paragraph C5.3.6; instead, FAA will work with the Military Department to prepare an agreement to take over the facilities and obtain the real property rights necessary to control the air space being relinquished.

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C5.3.5. Property for Indian Tribes. As part of Federal screening, the Bureau of Indian Affairs (BIA) will have an opportunity to request that property be held in trust on behalf of Federally recognized Indian tribes. Property that is held in trust for Indian tribes is exempt from local planning and zoning requirements as well as taxation, as with Federal property. It is DOI's responsibility to contact the federally recognized tribes in the vicinity of the installation after it receives the Notice of Availability and to determine whether to submit a Request for Transfer of Excess Real and Related Personal Property on behalf of a tribe. Such requests must be signed by the Secretary of the Interior or an authorized designee. The Military Department will evaluate these requests using the same criteria applied to other Federal agency transfer requests. Indian tribes may not acquire excess real property directly by Federal agency transfer from the Military Department; they need to make their interests known through the BIA. An Indian tribe also may seek to acquire surplus property through a public benefit conveyance for education, public health, or other applicable public benefit purposes through the appropriate sponsoring agency, as well as through public sale, in accordance with the regulations applicable to those conveyance authorities. An Indian tribe interested in a public benefit conveyance should consult with the LRA and applicable Federal sponsoring agency in preparing this request.

C5.F1. Property Determinations



C5.3.6. Receiving and Evaluating Requests for Excess Property from Military Departments and Federal Agencies

C5.3.6.1. Requests for transfer of real and related personal property may be made by a

Military Department (for its own requirements or those of DoD Components whose property requirements it supports) or by other Federal agencies. The closure or realignment of an installation (whether leased or owned) does not preclude a DoD component (even the component currently utilizing the installation) from using that installation for missions or functions other than those that were the subject of the closure or realignment recommendation. The Military Department will keep the LRA informed about DoD and Federal agency interests. Federal agencies are also strongly encouraged to consult with the LRA on the compatibility between Federal uses and the LRA's redevelopment planning.

C5.3.6.2 A request from a DoD Component or Federal agency must contain the following:

C5.3.6.2.1. A completed GSA Form 1334 (reference (aj)). This form must be signed by the head of the department or agency requesting the property, or by an authorized designee. If the authority to acquire property has been delegated, a copy of the delegation must accompany the form (for requests from other Military Departments, a DD Form 1354 (reference (ak)) is required instead of GSA Form 1334).

C5.3.6.2.2. A statement from the head of the requesting Component or agency that the request does not establish a new program (i.e., one that has never been reflected in a previous budget submission or Congressional action).

C5.3.6.2.3. A statement that the requester has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal agencies and outleases to other organizations.

C5.3.6.2.4. A statement certifying that the requested property would provide greater long-term economic benefits than acquisition of a new facility or other property for the program.

C5.3.6.2.5. A statement that the program for which the property is requested has long-term viability.

C5.3.6.2.6. A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility.

C5.3.6.2.7. A statement certifying that the size and location of the property requested are consistent with the actual requirement.

C5.3.6.2.8. A statement that reimbursement to the Military Department, at fair market value as determined by the Military Department, will be made at the later of January 2008 or the date of transfer. This requirement does not apply to requests from other Military Departments or the Coast Guard.

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C5.3.6.2.9. A statement that the requesting agency agrees to accept the care, custody, and costs for the property on the date the property is available for transfer, as determined by the Military Department.

C5.3.6.2.10. A statement that the requesting agency agrees to accept transfer of the property in its existing condition, including environmental, and further accepts all future government liabilities for conditions on the property, such as remediating releases of hazardous substances, pollutants, or contaminants, as of the date of transfer.

C5.3.6.3. The Military Department will use the following criteria when reviewing applications from DoD and Federal requesters:

C5.3.6.3.1. The requirement upon which the request is based is both valid and appropriate.

C5.3.6.3.2. The proposed Federal use is consistent with the highest and best use of the property. (See the text box below for the definition of "highest and best use," which pertains to both Federal and non-Federal requesters.)

C5.3.6.3.3. The requested transfer will not have an adverse impact on the transfer of any remaining portion of the installation.

C5.3.6.3.4. The proposed transfer will not establish a new program or substantially increase the level of an agency's existing programs.

C5.3.6.3.5. The application offers fair market value for the property (does not apply to the Department of Defense and Coast Guard).

C5.3.6.3.6. The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Military Department, in accordance with the "as-is" transfer policy.

C5.3.6.3.7. The proposed transfer is in the best interest of the Federal government.

41 CFR Part 102-71.20 "Highest and best use" means the most likely use to which a property can be put, which will produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social and environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (e.g., zoning, physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access, roads, location, and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural.

C5.3.6.4. The Secretary of the Military Department responsible for the installation will forward requests by other Military Departments to the Deputy Under Secretary of Defense

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(Installations and Environment) for review before making a final decision. If competing demands arise (e.g., two Federal agencies submit acceptable applications for the same property), the Military Department will resolve the conflict considering first the paramount needs of the national defense mission, followed by the homeland defense mission, followed by the views of the LRA and other appropriate factors.

C5.3.7. Making Final Determinations on Military Department and Federal Agency Transfer Requests.

C5.3.7.1. The Military Departments will make the final determination regarding DoD and Federal property needs for excess property at closing and realigning installations no later than 6 months after the date of approval of closure or realignment. Consistent with DoD policy that rapid property disposal is normally in the best interest of all parties including the affected local communities, the time period for making final determinations regarding DoD and Federal property needs will be extended only by the Secretary of the Military Department in circumstances demonstrating good cause**.**

C5.3.7.2. The transfer of property to the receiving Military Department or Federal agency should be completed as quickly as possible following final approval of transfer requests. At a minimum, the head of the Component or agency requesting the property must make a firm commitment to accept the property, in accordance with the provisions of this chapter, under the terms that the Military Department has offered before the remainder of the installation is declared surplus. This should occur within the same 6-month period.

C5.3.8. If a requesting agency decides not to accept the transfer of a portion of the installation after the rest of the property has been determined surplus and redevelopment planning is underway, it significantly complicates the planning process and the identification of surplus property for use by the homeless, and it increases costs for all participants. Similarly, if an agency makes an untimely property transfer request after the property has already been determined surplus, it can also delay and frustrate redevelopment planning and increase costs to all participants.

C5.3.9. Accordingly, such untimely requests to withdraw previously approved transfer requests or submit new transfer requests after surplus determinations may only be approved by the Secretary of the Military Department and then only in cases with an unusually compelling and unforeseen public interest that was not known when the surplus determination was made. After the Military Department has made final determinations on the transfer requests, it will publish a formal surplus property determination, as further discussed in Section C5.4.

C5.4. IDENTIFYING INTERESTS IN SURPLUS PROPERTY

C5.4.1. Base closure makes the identification of property for use by the homeless an integral part of the redevelopment planning process for the entire installation. This section describes how the Military Department and the LRA will apply this process to identify interests of State and local governments, representatives of the homeless, and other interested parties in surplus Federal property at the closing or realigning installation.

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C5.4.2. Publicizing the Availability of Property.

C5.4.2.1. Establishment and Recognition of a Local Redevelopment Authority. As soon as practicable after the list of installations recommended for closure or realignment is approved, the Department of Defense will recognize an LRA for each installation where there is surplus real property for disposal. The LRA, an entity established by a State or local government, is recognized by the Secretary of Defense as the entity responsible for preparing the redevelopment plan for any property made surplus by closure or realignment of an installation. State and local governments are urged to create a redevelopment authority that includes the governmental body or bodies, if any, with land-use planning (i.e., zoning) authority over the installation, because the redevelopment plan that is prepared by the LRA may not be able to be implemented if the land-use planning authority is unwilling to enact zoning ordinances that are consistent with the redevelopment plan. OEA, after consulting with the Military Department, is responsible for officially recognizing an LRA and assisting LRAs in their redevelopment planning responsibilities. After it recognizes an LRA, OEA will publish information about it (including name, address, telephone number, and point of contact) in the Federal Register and in a newspaper of general circulation in the vicinity of the installation.

C5.4.2.2. Surplus Property Notice. As soon as possible after the surplus determination has been made, the responsible Military Department shall:

C5.4.2.2.1. Provide information on the surplus real property to HUD and the installation's LRA. If there is no recognized LRA at the time of the surplus determination, the Military Department will provide this information to the governor of the State and the heads of local governments concerned.

C5.4.2.2.2. Publish information about the surplus real property in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation. The published information should be similar to that furnished to DoD Components and Federal agencies in the notice of availability. The surplus notice will include information about the LRA if one has been recognized, along with the Military Department's determination, based on a highest and best use analysis, concerning availability of some or all of the surplus real property for conveyance to State and local governments and other eligible entities for public benefit purposes. Examples of such purposes include education, health, parks and recreation, historic monuments, public airports, highways, correctional facilities, ports, self-help housing, and wildlife conservation. The Military Department will send a copy to the Federal agencies that sponsor or approve such conveyances.

C5.4.3. Soliciting Notices of Interest.

C5.4.3.1. The base closure law (reference (c)) requires that the LRA publish the time period that the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties located in the vicinity of the installation ("interested parties"). A representative of the homeless need not be located in the vicinity of the installation as long as the representative proposes to serve the homeless population in the vicinity of the installation. It is in the LRA's interest to identify all interests in the property before preparing the redevelopment plan. If the Military Department receives any

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notices of interest, it should provide them to the LRA for consideration in its redevelopment planning.

C5.4.3.2. The LRA and the Military Department will provide interested parties with information regarding surplus property, including the condition of existing structures and the availability of utilities. The Military Department will also arrange for the LRA and other interested parties to have the opportunity to inspect the property.

C5.4.3.3. The LRA will give public notice and hold hearings to allow interested parties and members of the public to provide their views regarding the proposed land-use plan and redevelopment of the base, including consideration of the needs of the homeless.

C5.4.3.4. Representatives of the Military Department, OEA and HUD will be available to assist the LRA in identifying interests in base property (including how to conduct outreach efforts) and addressing expressions of interest in its redevelopment plan.

C5.4.4. Local Timeframes. Although DoD encourages communities to begin planning early, the local redevelopment planning process and identification of interests in surplus property must begin no later than the completion of Federal screening—the date of the Federal Register publication of available surplus property. Within 30 days after the Military Department publishes the Determination of Surplus, the LRA shall publicize its notice for expressions of interest in a local newspaper, and through other means as deemed appropriate. The deadline for expressing interest is set by the LRA, but it can be no earlier than 3 months and no later than 6 months after publication of the LRA's notice for expressions of interest. The LRA notice shall inform interested parties of its process, including the required format, content, deadline, and address for submitting formal notices of interest.

C5.4.5. Outreach.

C5.4.5.1. The Military Department and LRA shall assist State and local governments, representatives of the homeless, and other interested parties in evaluating surplus property at the installation by providing information on the condition of the property, hosting site visits, and so forth. The LRA should coordinate these evaluations with the installation commander to ensure that they do not disrupt any ongoing military activities. Furthermore, the LRA is required to conduct outreach efforts to provide information on the surplus real property to representatives of the homeless. The LRA should contact the local HUD field office for an updated list of persons and organizations that are representatives of the homeless in the vicinity of the installation. The LRA should then invite these representatives to participate in the redevelopment planning process. This participation should occur in conjunction with a workshop, seminar, or forum in which the LRA and representatives of the homeless discuss homeless needs in the vicinity of the installation and whether there is appropriate property at the installation to meet those needs. The LRA is responsible for formulating and undertaking this outreach effort to make redevelopment planning as inclusive as possible.

C5.4.5.2. The LRA should, while conducting its outreach efforts, work with Federal agencies that sponsor public benefit conveyances and refer potentially interested parties to the appropriate PBC sponsoring agency. Those agencies can provide information on parties in the

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vicinity of the installation that might be interested in and eligible for public benefit conveyances. The LRA should inform such parties of the availability of the property and consider their interests within the planning process. The Military Department will notify sponsoring Federal agencies of surplus property that is available for consideration for public benefit conveyance. It will also keep the LRA apprised of any expressions of interest. Expressions of interest from parties potentially eligible to receive public benefit conveyances are not required to be incorporated into the redevelopment plan, but they must be considered. The appropriate sponsoring Federal agency will determine all public benefit conveyance property recipients.

C5.4.6. Information Required in Notice of Interest from Representative of the Homeless.

C5.4.6.1. The term "homeless person" is defined as an individual who lacks a fixed, regular, and adequate night-time residence; or an individual or family that has a primary nighttime residence that is a supervised publicly or privately operated shelter designated to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill) or a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for human beings.

C5.4.6.2. Organizations that propose to use base property to provide services to the disabled or to low-income persons who are not homeless are not eligible to receive a homeless assistance conveyance. All questions regarding the eligibility of a particular entity should be referred to HUD headquarters base closure team.

C5.4.6.3. The following text box details what must be included in the notice of interest from representatives of the homeless.

32 CFR Part 176.20(c)(2)(ii) "The notices of interest from representatives of the homeless must include:

(A) A description of the homeless assistance program proposed, including the purposes to which the property or facility will be put, which may include uses such as supportive services, job and skills training, employment programs, shelters, transitional housing or housing with no established limitation on the amount of time of residence, food and clothing banks, treatment facilities, or any other activity which clearly meets an identified need of the homeless and fills a gap in the continuum of care;

(B) A description of the need for the program;

(C) A description of the extent to which the program is or will be coordinated with other homeless assistance programs in the communities in the vicinity of the installation;

(D) Information about the physical requirements necessary to carry out the program including a description of the buildings and property at the installation that are necessary to carry out the program;

(E) A description of the financial plan, the organization, and the organizational capacity of the representative of the homeless to carry out the program; and

(F) An assessment of the time required to start carrying out the program."

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C5.4.6.5. Although the LRA may publicly disclose the identity of the representative of the homeless who submitted a notice of interest, pursuant to the base closure law it may not release any information submitted to the LRA regarding the capacity of the representative of the homeless to carry out its program, a description of the organization, or the organization's financial plan for implementing the program without the consent of the representative of the homeless, unless such a release is authorized under Federal law and under the law of the State and communities in which the installation is located.

C5.4.6.6. The notices of interest from entities other than representatives of the homeless should specify the name of the entity and its specific interest in property or facilities, along with a description of the planned use. The LRA may also request that these entities submit a description of the planned use to the sponsoring Federal agency as well.

> Public Law 101-510, Section 2905(b)(7)(E)(ii) -- A redevelopment authority may not release to the public any information submitted to the redevelopment authority under clause (i)(V) without the consent of the representative of the homeless concerned unless such release is authorized under Federal law and under the law of the State and communities in which the installation concerned is located.

C5.4.7. Preparing Redevelopment Plan and Accommodating Homeless Assistance Needs.

C5.4.7.1. The LRA will give public notice and hold at least one public hearing to allow interested parties and members of the public to present their views regarding the proposed redevelopment of the installation and property that may be considered to help the homeless. The LRA and the Military Department should provide interested parties information regarding the surplus property, including the condition of existing structures and the availability of utilities, and they should be given an opportunity to inspect the site.

> 32 CFR 176.20(c) Responsibilities of the LRA:
>
> (5) Develop an application, including the redevelopment plan and homeless assistance submission, explaining how the LRA proposes to address the needs of the homeless. This application shall consider the notices of interest received from State and local governments, representatives of the homeless, and other interested parties. This shall include, but not be limited to, entities eligible for public benefit transfers under either 40 U.S.C. 471 et. seq., or 49 U.S.C. 47151-47153; representatives of the homeless; commercial, industrial, and residential development interests; and other interests. From the deadline date for receipt of notices of interest described at §176.20(c)(1), the LRA shall have 270 days to complete and submit the LRA application to the appropriate Military Department and HUD. The application requirements are described at §176.30.
>
> (6) Make the draft application available to the public for review and comment periodically during the process of developing the application. The LRA must conduct at least one public hearing on the application prior to its submission to HUD and the appropriate Military Department. A summary of the public comments received during the process of developing the application shall be included in the application when it is submitted.

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C5.4.7.2. Within 270 days after the deadline for notices of interest, the LRA is required to complete its redevelopment plan for the closing installation and submit its application (containing the redevelopment plan and homeless assistance submission) to HUD and the Military Department. If the LRA fails to complete the redevelopment plan within the time provided, the Military Department may consider implementing procedures set out in this chapter for identifying property for the homeless and completing the disposal process without a redevelopment plan.

C5.4.8. Considering and Accommodating Notices of Interest.

C5.4.8.1. Under the base closure law, the LRA is required to consider the notices of interest received from the representatives of the homeless and from other interested parties when preparing their plan. The LRA must balance the needs of the communities for economic redevelopment and other development with the needs of the homeless. In considering and accommodating homeless assistance needs, the LRA should be mindful of the criteria that HUD uses in evaluating the homeless assistance provisions of redevelopment plans. The criteria from 24 CFR 586.35 (reference (am)) and 32 CFR 176.35 (reference (e)) are shown in the following text box.

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CFR Section 176.35 (b) HUD's review of the application --

Standards of review. The purpose of the review is to determine whether the application is complete and, with respect to the expressed interest and requests of representatives of the homeless, whether the application:

1) *Need.* Takes into consideration the size and nature of the homeless population in the communities in the vicinity of the installation, the availability of existing services in such communities to meet the needs of the homeless in such communities, and the suitability of the buildings and property covered by the application for use and needs of the homeless in such communities. HUD will take into consideration the size and nature of the installation in reviewing the needs of the homeless population in the communities in the vicinity of the installation.

(2) *Impact of notices of interest.* Takes into consideration any economic impact of the homeless assistance under the plan on the communities in the vicinity of the installation, including:

(i) Whether the plan is feasible in light of demands that would be placed on available social services, police and fire protection, and infrastructure in the community; and,

(ii) Whether the selected notices of interest are consistent with the Consolidated Plan(s) or any other existing housing, social service, community, economic, or other development plans adopted by the political jurisdictions in the vicinity of the installation.

(3) *Legally binding agreements.* Specifies the manner in which the buildings, property, funding, and/or services on or off the installation will be made available for homeless assistance purposes. HUD will review each legally binding agreement to verify that:

(i) They include all the documents legally required to complete the transactions necessary to realize the homeless use(s) described in the application;

(ii) They include all appropriate terms and conditions;

(iii) They address the full range of contingencies including those described at §176.30(b)(3)(i);

(iv) They stipulate that the buildings, property, funding, and/or services will be made available to the representatives of the homeless in a timely fashion; and

(v) They are accompanied by a legal opinion of the chief legal advisor of the LRA or political jurisdiction or jurisdictions which will be executing the legally binding agreements that the legally binding agreements will, when executed, constitute legal, valid, binding, and enforceable obligations on the parties thereto.

(4) *Balance.* Balances in an appropriate manner a portion or all of the needs of the communities in the vicinity of the installation for economic redevelopment and other development with the needs of the homeless in such communities.

(5) *Outreach.* Was developed in consultation with representatives of the homeless and the homeless assistance planning boards, if any, in the communities in the vicinity of the installation and whether the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled by the LRA.

C5.4.8.2. As part of the planning process, the LRA should consider how specific requests for property by the homeless would affect the redevelopment of the remainder of the installation. It also may propose alternate sites on or off the installation to the representatives of the homeless that would be more compatible with the LRA's plans for redevelopment of the

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remainder of the installation. The LRA must provide an opportunity for public comment before submitting its plan to HUD and the Department of Defense.

C5.4.9. Legally Binding Agreements.

C5.4.9.1. If the LRA approves an application by a representative of the homeless for property on the installation and reaches an agreement with the representative on the terms and conditions, the parties shall enter into a legally binding agreement. That agreement may provide for a parcel of installation property to be conveyed either to the representative of the homeless or to the LRA at no cost. If the property is to be conveyed to the LRA, then the LRA will lease or otherwise convey it to representatives of the homeless at no cost. The representative must use the property for homeless assistance purposes, such as homeless shelters, transitional housing, job training, warehousing, and food banks. The property may not be used for unrelated purposes, or sold, to generate revenue for the representative's programs.

C5.4.9.2. During the planning process, the LRA may decide that the presence of a facility for the homeless would be incompatible with the proposed redevelopment plan for the installation. As an example, the LRA may propose a port facility, a civil airport or a shopping mall for the entire installation. In such cases, it may be in the public interest for the LRA, at its expense, to offer property off the installation, or other assistance or resources, to representatives of the homeless, instead of the surplus property at the installation.

C5.4.9.3. The legally binding agreement between the LRA and the representative of the homeless must contain a provision stating that implementation of the agreement is contingent upon the decision regarding the disposal of the buildings and property covered by the agreement by the Military Department. HUD must approve these legally binding agreements. The agreements also must contain a provision that, in the event the representative of the homeless ceases to use the property to assist the homeless, the property will revert to the LRA or another eligible representative of the homeless.

C5.4.10. Determination of Eligibility for Public Benefit Conveyance (PBC).

C5.4.10.1. PBCs, which are authorized by Federal statute, are conveyances of surplus government property to State and local governments and certain nonprofit organizations for a specific public purpose, such as schools, parks, airports, ports, prisons, self-help housing, and public health facilities. For each of these public purposes, there is a sponsoring Federal agency (such as the Department of Education for conveyances for school purposes) with regulations that set forth the criteria it uses for determining whether an applicant is eligible for a public benefit conveyance and whether the applicant has a need for the property. Generally, the applicant must demonstrate that it has the financial resources to improve the property and begin to use the property for the approved purpose within a specific period of time. These transfers can be further categorized as described below:

C5.4.10.1.1. Sponsored public benefit conveyances. These conveyances include PBCs for education, public health, public park or recreation, self-help housing, and port facility purposes. Applications are provided by the sponsoring Federal agency to the interested entity. Sponsoring Federal agencies must officially approve the completed applications and recommend

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and submit a request to the Military Department for the transfer on behalf of the applicant. The terms and conditions attached to the use and/or redevelopment and the value (or the discount allowed) of the real property are determined by the sponsoring agency. In this type of conveyance, the Military Department assigns the real property to the sponsoring agency for subsequent transfer to the recipient. The deed includes, by reference, the application or defined planned use for the property, as well as the property description, various disclosure documents, and covenants and conditions provided by the sponsoring agency and the Military Department. Special conditions may be added by the Military Department or the sponsoring Federal agency to protect the government's interest in the property. Properties typically include a discretionary right of reversion for noncompliance with the terms of the transfer. The Military Department may include, at its discretion, the right to revert for national defense purposes, if this requirement is defined in the assignment. The Military Department may transfer related personal property along with the conveyance of real property.

C5.4.10.1.2. Approved public benefit conveyances. These conveyances include PBCs for non-federal correctional facilities, law enforcement, emergency management response, wildlife conservation, historic monuments, airport facilities, and power transmission lines. The terms and conditions attached to the redevelopment are determined by the Military Department, which transfers the qualifying personal property directly to the approved PBC recipient. This may include related personal property as well.

C5.4.10.2. If an entity has expressed interest in a public benefit conveyance during the LRA's outreach process or the Military Department's Determination of Surplus notification, the LRA or the Military Department will refer the entity to the sponsoring agency, which will determine whether the applicant for the property is eligible to acquire the property under its criteria. This screening for public benefit conveyances should be completed before the submission of the redevelopment plan to HUD and the Department of Defense. The redevelopment plan should identify sites where public uses such as schools, parks, or airports would be suitable.

C5.4.11. Completion of Redevelopment Plan. The redevelopment plan should propose land uses that consider past use of the property, existing property conditions, needs of the homeless in the communities in the vicinity of the installation, and needs of the communities in the vicinity of the installation for economic redevelopment and other development. After completion of the redevelopment plan, the LRA must submit an application containing the plan to the Secretary of Defense and the Secretary of HUD. The application must include all of the information required by HUD regulations published at 24 CFR Part 586.30 (reference (am)) and DoD regulations published at 32 CFR Part 176.30 (reference (e)). (See the following summary.)

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32 CFR Part 176.30 "LRA application." (Summary -- see actual regulations for full text)

(a) Redevelopment plan. A copy of the redevelopment plan shall be part of the application.

(b) Homeless assistance submission. This component of the application shall include the following:

(1) Information about homelessness in the communities in the vicinity of the installation.
(2) Notices of interest proposing assistance to homeless persons and/or families.
(3) Legally binding agreements for buildings, property, funding, and/or services.
(4) An assessment of the balance with economic and other development needs.
(5) A description of the outreach undertaken by the LRA. The LRA shall explain how the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled. This explanation shall include a list of the representatives of the homeless the LRA contacted during the outreach process.

(c) *Public comments.* The LRA application shall include the materials described at §176.20(c)(6). These materials shall be prefaced with an overview of the citizen participation process observed in preparing the application.

C5.4.12. Review of Homeless Assistance Application.

C5.4.12.1. Not later than 60 days after receiving the completed application, the Secretary of HUD shall complete the review. That review will determine whether the LRA's application is complete and, with respect to the expressed interests and requests of representatives of the homeless, whether the application meets HUD's criteria. The standards of the review are addressed in 32 CFR Part 176.35 (reference (e)).

C5.4.12.2. The homeless assistance submission is the LRA's opportunity to convince HUD that the LRA complied with the required procedures and took into account all the factors in HUD's standards of review. The LRA should explain in detail why it believes the application appropriately balances the needs of the homeless in the community with economic redevelopment and other development needs of the community. When reviewing the plan, HUD takes into consideration and is receptive to the predominant views of the local communities. HUD may enter into negotiations and consultations if it determines that the plan does not meet the statutory requirements and the LRA may modify the plan after such consultations. Upon completion of its review, HUD must notify the LRA, the Military Department, and the Department of Defense of its determination. If HUD determines that the LRA's redevelopment plan meets the above requirements, the Military Department will complete the disposal decision and proceed with disposal of the property.

C5.4.13. Revision of Application and Redevelopment Plan. If the Secretary of HUD determines that the application of the LRA does not meet the review criteria, the Secretary includes a summary of the deficiencies in the application, an explanation of the determination, and a statement of the actions needed to address the determination. The LRA then has the opportunity to cure the deficiencies identified by HUD. This sequence of events is laid out in the following text box.

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32 CFR Part 176.35(c) and (d)

(c) *Notice of determination.*

(1) HUD shall, no later than the 60th day after its receipt of the application, unless such deadline is extended pursuant to §176.15(a), send written notification both the DoD and the LRA of its preliminary determination that the application meets or fails to meet the requirements of §176.35(b). If the application fails to meet the requirements, HUD will send the LRA:

(i) A summary of the deficiencies in the application;

(ii) An explanation of the determination; and

(iii) A statement of how the LRA must address the determinations.

(2) In the event that no application is submitted and no extension is requested as of the deadline specified in §176.20(c)(5), and the State does not accept within 30 days a DoD written request to become recognized as the LRA, the absence of such application will trigger an adverse determination by HUD effective on the date of the lapsed deadline. Under these conditions, HUD will follow the process described at §176.40.

(d) *Opportunity to cure.*

(1) The LRA shall have 90 days from its receipt of the notice of preliminary determination under §176.35(c)(1) within which to submit to HUD and DoD a revised application which addresses the determinations listed in the notice. Failure to submit a revised application shall result in a final determination, effective 90 days from the LRA's receipt of the preliminary determination, that the redevelopment plan fails to meet the requirements of §176.35(b).

(2) HUD shall, within 30 days of its receipt of the LRA's resubmission, send written notification of its final determination of whether the application meets the requirements of §176.35(b) to both DOD and the LRA.

C5.4.14. Identification of Property for Use by Homeless without a Redevelopment Plan.

C5.4.14.1. If an LRA does not submit a redevelopment plan or a revised redevelopment plan within the times provided, or if HUD does not approve the LRA’s revised plan, HUD has the responsibility for identifying installation property that could be used to assist the homeless. In carrying out that responsibility, HUD will undertake the following activities (see the following text box).

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32 CFR 176.40 Adverse determinations.

(a) *Review and consultation.* If the resubmission fails to meet the requirements of §176.35(b), or if no resubmission is received, HUD will review the original application, including the notices of interest submitted by representatives of the homeless. In addition, in such instances or when no original application has been submitted, HUD:

(1) Shall consult with the representatives of the homeless, if any, for purposes of evaluating the continuing interest of such representatives in the use of buildings or property at the installation to assist the homeless;

(2) May consult with the applicable Military Department regarding the suitability of the buildings and property at the installation for use to assist the homeless; and

(3) May consult with representatives of the homeless and other parties as necessary.

(b) *Notice of decision.*

(1) Within 90 days of receipt of an LRA's revised application which HUD determines does not meet the requirements of §176.35(b), HUD shall, based upon its reviews and consultations under §176.40(a):

(i) Notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless; and

(ii) Notify DoD and the LRA of the extent to which the revised redevelopment plan meets the criteria set forth in §176.35(b).

(2) In the event that an LRA does not submit a revised redevelopment plan under §586.35(d), HUD shall, based upon its reviews and consultations under §176.40(a), notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless, either

(i) Within 190 days after HUD sends its notice of preliminary adverse determination under §176.35(c)(1), if an LRA has not submitted a revised redevelopment plan; or

(ii) Within 390 days after the Military Department's Federal Register publication of available property under §176.20(b), if no redevelopment plan has been received and no extension has been approved.

C5.4.14.2. Upon receipt of the notice from HUD, the Military Department completes its NEPA analysis of property disposal, and it disposes of the buildings and property in consultation with HUD and LRA. The Military Department's proposed Federal action for property disposal shall incorporate the notification from HUD regarding buildings and property that would be suitable for use to assist the homeless only to the extent that the Military Department considers appropriate and consistent with the highest and best use of the installation as a whole, taking into consideration the redevelopment plan (if any) submitted by the LRA.

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C5.5. PROPERTY DISPOSAL ALTERNATIVES (the "Toolbox")

C5.5.1. After completion of the NEPA process and compliance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (reference (f)), the Military Department will dispose of all surplus property. As the disposal agency, the Military Department has the authority to select the methods of disposal. It may dispose of surplus real and personal property at the installation as one conveyance, or convey the property in multiple parcels using one or more property conveyance authorities.

C5.5.2. Disposal of Property for Use by Homeless. Property that has been identified for use to assist the homeless as determined by HUD must be conveyed to either the representative of the homeless or the LRA, as provided in HUD's approval of the application. If the property is conveyed to the LRA, it then will make it available to the representative of the homeless. It also will be responsible for monitoring the use of the property and ensuring that the representatives of the homeless comply with the legally binding agreement and provide the services that they agreed to provide for the benefit of the homeless. The conveyance must be for no cost. The deed must include a provision that, in the event the representative of the homeless ceases to provide services to the homeless, the property will revert to the LRA. The LRA must take appropriate action to secure, to the maximum extent practicable, another qualified representative of the homeless to use the property to assist the homeless. If the LRA is unable to find a qualified representative of the homeless to use the property, it will own the property without any requirement to use the property to assist the homeless. If there is no HUD-approved redevelopment plan and no legally binding agreement between the LRA and the representative of the homeless, the deed will provide that the property will revert to the United States in the event that the representative of the homeless fails to use the property for the benefit of the homeless.

C5.5.3. Public Benefit Conveyance (PBC).

C5.5.3.1. PBCs are conveyances of real and personal property to State and local governments and certain nonprofit organizations for public purposes as authorized by statute. These public purposes include schools, parks, airports, ports, public health facilities, law enforcement, emergency management response, correctional facilities, historic monuments, self-help housing, and wildlife conservation. If the Military Department has determined that the best use of a particular parcel is consistent with a specific public benefit conveyance, a Federal sponsoring agency may request assignment of the property for purposes of conveying the property to a designated eligible recipient, such as the Department of Education for schools or the National Park Service for parks and recreation purposes. The sponsoring agencies are responsible for selecting qualified applicants and determining the amount of the discount (if any) from fair market value to be proposed.

C5.5.3.2. With the exception of airport, law enforcement, emergency management response, historic monuments, and wildlife conservation conveyances, the sponsoring agency will normally draft and execute the deeds. The Military Department must inform the sponsoring agency of any land use controls, as defined in "Defense Environmental Restoration Program Management Guidance" promulgated by the DUSD (I&E) in a September 28, 2001, memorandum (reference (an)) that must be included in the deed. The sponsoring agency will include additional deed covenants and restrictions consistent with its authorities and regulations;

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the sponsoring agency is also responsible for monitoring compliance with those additional covenants and restrictions.

C5.5.3.3. The sponsoring Federal agency is required to accept the assignment and convey the ownership of the property within 45 days of the Military Department making it available for assignment. Further information about public benefit conveyances can be found in the Federal Management Regulation, 41 CFR Part 102-75 (reference (ab)).

C5.5.4. Conservation Conveyances. 10 U.S.C. 2694a (reference (ao)) (see quote below) authorizes a Military Department to convey surplus property that is suitable for conservation purposes to a State or local government, or to a nonprofit organization that exists primarily for the purpose of natural resource conservation. The deed may permit the recipient to convey the property for the same purpose and conduct incidental revenue-producing activities. The deed also must contain a clause that the property shall revert to the United States in the event that it ceases to be used for conservation purposes.

> 10 U.S.C. 2694a —"Authority to Convey — The Secretary of a military department may convey to an eligible entity described in subsection (b) any surplus real property that —
>
> (1) is under the administrative control of the Secretary;
>
> (2) is suitable and desirable for conservation purposes;
>
> (3) has been made available for public benefit transfer for a sufficient period of time to potential claimants; and
>
> (4) is not subject to a pending request for transfer to another Federal agency or for conveyance to any other qualified recipient for public benefit transfer under the real property disposal processes and authorities under subtitle I of title 40."

C5.5.5. Transfer Authority in Connection with Payment of Environmental Remediation Costs.

C5.5.5.1. Public Law 101-510, Section 2905(e) (reference (c)) authorizes the Military Departments to convey property to an entity that will undertake the responsibility for all environmental actions on the property. If the fair market value of the property is more than the restoration cost, the purchaser must pay the Military Department the difference. If the fair market value is less than the restoration cost, the Military Department may pay the purchaser the difference. The proposed purchaser will be selected through a two-step competitive negotiation process. The solicitation will include the qualification requirements for bidders, a description of the property for sale, proposed land use controls, zoning classification (if the property has been zoned), environmental condition of the property, and requirements for an early transfer and a Section 2905(e) conveyance. The Administrator of the Environmental Protection Agency (EPA) and the governor of the State should be notified of the intent by the Military Department to request a CERCLA covenant deferral. The Military Department will request a statement of qualifications from prospective purchasers. Because the purchaser will be responsible for completing the restoration, the Military Department must confirm that prospective purchasers

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have the technical expertise and financial capability to complete the restoration before considering them for award. The Military Department will evaluate the responses to the solicitation, determine which bidders meet the qualification requirements, and notify all bidders of its decision.

C5.5.5.2. Qualifying bidders will be given a specific period of time to review the terms of Federal and State laws, administrative decisions, agreements (including schedules and milestones), and concurrences previously received from regulators. Bidders must consider the terms of previous agreements and concurrences in their bids. If a remedy has not been selected, bidders may base bids on remedies that they believe will meet the applicable standards and achieve regulator concurrence. The qualifying bidders will then submit their bid packages, setting out their bids for the property. The Military Department may negotiate with the bidders, provided their prices are at or above the fair market value for the property (taking into consideration the cost of all environmental restoration, waste management, and environmental compliance activities assumed by the offeror). If none of the bidders offers fair market value for the property, the Military Department will terminate the bidding process and consider other options for disposal of the property. Once a winning bidder has been determined by the Military Department, EPA (and a state as appropriate) will negotiate an enforceable cleanup agreement with that party, after which a covenant deferral request could be submitted to the Regional Administrator, who has been delegated the authority by EPA's Administrator.

C5.5.5.3. If the Military Department selects a winning bidder, it will submit a covenant deferral request to the Governor of the State (regardless of the installation's National Priorities List (NPL) status), and to the Administrator of EPA if on the NPL. The covenant deferral request should adequately address all of the requirements in CERCLA 120(h)(3)(C) for EPA and the State to approve the deferral. The EPA's "Guidelines on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)__ Early Transfer Authority Guidance" (reference (ap)) and appropriate state guidance can be valuable aids when developing the covenant deferral request.

C5.5.5.4. Once the requested deferral has been approved by the regulatory agency(ies), the Military Department can enter into a binding purchase agreement. At closing, the Military Department will tender a deed that includes the land-use controls. The restoration cost credited in this transaction must be the lesser of the costs incurred by the recipient of the property for restoration or the amount the Secretary of Defense would otherwise have incurred. The Secretary also must certify these costs to Congress. Upon completion of the restoration by the recipient, the Military Department will give CERCLA (reference (f)) 120(h)(3)(A)(ii)(I) covenants (CERCLA 120(h)(3)(A)(i) and (ii)(II) covenants will have been given at the time of conveyance).

C5.5.6. Public Sales. The Military Department, in consultation with the LRA, will determine when public sale is the best method to dispose of a parcel. The Department of Defense believes that market-based property conveyance using public sales is an effective means of achieving the mutual goal of rapidly putting the property back into productive uses by new owners. In preparing for public sale, it is necessary to decide whether the property would be more marketable as a single parcel or whether it should be subdivided for sale. The amount of advertising and the method of sale will depend upon the value of the property and the potential

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market. The Department of Defense has successfully employed a number of different public sale approaches, including sealed bid, Internet auction, and auction on the site to the highest responsible bidder. Further information about public sales can be found in the Federal Management Regulation, 41 CFR Part 102-75 (reference (ab)).

C5.5.7. Economic Development Conveyances.

C5.5.7.1. The BRAC law (reference (c)) authorizes a Military Department to convey real and personal property to an LRA for the purpose of job generation on the installation. Only an LRA is eligible to acquire property under an EDC. The LRA must demonstrate in its application that the proposed uses for the property will generate sufficient jobs to justify an EDC conveyance, and that the proposed land uses are realistically achievable given current and projected market conditions. The Military Department is required to seek to obtain fair market value consideration for EDC conveyance of property on installations that were approved for closure or realignment after January 1, 2005. On a case-by-case basis, the Military Department may grant an EDC without consideration, subject to the following statutory requirements:

C5.5.7.1.1. The LRA agrees that the proceeds of sale or lease of the property received during at least the first 7 years after the initial conveyance shall be used to support the economic redevelopment of, or related to, the installation.

C5.5.7.1.2. The LRA agrees to take title to the property within a reasonable time after the Military Department makes its surplus determinations.

C5.5.7.2. The following uses of proceeds by the LRA support economic redevelopment as required above:

C5.5.7.2.1. Road construction and public buildings.

C5.5.7.2.2. Transportation management facilities.

C5.5.7.2.3. Storm and sanitary sewer construction.

C5.5.7.2.4. Police and fire protection facilities and other public facilities.

C5.5.7.2.5. Utility construction.

C5.5.7.2.6. Building rehabilitation.

C5.5.7.2.7. Historic property preservation.

C5.5.7.2.8. Pollution prevention equipment or facilities.

C5.5.7.2.9. Demolition.

C5.5.7.2.10. Disposal of hazardous materials generated by demolition.

C5.5.7.2.11. Landscaping, grading, and other site or public improvements.

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C5.5.7.2.12. Planning for or the marketing of the development and reuse of the installation.

C5.5.7.3. Before investments made off the installation can be considered allowable uses of proceeds, the LRA must demonstrate that they are related to those uses listed above and directly benefit the economic redevelopment and long-term job generation efforts on the installation.

C5.5.7.4. EDC agreements must require the LRA to submit an annual financial statement certified by an independent certified public accountant. This statement should cover the LRA's use of proceeds from a sale, lease, or equivalent use of EDC property. The agreement also must provide that the Military Department may recoup from the LRA any proceeds that are not used for economic development within, at minimum, the 7-year period following initial EDC conveyance. The Military Department may require a longer recoupment period if it determines that a longer period is warranted.

C5.5.7.5. The Military Department may convey property to the LRA using EDC authority subject to a requirement that it subsequently lease one or more portions of the property to a Federal agency. Such conveyance authority shall not be used when the Secretary concerned determines that the mission requirement of the benefiting Federal agency can reasonably be met by direct transfer of property. Conveyances under this authority will be at fair market value and the associated lease shall include the following conditions:

C5.5.7.5.1. Be for a term of not more than 50 years, but may have options.

C5.5.7.5.2. Not require payment of rent by the United States.

C5.5.7.5.3. Permit another Federal agency to complete the lease term.

C5.5.8. Negotiated Sales. The Military Department may dispose of property by negotiated sale only under limited circumstances. Negotiated sales to public bodies can only be conducted if a public benefit, which would not be realized from competitive sale or authorized public benefit conveyance, will result from the negotiated sale. The most common exception to the requirement for a competitive public sale is a negotiated sale to a State or local government for a public purpose (such as acquiring property for a new city hall) that does not qualify under one of the public benefit conveyance authorities. The grantee must pay not less than fair market value based upon highest and best use and an appraisal. An Explanatory Statement detailing the circumstances of the proposed sale must be sent to the appropriate Congressional committees and there is a 30-day waiting period after notification before the property may be conveyed. The deed must include an excess profits clause that requires the grantee to remit all proceeds in excess of its costs if it sells the property within 3 years. Further information about negotiated sales may be found in the Federal Management Regulation, 41 CFR Part 102-75 (reference (ab)).

C5.5.9. Disposal to Depository Institutions. The Military Department may convey the property and improvements to a bank or credit union that conducted business on a closed installation and constructed or substantially renovated the facility with its funds. The Military Department must offer the land on which the facility is located to the financial institution before offering it to another entity; however, the depository institution must agree to pay fair market

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value. If the institution constructed the facility at its expense, it must pay fair market value for just the underlying land. If the institution substantially renovated a structure belonging to the Military Department, it must pay fair market value for the structure as well as the land, less the value of the renovations. The Military Department may not convey the property to the institution if the operation of a depository institution would be inconsistent with the redevelopment plan.

C5.5.10. Exchanges for Military Construction. Section 2869 of title 10, United States Code (reference (aq)), provides an alternative authority for disposal of real property at a closing or realigning installation. That authority allows any real property at such an installation to be exchanged for military construction at that or another location. This authority may be exercised at any time after the date of approval of the closure or realignment. The Military Department may seek offers of military construction in exchange for real property or receive them unsolicited. If the exchange takes place after the property has been determined to be surplus, consultation must take place in accordance with section 2905(b)(2)(D) of the DBCRA (reference (c)).

> 10 U.S.C. 2869—"(a) Conveyance Authorized; Consideration.— The Secretary concerned may enter into an agreement to convey real property, including any improvements thereon, located on a military installation that is closed or realigned under a base closure law to any person who agrees, in exchange for the real property—
> **(1)** to carry out a military construction project or land acquisition; or
> **(2)** to transfer to the Secretary concerned housing that is constructed or provided by the person and located at or near a military installation at which there is a shortage of suitable military family housing, military unaccompanied housing, or both.
>
> (b) Conditions on Conveyance Authority.— The fair market value of the military construction, military family housing, or military unaccompanied housing to be obtained by the Secretary concerned under subsection (a) in exchange for the conveyance of real property by the Secretary under such subsection shall be at least equal to the fair market value of the conveyed real property, as determined by the Secretary. If the fair market value of the military construction, military family housing, or military unaccompanied housing is less than the fair market value of the real property to be conveyed, the recipient of the property shall pay to the United States an amount equal to the difference in the fair market values."

C5.6. PROPERTY DISPOSAL CONSIDERATIONS

C5.6.1. Property Disposal Planning. The Military Department may develop an installation summary report that considers all property assets, market conditions, and potential disposal options. The purpose of this summary report is to help identify the highest and best use of the property to assist in formulating a property disposal strategy, taking into account all property assets and property conditions.

C5.6.2. Appraisals.

C5.6.2.1. The Military Department must obtain appraisals of the fair market value of the property prior to conveyance under an EDC, negotiated sale, public sale, sale under Section 2905(e) of the DBCRA (reference (c)), or conveyance to a depository institution. A Military Department does not need to obtain appraisals for parcels that will be conveyed at no cost to assist the homeless, by a public benefit conveyance, or for property with an estimated value less than $300,000 that will be disposed of by competitive public sale. The Military Department must use only experienced and qualified real estate appraisers familiar with the types of property being appraised. Appraisals must be based upon the highest and best use of the property, taking account of all property conditions that are relevant to fair market value. After the Secretary concerned has made a determination of fair market value pursuant to the DBCRA (reference (c)), the Military Department shall share the appraisals with the LRA when considering an EDC application. The purpose of sharing the appraisal is to fully inform the LRA regarding the Military Department's determination of the fair market value; it is not to promote or allow "negotiation" of the fair market value. The determination of fair market value is statutorily assigned to the Secretary and the appraisal represents, when adopted by the Secretary, his determination of the fair market value. The fair market value is not itself to be negotiated.

C5.6.2.2. In preparing the estimate of fair market value, the Military Department will use the most recent edition of the Uniform Appraisal Standards for Federal Land Acquisitions. The Military Department will consult with the LRA on valuation assumptions, guidelines, and instructions given to the appraiser where fair market value estimating is being conducted for an EDC.

C5.6.3. Environmental Covenant Deferral Process.

C5.6.3.1. CERCLA (reference (f)) requires Federal agencies to include a covenant in the deed conveying property to a non-federal party that provides certain warranties regarding completion of environmental remediation. It also authorizes a procedure for the deferral of this covenant (known as 'early transfer') to enable property conveyance before environmental remediation is complete. The following text box addresses the covenant deferral authority.

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42 USC 9620(h)(3)(C)(i), "Deferral.--

(i) In general.-- The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that--

(I) the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property."

C5.6.3.2. In furtherance of the goal of rapidly putting property back into productive uses by new owners, the Military Department should identify early in the property disposal planning process all property that appears to be suitable for an "early transfer" conveyance by using the process authorized in CERCLA (reference (f)) for deferral of the normal deed covenant that all actions needed to protect human health and the environment have been taken. This covenant deferral process can be used in combination with any of the property disposal authorities. The Military Department must obtain the approval of the Administrator of EPA, with concurrence of the governor of the State, for property listed on the NPL, or approval from the governor for property not listed on the NPL. The Military Department must publish notice of the proposed CERCLA covenant deferral in a local newspaper, complete a 30-day waiting period for public comment, and address and incorporate any comments received, as appropriate.

C5.6.4. Complying with National Historic Preservation Act (reference (u)).

C5.6.4.1. Section 106 of the National Historic Preservation Act, or NHPA (see the following excerpt), requires Federal agencies to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. To comply with those requirements, installations must follow the provisions of the ACHP regulations, 36 CFR 800, "Protection of Historic Properties" (reference (ar))[1].

[1] Detailed guidance is available on the ACHP Web site in "The Section 106 Regulations Users Guide" at http://www.achp.gov/usersguide.html. A flowchart for the Section 106 process is at http://www.achp.gov/regsflow.html

> Section 106, National Historic Preservation Act of 1966 (NHPA) —"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking."

C5.6.4.2. If historic properties will be adversely affected by a Federal undertaking, the Federal agency generally enters into a memorandum of agreement with appropriate interested parties. The NHPA (reference (u)) is a procedural statute; it does not require a specific outcome. Whenever practicable, the Federal agency should conduct the Section 106 process concurrent with NEPA, 36 CFR 800.8 (reference (t)). (Chapter 8 provides more information on NEPA.)

C5.6.4.3. BRAC activities, such as realignment, transfer, lease, or sale, constitute an "undertaking" as defined in the ACHP regulations (36 CFR 800, (reference (ar)), see quote below) and require compliance with Section 106. Any conveyance, lease, or sale of historic property out of Federal ownership or control constitutes an "adverse effect" (unless the property is protected by legally enforceable restrictions or conditions), as defined in the ACHP regulations, see 36 CFR 800.5(a)(2)(vii) (reference (ar)). Depending on its conditions, a lease also may constitute an adverse effect. Any ongoing requirement, such as a survey or recordation, in existing memoranda of agreement or purchase agreements must either be completed prior to BRAC transfer or accounted for in an updated BRAC-specific consultation.

> 36 CFR 800, "Protection of Historic Properties." —"(a) *Purposes of the Section 106 process*. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."

C5.6.4.4. ACHP broadly defines the term "historic property" to include any "prehistoric or historic district, site, building, structure, or object included, or eligible for inclusion, in the National Register of Historic Places," see 36 CFR 800.16(l)(1) (reference (ar)). The term also includes properties of traditional religious and cultural importance (generally referred to as "traditional cultural properties" or TCPs) to a Federally recognized Indian tribe or Native Hawaiian organization.

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C5.6.4.5. The installation's Integrated Cultural Resources Management Plan should include information on historic and TCP properties on the installation. Any property 50 years or more in age, regardless of use or condition, as well as Cold War-era assets less than 50 years in age, must be evaluated for eligibility for inclusion in the National Register of Historic Places (National Register). The National Register process, including eligibility criteria, is found in 36 CFR 63 (reference (as)).

C5.6.5. Complying with Native Americans Grave Protection and Repatriation Act (NAGPRA) (reference (s)).

C5.6.5.1. NAGPRA requires Federal agencies to protect, inventory, and repatriate Native American cultural items to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations. It defines Native American "cultural items" as:

C5.6.5.1.1. Native American human remains.

C5.6.5.1.2 Funerary objects.

C5.6.5.1.3 Sacred objects.

C5.6.5.1.4 Objects of cultural patrimony.

C5.6.5.2. Although most installations have started the NAGPRA process, they must complete it or otherwise provide for its completion prior to closure. In addition to existing collections, NAGPRA also applies to cultural items intentionally excavated or inadvertently discovered during ground disturbing activities, including the process of completing archeological inventories as part of BRAC.

C5.6.6. Complying with Executive Order (E.O.) 13007, "Indian Sacred Sites" (reference (at)). An installation that has known sacred sites must comply with reference (at). This order requires that, where practicable and appropriate, Federal agencies must ensure reasonable notice is provided to Federally recognize Indian tribes of proposed actions or land management policies (which include BRAC actions) that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. Executive Order 13007 (reference (at)) defines sacred sites.[2]

C5.6.7. Options to Buy and Purchase Agreements. Purchase agreements or memoranda of agreement, whether for EDCs, negotiated sales, or other forms of negotiated conveyances, shall not include options to buy. Those documents should not bind the Military Department to hold the property for a period of time after it is otherwise ready for conveyance while the prospective grantee has an opportunity to decide whether it wants to acquire the property. The purchase agreement or memorandum of agreement must be a binding contract that identifies the buyer and

[2] More information on the connection between reference (as) and Section 106 can be found at http://www.achp.gov/eo13007-106.html.

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the seller, the property to be conveyed, the consideration, and all material terms and conditions including the time for performance of the obligations there under.

C5.6.8. Leasing of BRAC Property. The goal of the Military Department is to dispose of any surplus property as promptly as possible. Prompt disposal reduces caretaker costs and helps the local community by expediting the redevelopment of the property. The extensive real property and environmental requirements to ensure that property is suitable for interim lease can detract from the Military Department's ability to accomplish actions needed to dispose of the property. As a result, whenever the leasing of property might delay the disposal of the property, the military department will not lease base closure property. It may, however, lease surplus property pending final disposition if the Military Department determines that the lease would facilitate State and local economic efforts and not interfere with or delay property disposal. The Military Department may accept less than fair market value if it determines that such acceptance would be in the public interest and fair market rent is unobtainable or not compatible with such public benefit. Before entering into a lease, the Military Department must consult with EPA to determine whether the environmental condition of the property is such that a lease is advisable. The Military Department must assure compliance with the requirements of 10 U.S.C. 2692 (reference (au)) prior to authorizing a lessee to store, treat, or dispose of any toxic or hazardous material on leased property.

C5.6.9. Proceeds from Sales and Leases of BRAC Property. All proceeds from the sale of BRAC property and the rent from property that has been closed under BRAC must be deposited in the BRAC Account. However, if any real property or facility was acquired, constructed, or improved with commissary or non-appropriated funds, a portion of the proceeds from the transfer or disposal of property at that installation shall be deposited into a reserve account. The amount deposited shall be equal to the depreciated value of the investment made with such funds as of the date of closure.

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C6. CHAPTER 6

PERSONAL PROPERTY

C6.1. INTRODUCTION

C6.1.1. The Department of Defense will dispose of personal property at a closing installation in a timely and orderly fashion, in consideration of the continuing military needs for the equipment and the redevelopment needs of the community. This task will be accomplished in consultation with the LRA. The needs of the Military Department to continue using the personal property to support its relocating units or other military missions and functions at another installation are of paramount consideration in determining the ultimate disposition of the property. The Department of Defense recognizes that personal property not required by the Military Department can have an important impact on the local community's prospects for economic recovery. After considering military needs, the Military Department should make every effort to find the best and most cost-effective use for the property while making every reasonable effort to assist the LRA in obtaining the available personal property needed to implement its redevelopment plan in a timely fashion. The procedures described in this chapter only apply to realigning installations to the extent that their real property becomes surplus and available for redevelopment.

C6.1.2. Definition of Personal Property. Personal property includes all property except land and fixed-in-place buildings, naval vessels, and records of the Federal government. Personal property does not normally include fixtures.

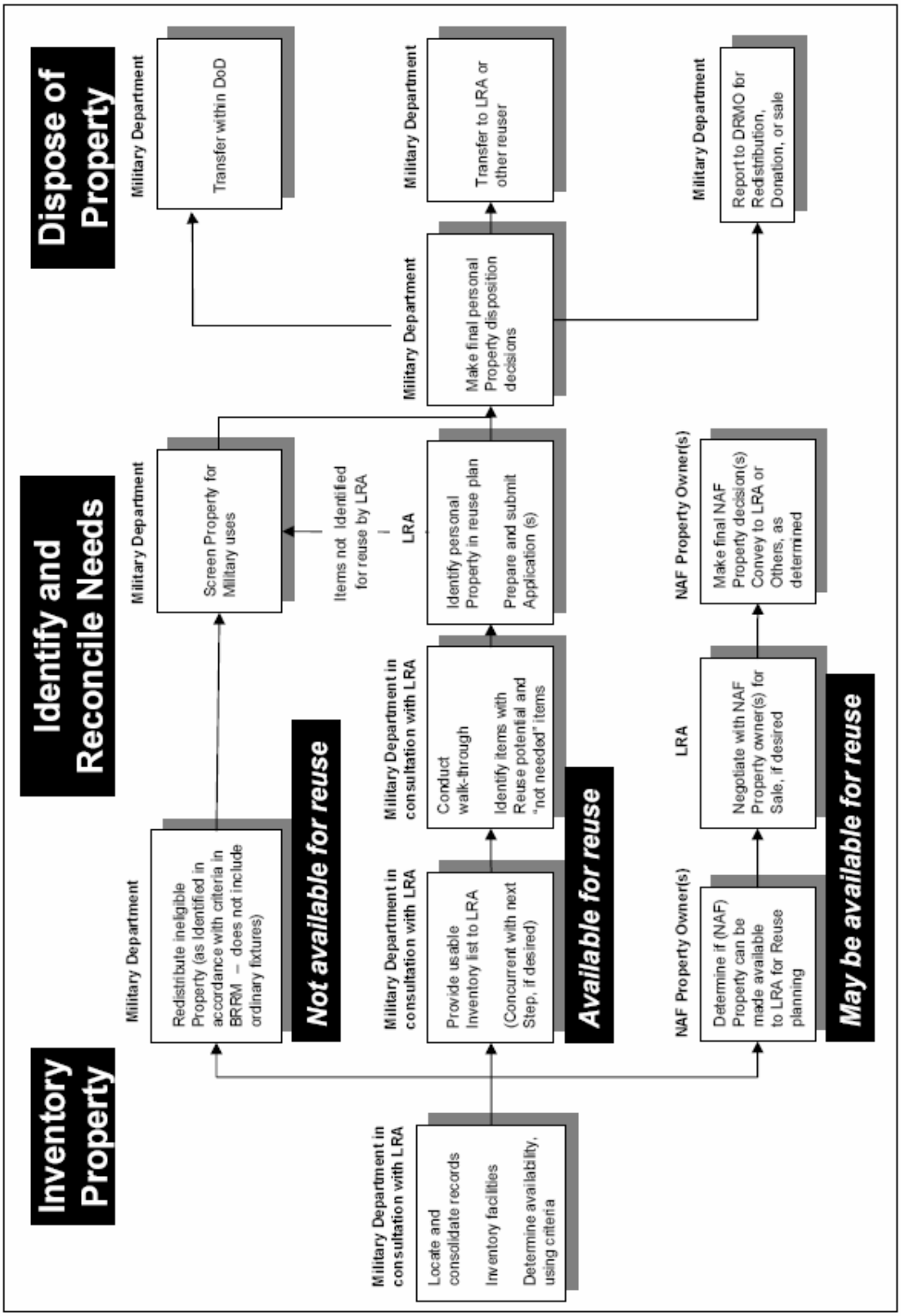
C6.1.3. General Practice. Personal property is often useful to the redevelopment of real property, but is also important to the functioning of the military mission. Figure C6.F1. shows the general practice by which personal property is identified for reuse and subsequently disposed of at a closing installation. This process can be summarized as follows:

C6.1.3.1. The installation commander will inventory the personal property at the installation no later than 6 months after the date of closure or realignment approval and prepare usable inventory records.

C6.1.3.2. The installation commander will consult with the LRA on property not required by the military, which will help the LRA identify assets with reuse potential. That consultation should include a walk-through of the installation so LRA officials can view available personal property and continue during redevelopment planning. The Military Department will be sensitive to the planning needs of the LRA and not move available property likely to be suitable for reuse during redevelopment planning. However, personal property necessary to meet military requirements or non-Military Department-owned property may be relocated off base.

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FIGURE C6.F1. BRAC Personal Property General Practice Flow Chart



C6.1.3.3. The Military Department should advise the LRA to identify in its redevelopment plan the personal property necessary for the effective implementation of the plan. Personal property may be conveyed to an LRA or other recipients under various authorities, including public sale, negotiated sale, or an EDC. The LRA may negotiate for NAF-owned property separately.

C6.1.3.4. Payment for personal property may be at fair market value or at no cost, depending on the conveyance authority used.

C6.2. PERSONAL PROPERTY INVENTORY

C6.2.1. Inventory Requirement. The installation commander must conduct an inventory of all property owned by the Department of Defense on the installation, including any non-contiguous parcels of property to be disposed of in conjunction with the main site, within 6 months after the approval date of closure or realignment. The goal of the inventory is to establish the status of property required for continuing military missions and to identify, as early as possible, personal property that will be made available to the LRA for reuse planning purposes.

C6.2.2. Procedure. Personal property records should be assembled and made available as soon as possible after the date of approval. After the property records are available, a physical inspection and count should be made to determine the condition and quantity of personal property that will be made available to the LRA for reuse planning purposes. That inventory should be performed under the direction of the installation commander, with input from tenant commanders, if applicable, and in consultation with the LRA. The inventory should:

C6.2.2.1. Include all DoD tenant organizations, including the National Guard and Reserves, if applicable (see section on eligibility criteria for personal property items identified as "not available for reuse" or "not needed for redevelopment" later in this chapter). DoD tenant organizations must provide the physical inventory documentation to the installation commander and prepare to support the personal property consultation and walk through for all tenant personal property.

C6.2.2.2. Exclude non-DoD tenant organizations and transient property (e.g., other Federal agency offices, GSA vehicles, and contractor equipment); property located on any portion of the installation retained by the Department of Defense and not related to the productive capacity or minimum maintenance requirements of the installation; and NAF-owned property.

C6.2.2.3. Identify personal property that is available for redevelopment, or not available for redevelopment. Installation personal property records should be provided to the LRA in available formats. However, if these formats are not easily usable, the installation commander should consider reasonable requests for summary data or other similar simplified formats.

C6.2.3. Personal Property Categories.

C6.2.3.1. The following descriptions and categories of personal property should facilitate LRA and Military Department dialogue during the redevelopment planning period. This information is also provided to help installation and tenant commanders determine items of personal property that will be made available for redevelopment purposes. Personal property should be identified according to the following categories:

C6.2.3.1.1. Available for redevelopment and not available for redevelopment. The installation commander will identify both accountable and non-accountable personal property as either available or not available for redevelopment in accordance with paragraph C6.2.4.

C6.2.3.1.2. Ordinary fixtures. This category includes items commonly referred to as fixtures in typical real estate transactions. It includes, but is not limited to, such items as sprinklers, lighting fixtures, electrical and plumbing systems, built-in furniture, and fuse boxes that are usually affixed to a facility. These items are normally considered part of, designed for, and integral to the function of the real property. Removal of these items could significantly diminish the value of the real property. Commanders may consider designating items in this category as personal property normally only if they have possible historic or artistic value.

C6.2.3.1.3. Not needed for redevelopment. After the inventory and LRA consultation (see paragraph 6.3), the inventory list or other identification records should be updated to include items not needed for redevelopment (see also paragraph C6.2.4). This determination can be made at any time.

C6.2.3.1.4. Federally owned archeological collections. These collections include prehistoric and historic material remains, and associated records, recovered under the authority of the Antiquities Act, the Reservoir Salvage Act, Section 110 of the National Historic Preservation Act, or the Archaeological Resources Protection Act (references (av), (aw), (u), and (ax), respectively).

Antiquities Act (16 U.S.C. 431- 433) — "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

Reservoir Salvage Act (16 U.S.C. 469-469c) — "It is the purpose of sections 469 to 469c–1 of this title to further the policy set forth in sections 461 to 467 of this title, by specifically providing for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen's communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.

Section 110 of the National Historic Preservation Act (16 U.S.C. 470h-2) — "a) (1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(g), any preservation, as may be necessary to carry out this section.

Archaeological Resources Protection Act (16 U.S.C. 470aa-mm) — "Amended the 1960 Reservoir Salvage Act; provided for the preservation of significant scientific, prehistoric, historic, and archeological materials and data that might be lost or destroyed as a result of federally sponsored projects; provided that up to one percent of project costs could be applied to survey, data recovery, analysis, and publication."

C6.2.3.2. If an installation has an agreement with a repository off the installation to preserve and store Federal archeological collections, it must ensure that the agreements with these repositories are transferred to another military entity.

C6.2.3.3. Additionally, all personal property is either accountable or non-accountable. This distinction affects the level of detail required for the inventory records to be provided to the LRA. These categories of personal property are defined below:

C6.2.3.3.1. Accountable personal property. Property for which a continuously updated itemized inventory is maintained. Inventorying accountable property should be straightforward, using installation inventory procedures and records.

C6.2.3.3.2. Non-accountable personal property. Property for which an updated itemized inventory is not maintained. For example, some office furnishings (e.g., desks, chairs, and file cabinets) and consumables (e.g., paper and pencils) not attached to the buildings are non-accountable. All non-accountable personal property determined to be available for redevelopment should be inventoried. Consumables do not have to be included, however. The level of detail of inventory information to be provided to the LRA should be determined by the installation in consultation with the LRA. Non-accountable personal property may be inventoried on a gross basis by facility and provided to the LRA in summary format, as the two examples below illustrate:

C6.2.3.3.2.1. Bachelor Officers' Quarters (BOQ)—25 rooms and offices, furnished.

C6.2.3.3.2.2. Administration Building—10 offices, furnished.

C6.2.3.3.3. Unserviceable but repairable personal property. Certain items of personal property may be in unserviceable but repairable condition. These items should be specifically noted on the inventory record, including any safety precautions that apply to them.

C6.2.3.4. All transferred personal property will be conveyed to the recipient in an "as-is" condition and will not be repaired by the Military Department, regardless of condition at the time of conveyance.

C6.2.4. Eligibility Criteria for Personal Property Items.

C6.2.4.1. The installation commander may initially identify items as not available for redevelopment if they meet one of the following criteria:

C6.2.4.1.1. Property Required for the Operation of a Unit, Function, Component, Weapon, or Weapon System at Another Installation. This category includes property belonging to a unit or activity relocating to another installation where equivalent property does not exist. For example, a unit being transferred to another location may take with it any property it needs to function properly as soon as it arrives at its new location. That property may include any personal property, both accountable and non-accountable, that is required for continuing military operations at an installation not necessarily involved in a BRAC action. In any case, it should be economical and cost-effective to relocate the personal property to the new location.

C6.2.4.1.2. Property Required for the Operation of a Unit, Function, Component, Weapon, or Weapon System at Another Installation within the Military Department or Defense Agency. This category includes all personal property, both accountable and non-accountable, that is required for continuing military operations and is economical to relocate to the new location.

C6.2.4.1.3. Property Uniquely Military in Character and is likely to have No Civilian Use (other than use for its material content or as a source of commonly used components). Such property includes classified items; nuclear, biological, and chemical items, weapons and munitions; museum-owned property, military heritage property, and items of significant historic value that are maintained or displayed on loan from a museum or other entity; and similar military items.

C6.2.4.1.4. Property Stored at the Installation for Distribution**.** This category includes spare parts or stock items, such as materials or parts used in a manufacturing or repair function, but not maintenance spare parts for equipment that will be left in place.

C6.2.4.1.5. Property Meets Known Requirements of an Authorized Program of another Federal Agency that would otherwise have to purchase similar items and the property has been requested in writing by the head of the agency. If the authority to acquire personal property has been delegated, a copy of the delegation must accompany the request. The requesting Federal agency must pay packing, crating, handling, and transportation charges associated with such transfers of personal property.

C6.2.4.1.6. Property is Needed Elsewhere in the National Security Interest of the United States**.** For any personal property located on the installation, the property can be

relocated or otherwise designated as not available for redevelopment if the Secretary of the Military Department determines that it is needed in the national security interest of the United States. In exercising this authority, the Secretary of the Military Department may transfer the property to any DoD Component or other Federal agency. This authority may not be delegated below the level of an Assistant Secretary.

C6.2.4.1.7. Federally Owned Archeological Collections. Installations must comply with 36 CFR 79 (reference (ay)), which contains the definitions, standards, procedures, and guidelines to be followed by Federal agencies to preserve collections of prehistoric and historic material remains, and associated records. While the Federal government can transfer custody of collections and records to non-federal government repositories, it cannot transfer ownership. If an installation has an agreement with an off-installation repository to store or display Federal archeological collections, it must ensure that responsibility for maintaining the agreement with the repository is transferred to another military entity. A closing installation must ensure collections and records are transferred to the custody of an appropriate repository and the agreement with that repository is maintained by another military entity.

C6.2.4.1.8. Property Belongs to NAF Instrumentalities or Other non-DoD Entities. Several situations could be encountered:

C6.2.4.1.8.1. NAF property. This category includes property purchased with funds generated by government personnel and their dependents for religious activities; morale, welfare or recreational activities; post exchanges; ship stores; military officer or enlisted clubs; or veterans' canteens. This property is not owned by the Military Department. Disposal of consecrated items must be in accordance with faith requirements of the distinctive faith groups who consecrated them. Arrangements to purchase NAF property (including negotiating the purchase price) must be made with the property owner through the Military Department.

C6.2.4.1.8.2. Non-DoD personal property. This category consists of personal property that belongs to, for example, a lessee renting space on the active installation, a contractor, or a government employee. As a result, it is not the property of the Military Department and cannot be identified as being available for redevelopment. This property will not be subject to availability for planning purposes or for transfer to the LRA or any other recipient.

C6.2.4.1.8.3. State-owned National Guard property. At installations hosting National Guard units, some items of personal property may have been purchased with state funds. These items are not available for redevelopment planning or subject to transfer for redevelopment purposes, unless so identified by the State property officer. However, certain items of personal property used by National Guard units at closing installations have been purchased with Federal funds. These items are subject to inventory and may be made available for redevelopment planning purposes.

C6.2.4.2. Personal property that is available for redevelopment will be designated as Not Needed for Redevelopment based on the following criteria:

C6.2.4.2.1. The LRA indicates it does not need the property (e.g., during the installation walk-through).

C6.2.4.2.2. The LRA does not include the property in its redevelopment plan.

C6.2.4.2.3. The LRA indicates it will not submit a redevelopment plan.

C6.3. LRA CONSULTATION

C6.3.1. Initial LRA Consultation. Consultation between the installation commander and the LRA should occur throughout the redevelopment planning period. The following guidelines should be used to facilitate that consultation.

C6.3.1.1. Consult early. The installation commander should coordinate all personal property-related decisions with the LRA early in the redevelopment planning process.

C6.3.1.2. Provide a usable inventory record. The installation commander will provide a usable inventory record to the LRA and should consider all reasonable requests for personal property information from the LRA within the Military Department's standard inventory management process. This record should help the LRA identify the personal property to support its redevelopment plan. All property should be identified. However, property to accompany a realigning unit need be only broadly identified.

C6.3.1.3. Offer a walk-through. As part of the personal property inventory and consultation process, the installation commander should invite the LRA to walk-through the installation. The installation commander will determine the timing of this walk-through. The walk-through will help the LRA identify items of personal property it wants to include in the redevelopment plan.

C6.3.1.4. Identify items no longer required for military use. The installation commander and applicable tenant commanders should identify personal property that is no longer required for military use and available for redevelopment. The identification of those items should be made to the LRA following the inventory and be updated as necessary.

C6.3.1.5. Resolve disagreements as they arise. The Military Department should strive to respond within 30 days to all requests by the LRA to reconsider an issue related to personal property availability or disposal decisions made by the installation commander. Final authority for resolving personal property issues rests with the Military Department.

C6.3.2. Follow-Up LRA Consultation. The installation commander will continue to consult with the LRA throughout the redevelopment planning period. The objectives of that consultation include the following:

C6.3.2.1. Ensure the LRA knows which items of personal property are available to it for incorporation in its redevelopment plan and which items are being relocated off-base or disposed of by other means.

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C6.3.2.2. Allow for timely disposal of personal property identified by the LRA as not needed for its redevelopment planning.

C6.3.3. Off-base Movement of Personal Property. Except for property subject to the exemptions in paragraph C6.2.4, personal property that is available for redevelopment shall remain at the installation being closed or realigned until one of the following events occurs:

C6.3.3.1. One week after the Secretary of the Military Department receives the redevelopment plan.

C6.3.3.2. The date on which the LRA notifies the Military Department that it will not submit a redevelopment plan.

C6.3.3.3. Twenty-four months after the date of approval of the closure or realignment of the installation.

C6.3.3.4. Ninety days before the date of the closure or realignment of the installation.

C6.4. PERSONAL PROPERTY TRANSFER METHODS

C6.4.1. Principal Authorities Affecting Personal Property Transfers. Several authorities guide the transfer of personal property, including the following:

C6.4.1.1. 32 CFR Parts 174 and 176 (Base closure community assistance and homeless assistance conveyances to LRAs or representatives of the homeless) (reference (e)).

C6.4.1.2. 41 CFR Part 102–75 (Special disposal provisions for public airports; historic monuments; education and public health uses; shrines, memorials or religious uses as part of another public benefit conveyance; public park or recreation uses; housing for displaced persons; and non-federal correctional facility uses) (reference (ab)).

C6.4.1.3. 41 CFR Part 102–75 (Negotiated sales and public sales) (reference (ab)).

C6.4.1.4. 41 CFR Part 102–14 through 102-220 (Utilization of personal property) (reference (az)).

C6.4.1.5. 41 CFR Part 102–37 (Donation of personal property) (reference (ba)).

C6.4.1.6. 41 CFR Part 102–38 (Sale, abandonment, or destruction of personal property) (reference (bb)).

C6.4.1.7. Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96-480, as amended (15 U.S.C. 3710(i)) (reference (bc)) (Donation of research equipment to educational institutions and nonprofit organizations).

C6.4.1.8. Executive Order 12999 (reference (bd)) (Donation of personal property to further math and science education).

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C6.4.2. Personal Property Disposition and Disposal Strategy. The Military Department should develop personal property disposal plans that coincide with its real property disposal plans. The Military Department must determine how to convey the personal property needed for redevelopment to the intended recipient. In accordance with the available actions below, the personal property that supports the intended reuse and adds value to the real property should be conveyed at fair market value unless otherwise authorized (e.g., PBC and homeless conveyances) along with the real property. Personal property that does not support or add value to the real property should be conveyed at fair market value through a Defense Reutilization and Marketing Office (DRMO) or one of the conveyance methods listed below at fair market value to the LRA. Installation commanders should consult with local DRMO officials and the LRA when determining personal property disposal methods for property identified by the LRA in support of redevelopment. Only the personal property identified as required for redevelopment by the LRA, and not being conveyed in conjunction with a real property conveyance, can convey separately to the LRA via an EDC. All personal property conveyance to an LRA should occur at fair market value unless the conveyance meets the established criteria for a no-cost EDC.

C6.4.2.1. Leases. Personal property associated with a lease will typically be included in the leasehold (see Chapter 5 for additional information on leasing). However, that property cannot be used outside the leasehold premises.

C6.4.2.2. Public Sales of Personal Property with Real Property. Under a public sale, personal property is sold and conveyed as an economic unit with the realty to the highest bidder at no less than fair market value. The Federal disposal agent is not obligated to accept less than fair market value bids.

C6.4.2.3. Negotiated Sales of Related Personal Property to Public Entities. Under a negotiated sale, related personal property should be valued with the realty as an economic unit. Negotiated sales are at no less than the appraised fair market value.

C6.4.2.4. Public Airport Conveyances. Surplus personal property may be transferred as part of an airport conveyance. The Military Department may transfer personal property that is desirable for developing, improving, operating, or maintaining a public airport or is needed for developing sources of revenue from non-aviation businesses at a public airport (and the public interest is not best suited for industrial use). The FAA must approve all public airport transfers.

C6.4.2.5. Public Benefit Conveyances and Similar Approved, Sponsored, or Requested Conveyances. When personal property is required for the redevelopment of real property subject to a PBC, it may be related and treated as part of the real property conveyance. These transfers can be further categorized as described below:

C6.4.2.5.1. Sponsored public benefit conveyances. These conveyances include PBCs for education, public health, public parks or recreation, and port facility purposes. Surplus personal property may be transferred by the sponsoring Federal agency in accordance with its rules for implementing authorized programs. The terms and conditions attached to the redevelopment and the value (or the discount allowed) of the personal property are determined by the sponsoring agency. In this type of conveyance, the Military Department assigns the real,

related, and other qualifying personal property to the sponsoring agency for transfer to the sponsored applicant.

C6.4.2.5.2. Approved public benefit conveyances. These conveyances include PBCs for non-federal correctional facilities, law enforcement, emergency management response, wildlife conservation, historic monuments, and power transmission lines. The terms and conditions attached to the redevelopment are determined by the Military Department, which transfers the qualifying personal property directly to the approved PBC recipient.

C6.4.2.6. Homeless Assistance Conveyances.

C6.4.2.6.1. Personal property may be transferred to an LRA or a homeless assistance provider for homeless assistance purposes (see Chapter 5). Property transferred under this authority may be used by a homeless assistance provider either on or off the installation.

C6.4.2.6.2. After providing the LRA with the personal property inventory, the installation commander should recommend to the LRA that the following strategy be used for identifying and transferring personal property intended for use by homeless assistance providers:

C6.4.2.6.2.1. Coordinate with the proposed providers to identify any personal property to be conveyed.

C6.4.2.6.2.2. Incorporate the agreed-to disposition of all personal property identified in any binding contracts negotiated between the LRA and selected representatives of the homeless.

C6.4.2.6.2.3. Include identification and intended use of the personal property in the homeless assistance portion of the adopted redevelopment plan.

C6.4.2.7. Economic Development Conveyances. Economic development conveyances must satisfy the following conditions:

C6.4.2.7.1. Personal property may be transferred as part of an EDC of the real property (see Chapter 5 for more details).

C6.4.2.7.2. Personal property EDCs can be made only to the LRA. Any proceeds from the sale of BRAC personal property to EDCs must be deposited into the BRAC Account.

C6.4.2.7.3. Personal property EDCs are subject to the provisions of reference (c), which governs personal property disposal at closing and realigning installations.

C6.4.2.7.4. Personal property may not be acquired by the LRA under a no-cost EDC solely for the purpose of immediately leasing or reselling it to finance base redevelopment. However, the LRA may provide the property at no cost to others for use in accordance with the redevelopment plan for the installation.

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C6.4.2.8. Special Transfer Categories. If a NAF personal property owner makes the property available for disposal, the LRA or other interested parties must negotiate purchase terms with the property owner.

C6.4.2.9. Sale and Donation of Surplus Personal Property. Personal property designated as available for redevelopment and not needed by the LRA in support of its redevelopment plan should be sold or otherwise disposed through the DRMO.

C6.5. AIR EMISSION RIGHTS TRADING GUIDANCE

C6.5.1. Clean Air Act. The Clean Air Act (reference (d)) amendments of 1990 (CAAA) calls for a reduction in emissions by both military and civilian activities to meet the national ambient air quality standards for clean air. The Act introduced the marketplace into emission control regulations. To further emission reductions through market trading, the CAAA and implementing State regulations may allow movement or transfer of emission rights between parties at the same site, to other locations within the State, or, in some instances, to other States. It also contains the following provisions:

C6.5.1.1. Non-attainment. The CAAA designates acceptable ambient levels of selected ("criteria") pollutants. Areas that exceed those levels are designated as "non-attainment" areas and the State's control plan ("State Implementation Plan" or SIP) must be adequate to reach attainment within a specified time. The required reduction controls and the time required to achieve those reductions depend on the severity of the air pollution problem.

C6.5.1.2. Economic incentive programs. To encourage innovative approaches to reduce air pollution, the CAAA authorizes development of programs to trade emission rights, which are rights to emit specific amounts of criteria pollutants. Various State trading programs have been developed such as cap-and-trade allocation and emission reduction credit (ERC) banking. In addition, some States have entered into agreements that allow interstate trades.

C6.5.1.3. Emissions trading programs. A variety of individual trading programs have been created throughout the country. Some allow trading reductions from stationary, mobile, and area sources, and even intrastate and interstate trading. Generally, if an approved program is in place, when an owner permanently shuts down an emission source, ERCs can be created by submitting an application and fee to the State or air quality control region (AQCR). The AQCR may discount or retain some of the ERCs as part of a reserve bank to support future economic growth or to meet attainment requirements. Even in States that do not have a formal program for ERCs (including mobile source emission reductions), the Department of Defense has successfully quantified and traded these "offsets" to other DoD Components or Federal agencies to support conformity requirements. Because programs differ among the States and regulatory changes are frequent, consultation with experts within the Military Department is strongly encouraged. The trading and transfers of mobile source emissions raise special considerations, including transfers that support conformity, and should be referred to the Secretary of the Military Department.

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C6.5.1.4. Permit transfers. Stationary sources may be issued air permits by the State or AQCRs to emit specific levels of criteria pollutants during a year. Regulators usually allow the transfer of these air permits with transfer of the stationary source.

C6.5.1.5. General conformity. The CAAA requires a Federal agency to demonstrate that a new Federal action, or a federally approved or supported action, will not cause deterioration of air quality or impact attainment status in a non-attainment or maintenance (former non-attainment) area. Because military installations that gain units, functions, or weapons systems as a result of a BRAC action are required to comply with conformity, they need to determine whether emission reductions or offsets, which are needed to demonstrate conformity, can be transferred from closing or realigning installations.

C6.5.2. Guidance and Implementation.

C6.5.2.1. Emission credits can have substantial value and the Military Department should consider these assets in its overall property disposal plan. Decisions on the distribution of any such emission credits will be made by the Secretary of the Military Department in accordance with the BRAC law (reference (c)), Section 2905(b).

C6.5.2.2. When a receiving installation is located in an area that could be awarded credits, offsets, or allowances from a closing installation, the receiving installation should determine its emission needs as early as possible.

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C7. CHAPTER 7

MAINTENANCE, UTILITIES, AND SERVICES

C7.1. INTRODUCTION

Surplus facilities and equipment at installations that have been closed or realigned can be important to the eventual reuse of the installation. Each Military Department is responsible for protecting and maintaining such assets in order to preserve the value of the property in accordance with the law.

C7.2. GENERAL PRACTICE

C7.2.1. The Military Department will seek to minimize caretaker costs while supporting redevelopment. However, if no redevelopment plan is prepared, or if no reuse is actively being pursued for parts or all of the installation, the Military Department may reduce maintenance levels to the minimum levels required for similar surplus government property considering potential return to the government on such expenditures.

C7.2.2. The Military Department will follow a general practice for closing installations that protects and maintains the asset. That practice consists of the following elements:

C7.2.2.1. The Military Department, in consultation with the LRA and within the limits described in paragraph C7.3.2, will determine the initial maintenance levels for real property and their durations on a facility-by-facility basis. Such levels of maintenance may be adjusted over time as circumstances warrant.

C7.2.2.2. Maintenance of personal property will generally be limited to physical security in the expectation that this property will quickly be conveyed. (See Chapter 6 for more information on personal property.)

C7.2.2.3. Personal and real property will be transitioned from its active mission maintenance level to its initial maintenance level after the property is no longer put to military use or the active mission departs (see Section C7.3).

C7.2.2.4. The Military Department will relinquish its responsibility when possession and control of the property has been transferred to another entity pursuant to an agreement to transfer such property. To ensure caretaker funds are allocated appropriately, the Military Department should specify a time for closing on the transfer of such property, usually no more than 60 days from execution of the transfer agreement. At that time, the Military Department will cease its caretaker funding of such property. It also should not agree to delay or phase the transfer of any facility solely for the purposes of continuing to protect or maintain the facility.

C7.2.2.5. Maintenance functions that are the responsibility of the Military Department can be performed by a variety of service providers. All such maintenance providers will sustain the maintenance levels agreed to and funded by the Military Department.

C7.2.2.6. The Military Department will notify the LRA of any intended change in an established initial maintenance level for a facility, or part thereof, or item of personal property, if such a change becomes necessary (e.g., closure or change in mission, no reuse apparent for the property, or expiration of the maintenance periods identified in paragraph C7.3.2). This notice will occur prior to the reduction in maintenance level and give the LRA a reasonable period of time, as determined by the Military Department, in which to submit comments on the proposed reduction.

C7.2.2.7. Procedures and responsibilities for obtaining common services, such as fire protection, security, utilities, telephones, roads, and snow or ice removal, must be discussed and resolved in the earliest stages of the closure or realignment process. The Military Department cannot guarantee continued provision of these common services. For example, the Military Department will not be responsible for funding particular needs of new tenants or new owners of facilities, such as augmentation of fire response times.

C7.2.2.8. Maintenance levels of privatized utilities and housing will be determined by their associated contracts.

C7.3. ESTABLISHING INITIAL MAINTENANCE LEVELS

C7.3.1. Determining Initial Maintenance Levels. The Military Department will meet with the LRA after approval of the installation for closure or realignment (and again periodically during the redevelopment planning process, if necessary) to discuss the LRA's reuse plans and to work toward establishing initial and ongoing maintenance levels. Initial maintenance levels for all real property vacated as a result of BRAC will be to levels required to support the use of any such facilities or equipment for nonmilitary reuse purposes, but not exceed the standard of maintenance in effect at the approval of the closure or realignment.

C7.3.2. Initial Maintenance Levels and their Duration.

C7.3.2.1. The Military Department will set initial maintenance levels at a minimum that will ensure weather tightness for buildings, limit undue facility deterioration, and provide physical security. The Military Departments have developed specific maintenance levels that consider several factors, including the following:

C7.3.2.1.1. Required operational status of the facility and the level of effort and scope of work necessary to sustain that status.

C7.3.2.1.2. Anticipated time until facility reuse.

C7.3.2.1.3. Location-specific climatic conditions (e.g., air conditioning, dehumidification, and heat).

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C7.3.2.2. The initial maintenance levels shall not:

C7.3.2.2.1. Exceed the standard of maintenance and repair in effect on the date of closure or realignment approval.

C7.3.2.2.2. Be less than maintenance and repair required to be consistent with Federal government standards for excess and surplus properties (see 41 CFR Parts 102-75.945 and 102-75.965) (reference (ab)).[1]

C7.3.2.2.3. Require any property improvements, including construction, alteration, or demolition, except when required for health, safety, or environmental purposes, or is economically justified in lieu of continued maintenance expenditures.

C7.3.2.3. The Military Department may not reduce initial maintenance levels until one of the following events occurs:

C7.3.2.3.1. One week after the LRA submits the redevelopment plan to the Secretary of the Military Department.

C7.3.2.3.2. The date on which the LRA notifies the Military Department that it will not submit a redevelopment plan.

C7.3.2.3.3. Twenty-four months after the date of approval of the closure or realignment of the installation.

C7.3.2.3.4. Ninety days before the date of the closure or realignment of the installation.

C7.3.2.4. The Military Department may extend the period for initial or adjusted maintenance levels for property still under its control if the Secretary of the Military Department determines such levels of maintenance are justified. Examples may include:

C7.3.2.4.1. Where there is a benefit to the government to do so; or

C7.3.2.4.2. When it will clearly benefit redevelopment and property conveyance is delayed by the government.

C7.3.2.5. The continued maintenance of physical infrastructure (i.e., utility systems) presents a unique challenge in that water supply, electrical power, and sewage disposal facilities may need to be operated after mission departure at rates far below their designed capacity. The Military Department will perform an engineering analysis to determine what structural and operating changes are necessary (e.g., valve closures in water supply systems or power shutoff in unused facilities) to ensure lawful and cost-effective operation. It also should address conversion of utilities as early as possible in the disposal process.

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[1] Guidelines for protection and maintenance are in the GSA Customer Guide to Real Property Disposal, http://propertydisposal.gsa.gov/ResourceCenter/laws_regs_all/letters/csg.PDF.

C7.3.2.6. All periods of initial maintenance will be terminated when ownership or control of the property is turned over to another party by deed or lease. In the case of Federal agency transfers, the Military Department and the receiving agency will coordinate the transition of maintenance responsibilities, but the receiving agency will be expected to assume this responsibility as soon as the Military Department makes the property available for transfer or assignment. The Military Departments will work with public benefit conveyance sponsoring agencies on transfer of responsibility to public benefit conveyance recipients.

C7.3.3. Disagreements. If the LRA disagrees with the Military Department's determination of initial or subsequent maintenance level, the Military Department should make every effort to resolve that disagreement at the lowest possible level within its chain of command. Final authority for resolving disagreements rests with the Secretary of the Military Department.

C7.4. FACILITY MAINTENANCE AND COMMON SERVICES

C7.4.1. Maintenance Providers. Protection and maintenance of property can be performed by several different entities, depending on the particular phase of base closure and disposal. In general, funding for maintenance of property not in reuse will be provided by the Military Department. In addition, property no longer under the Military Department's control will be maintained at the expense of the user or new owner. The following guidance also applies:

C7.4.1.1. Funding of protection and maintenance activities can occur through several mechanisms, including the following:

C7.4.1.1.1. Caretaker contract. Under such a contract, a military-procured contractor performs protection and maintenance.

C7.4.1.1.2. Cooperative agreement. Under this agreement, the LRA or another qualified community entity performs protection and maintenance caretaking on a nonprofit, cost-reimbursement basis through an agreement with the Military Department. These agreements also may be used to provide for protection and maintenance of properties that will be disposed of at a realigning installation.

C7.4.1.1.3. Support agreement. Under this agreement, another military organization provides the required support.

C7.4.1.1.4. Residual work force. Under this arrangement, a residual government work force provides the required protection and maintenance.

C7.4.1.2. After expiration of the time periods identified in paragraph 7.3.2, the Military Department will normally reduce its maintenance to the minimum level for surplus government property, as required by 41 CFR Parts 102-75.945 and 102-75.965 (reference (ab)). This regulation states that facility maintenance must provide only those minimum services necessary to preserve the government's interest and realizable value of the property considered and render

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safe or destroy aspects of excess and surplus property that are dangerous to the public health or safety.[2]

C7.4.1.3. Leased property. The lease will specify the lessee's responsibility for protection and maintenance of the property during the term of the lease.

C7.4.1.4. Post-disposal. After the property has been conveyed, the Military Department will not perform nor pay for protection and maintenance. Protection and maintenance of conveyed property will be the sole responsibility of the transferee.

C7.4.2. Maintenance Activities. Maintenance of real property, facilities, and equipment can entail a wide range of activities, determined by the Military Department, including the following:

C7.4.2.1. Interior and exterior physical inspections of buildings, including building shells and exterior windows and doors, to verify security and structural soundness.

C7.4.2.2. Scheduled operational inspections and routine maintenance for utilities including heat, air conditioning, water supply and plumbing, electricity, sewage, gas, and fire protection systems.

C7.4.2.3. Maintenance and inspection of elevators and other installed mechanical equipment.

C7.4.2.4. Pest control, such as periodic termite inspections.

C7.4.2.5. Grounds maintenance, including grass mowing and fire breaks.

C7.4.3. Activities Not Considered Maintenance.

The following activities are not considered normal maintenance responsibilities:

C7.4.3.1. Building and other facility demolition, unless necessary to protect public health and safety.

C7.4.3.2. Asbestos abatement and lead-based paint removal beyond those actions required by law and regulation.

C7.4.3.3. Installation of facility-specific utilities or utility meters.

C7.4.3.4. Construction or modifications to meet Federal, State, or local building or utility infrastructure codes.

C7.4.3.5. Property improvements or alterations that are not necessary to protect public health and safety.

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[2] Guidelines for protection and maintenance are in the GSA Customer Guide to Real Property Disposal, http://propertydisposal.gsa.gov/ResourceCenter/laws_regs_all/letters/csg.PDF.

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C7.4.4. Common Services.

C7.4.4.1. The Military Department will arrange for common services that are necessary to support initial maintenance levels of government facilities. These common services may include the following:

C7.4.4.1.1. Road maintenance (including snow and ice removal)

C7.4.4.1.2. Physical security.

C7.4.4.1.3. Utility services.

C7.4.4.1.3.1. Electricity.

C7.4.4.1.3.2. Water and sewage.

C7.4.4.1.3.3. Telecommunications.

C7.4.4.1.3.4. Gas.

C7.4.4.1.4. Fire and emergency services.

C7.4.4.2. Users of common services, including LRA tenants, will pay for the services provided by the Military Department at rates established to fully recapture the costs of providing such services. After expiration of the initial maintenance period, and in consultation with the LRA, the Military Department may elect to discontinue performance of any common services not required to support its residual military mission or protection and maintenance activities.

C7.5. EQUIPMENT AND PERSONAL PROPERTY MAINTENANCE

The Military Department will generally follow a standard approach for establishing and maintaining minimum levels of maintenance for items of equipment and other personal property. This approach is based on the general practice described in Section C7.2. Some additional guidelines for equipment and personal property maintenance include the following:

C7.5.1. Equipment and personal property will be transitioned to initial maintenance levels as their mission use ceases or the active mission departs.

C7.5.2. Equipment and personal property will be physically secured, at the Military Department's option in consultation with the LRA, either in a central location or in individual facilities.

C7.5.3. Maintenance of installed equipment and related personal property will be at the initial levels for the associated real property, as set by the Military Department in consultation with the LRA. Duration of initial maintenance will be as specified in paragraph C7.3.2, after which time only physical security will be provided.

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C7.5.4. Maintenance of non-installed equipment and non-related personal property is normally restricted to physical security.

C7.5.5. The Military Department will stop all personal property maintenance upon transfer or reuse.

C7.5.6. The Military Department will notify the LRA of any intended change in an established maintenance level for equipment or personal property, if such a change becomes necessary, due to factors that may include closure or change in mission, no reuse apparent, or expiration of maintenance periods as specified in paragraph C7.3.2. This notice will occur prior to the reduction in maintenance level.

C7.5.7. The Military Department will not repair or replace any personal property that is damaged or lost.

C7.6. DoD-OWNED UTILITY SYSTEM MAINTENANCE AND OPERATION

C7.6.1. The Military Department will consider and address the operation, maintenance, and conveyance of utilities and the effects of mission drawdown and closure on utilities service contracts or other agreements early in the disposal planning process. Utilities include the following:

C7.6.1.1. Water and sewage.

C7.6.1.2. Storm water.

C7.6.1.3. Electricity.

C7.6.1.4. Energy plants (heating and cooling).

C7.6.1.5. Waste collection and recycling.

C7.6.1.6. Gas (natural and liquid propane).

C7.6.1.7. Telecommunications lines, including telephone and cable TV.

C7.6.2. The Military Department should find a mechanism and willing recipient to help in transferring a closing installation's utility systems to local entities (public or private) before the date of operational closure, or as soon as practicable after closure, to provide continuity of service. It is the Department of Defense's view that the community is best served when the Military Department transfers utility systems to local control early in the closure process. For example, the sooner a public concern accepts transfer of the utility systems, the sooner it can apply for assistance, such as Economic Development Administration grants, to upgrade or rework systems to meet its specific requirements. Moreover, if the LRA or local utility company operates the utility systems, prospective tenants will have confidence that utility services will continue to be provided.

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C7.6.3. All utility systems will be transferred in an “as is” condition and will not be improved to comply with local code or for other reasons before transfer.

C7.6.4. Operation of utility systems by the Military Department at a closed installation will normally be at the minimum level required to sustain caretaker operations. Any operation to support reuse in excess of that required for caretaker operations will be the responsibility of the LRA. The Military Department may agree to provide such increased services to support reuse prior to property conveyance only if it is fully reimbursed and there is no impact on the Department’s operational readiness. A Military Department may not agree to continue operating utility systems after real property conveyance.

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C8. CHAPTER 8

ENVIRONMENTAL ACTIONS

C8.1. KEY OBJECTIVES

The Department of Defense has established four key environmental objectives when closing or realigning installations:

C8.1.1. Ensure protection of human health and the environment on BRAC properties.

C8.1.2. Expeditiously transfer BRAC property to new owners.

C8.1.3. Maximize the utility of BRAC property by making wise public policy and business decisions regarding environmental actions.

C8.1.4. Maximize the use of all available tools to expedite response actions and redevelopment, including integration of early transfer authorities and privatization of response actions with redevelopment.

C8.2. COMPLYING WITH NATIONAL ENVIRONMENTAL POLICY ACT (reference (t))

An important feature of the BRAC process is compliance with NEPA. Under NEPA, the Military Departments must identify and consider the proposed action and reasonable alternatives and their respective environmental impacts. Actions to be analyzed include operational activities, proposed disposal and reuse actions, and planned community redevelopment.

C8.2.1. Application.

C8.2.1.1. The NEPA process is intended to help Federal officials make environmentally informed decisions. It also encourages and incorporates public comment and participation into the decision-making process.

C8.2.1.2. During the BRAC process, NEPA must be applied to the property disposal and relocation of functions at the receiving installation. However, Public Law 101-510, as amended (reference (c)), provides that the Military Department does not have to consider

C8.2.1.2.1. The need for closing or realigning the military installation, which has been recommended for closure or realignment by the BRAC Commission;

C8.2.1.2.2. The need for transferring functions to a military installation that has been selected as the receiving installation; or

C8.2.1.2.3. The alternative military installations to those recommended or selected.

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C8.2.2. Process.

C8.2.2.1. To accomplish this, a formal environmental impact analysis is prepared, either in the form of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), depending on the level of analysis required. In some cases, a Categorical Exclusion may be used for Military Department actions.

C8.2.2.2. The preparation of an EA is used to provide sufficient evidence in determining whether to issue a Finding of No Significant Impact (FONSI) or to prepare an EIS. A FONSI is a determination that, based on the EA, the proposed action will not significantly affect the environment and a full EIS is not necessary. Public comments can be received on the EA and the applicability of a FONSI. Upon issuance of a FONSI, the Military Department can move forward with the final disposal decision.

C8.2.2.3. The preparation of an EIS is more involved and engages the public in a more formal process, which can be summarized as follows:

C8.2.2.3.1. The Military Department publishes a Notice of Intent in the Federal Register that a property disposal action may be undertaken and an EIS will be prepared.

C8.2.2.3.2. A public scoping meeting will be held to obtain initial public comments about the proposed disposal action.

C8.2.2.3.3. A Draft EIS (DEIS) is developed and published, and made available for public review and comment. Public hearings are held in or near the affected communities.

C8.2.2.3.4. The Final EIS (FEIS) is then completed after considering the public comments received on the DEIS. A Notice of Availability (NOA) of the FEIS will be published in the Federal Register.

C8.2.2.3.5. No less than 30 days after publication of the FEIS, a Record of Decision (ROD) is issued. The ROD indicates what disposal action has been selected, the alternatives considered, the potential environmental impacts, and any specific mitigation activities to support the decision.

C8.2.2.3.6. The FEIS should be completed no later than 12 months after the submittal of the LRA's redevelopment plan.

C8.2.3. Documentation.

C8.2.3.1. The Military Department is required to analyze the potential environmental effects at the receiving installation or installations. This analysis will determine the condition of the environment, facilities, and natural or historic, and cultural resources. With such information, the Military Department will know which parts of the receiving installation can accept relocated functions and which areas need to be avoided or protected.

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C8.2.3.2. The NEPA analysis will be conducted according to the regulations of the host Military Department, including assignment of funding responsibility by its regulations. See Appendix AP.4 for Military Department NEPA regulations.

C8.2.3.3. Before disposing of any real property, the Military Department must analyze the environmental effects of the disposal action. In preparing that analysis, the Military Department must develop the proposed Federal action, which will include the redevelopment plan, and then consider a range of reasonable disposal alternatives and assess their environmental effects in the context of the reasonably foreseeable reuse of the property. In the record of decision, the LRA's redevelopment plan will be given substantial deference. The Military Department will work closely with the LRA in preparing the NEPA analysis.

Public Law 101-510, § 2905(b)(7)(K)(ii)&(iii).

"(ii) For purposes of carrying out an environmental assessment of the closure or realignment of an installation, the Secretary of Defense shall treat the redevelopment plan for the installation (including the aspects of the plan providing for disposal to State or local governments, representatives of the homeless, and other interested parties) as part of the proposed Federal action for the installation.

(iii) The Secretary of Defense shall dispose of buildings and property under clause (i) in accordance with the record of decision or other decision document prepared by the Secretary in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). In preparing the record of decision or other decision document, the Secretary shall give substantial deference to the redevelopment plan concerned."

C8.2.3.4. In the event that the LRA fails to prepare an acceptable (as determined by HUD) or timely redevelopment plan, the Military Department will prepare the NEPA analysis using reasonable assumptions about foreseeable reuse based upon market conditions, current property use, surrounding land use, community needs, and other factors that typically are used to determine the highest and best use under GSA Federal Management Regulations, 41 CFR 102-75 (reference (ab)).

C8.2.3.5. The NEPA analysis and decision documents prepared in connection with this analysis address the military department's decisions with respect to the property based on reasonably foreseeable uses and the potential mitigation actions that may be required for potential environmental impacts. Although the Military Departments may indicate the specific disposal decisions in these decision documents, these decisions do not represent an enforceable commitment to a prospective transferee and can be amended as appropriate.

C8.2.4. Data Gathering. To ensure efficient and effective data gathering in support of the NEPA process, early data collection should be combined with other ongoing processes supporting property disposal actions, such as the preparation of ECP reports. In addition, other environmental studies supporting the NEPA process, such as those involving threatened and endangered species, cultural or historic resources, and wetlands determination, should be started

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as early as possible to ensure timely compliance with the applicable regulatory requirements. Every effort will be made to provide the data gathered in the NEPA process to the LRA as soon as it is available to aid in the development and finalization of its redevelopment plan. Data gathering is a neutral activity and should not be confused with preparation or analysis of alternatives, which will not begin until after the closure and realignment recommendations become final.

C8.3. ENVIRONMENTAL CONDITION OF PROPERTY REPORT

C8.3.1. The Military Department with real property accountability shall assess, determine, and document the environmental condition of all transferable property in an ECP report (see Appendix AP2). The primary purposes of that report include the following:

C8.3.1.1. Provide the Military Department with information it may use to make disposal decisions regarding the property.

C8.3.1.2. Provide the public with information relative to the environmental condition of the property.

C8.3.1.3. Assist in community planning for the reuse of BRAC property.

C8.3.1.4. Assist Federal agencies during the property screening process.

C8.3.1.5. Provide information for prospective buyers.

C8.3.1.6. Assist prospective new owners in meeting the requirements under EPA's "All Appropriate Inquiry" regulations when they become final.

C8.3.1.7. Provide information about completed remedial and corrective actions at the property.

C8.3.1.8. Assist in determining appropriate responsibilities, asset valuation, and liabilities with other parties to a transaction.

C8.3.2. The ECP's scope and level of any additional efforts required to complete it will depend upon a number of factors including the following:

C8.3.2.1. The current property use.

C8.3.2.2. The nature and extent of any known contamination or lack thereof from hazardous substances, pollutants, contaminants, or petroleum and petroleum products (for uncontaminated determination, see paragraph C8.5.4).

C8.3.2.3. Any munitions and explosives of concern known or suspected to be present.

C8.3.2.4. The current phase of any remedial or corrective action being taken on the property.

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C8.3.2.5. The availability of existing information regarding the storage, release, or disposal on the property of hazardous substances, pollutants, contaminants, or petroleum and petroleum products.

C8.3.2.6. The presence of protected species or cultural assets.

C8.3.3. The ECP report may, based on the installation's individual circumstance, be prepared for an entire installation or for individual parcels.

C8.3.4. The ECP report will also summarize historical, cultural, and environmental conditions and include references to publicly available and related reports, studies, and permits. (Appendix AP.2 provides a format and describes the minimal required elements of the ECP report.) The report shall rely on existing information and, if necessary, new information readily available in order to provide an accurate summary of the environmental condition of the property. If needed, the Military Department will prepare an ECP Update Report based upon new information. This report may include additional site characterization to meet applicable regulatory or planning requirements, or help maximize the value of the property.

C8.3.5. The ECP report and any ECP Update Report shall be made publicly available and electronically accessible as soon as possible after it becomes final. The ECP report will be forwarded for information purposes to the following entities:

C8.3.5.1. Recognized LRAs.

C8.3.5.2. Local governments in each jurisdiction in which an installation having BRAC real property is located.

C8.3.5.3. Environmental agencies with regulatory authority over the matters described in the report.

C8.3.5.4. Any Federal agency seeking a property transfer at the installation.

C8.3.5.5. The Restoration Advisory Board (RAB).

C8.4. COMPLYING WITH LAWS THAT PROTECT NATURAL AND CULTURAL RESOURCES

As part of the NEPA analysis, the Military Department will analyze the impacts on natural and cultural resources. For example, EO 11988 (reference (be)) calls for determinations regarding floodplains and EO 11990 (reference (bf)) calls for determinations regarding wetlands. Additionally and aside from the NEPA requirements, other laws such as the Endangered Species Act and National Historic Preservation Act require the Military Department to analyze the impacts on natural and cultural resources and to consult with Federal and State agencies before making final property disposal decisions.

C8.4.1. Endangered Species Act (ESA) (reference (o)).

C8.4.1.1. The ESA includes both substantive prohibitions and affirmative obligations with which the Military Department must comply. It requires the Military Department to consult with the National Marine Fisheries Service for most marine species and the U.S. Fish and Wildlife Service for all other species before taking any BRAC-related realignment or disposal action that may affect, adversely or beneficially, a listed threatened or endangered species or designated critical habitat. It also requires the Military Department to confer with those agencies for actions that may affect a species that is proposed for listing as threatened or endangered. Regulations implementing the ESA are contained in 50 CFR 402 (reference (bg)), while the lists of endangered and threatened wildlife and plants are contained in 50 CFR 17.11 and 17.12; the designated critical habitats are listed in 50 CFR 17.95 and 17.96 (reference (bh)).

C8.4.1.2. The transfer of BRAC property does not by itself adversely affect listed species, but its reuse could be subject to the take prohibitions in Section 9 of the ESA (reference (o)). The mandatory Section 7(a)(2) consultation process will identify what species are likely to be present on the property, what habitat has been designated as critical, what reuse actions are likely to result in a take, and whether the developer or new owner will be able to use the property as planned.

C8.4.1.3. The Military Department's natural resource staff experts should be consulted when additional advice is required in this area.

C8.4.2. Coastal Zone Management Act (CZMA) (reference (n)). The Coastal Zone Management Act (CZMA) requires that all Federal actions that affect any land or water use or natural resource of the coastal zone be consistent to the maximum extent practicable with the enforceable policies of federally approved State Coastal Management Programs (CMPs). The ministerial act of transferring ownership of property generally will not affect coastal zone resources or uses. However, the new owners will be subject to the State's enforceable policies. In rare instances, restrictive covenants that limit the type of reuse to which property can be put may be inconsistent with the enforceable policies of a State coastal management program. Because such a situation is unlikely, the Military Department disposing of the property should address it with the assistance of legal counsel. In Federal-to-Federal transfers, the receiving agency will be responsible for any required consistency determination under CZMA.

C8.4.3. Historic Preservation.

C8.4.3.1. The transfer, lease, or sale of National Register-eligible historic property to a non-federal entity may constitute an "adverse effect" under the regulations implementing the National Historic Preservation Act (36 CFR 800.5(a)(2)(vii)) (reference (bi)). One way of resolving this adverse effect is to restrict the use that may be made of the property subsequent to its transfer out of Federal ownership or control through the imposition of legally enforceable restrictions or conditions. The Secretary of the Military Department may include such restrictions or conditions (typically a real property interest in the form of a restrictive covenant or preservation easement) in any deed or lease conveying an interest in historic property to a non-Federal entity. Before doing so, the Secretary should first consider whether the historic character of the property can be protected effectively through planning and zoning actions undertaken by units of State or local government. If so, working with such units of State or local government to

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protect the property through these means is preferable to encumbering the property with a covenant or easement.

C8.4.3.2. Before including such a covenant or easement in a deed or lease, the Secretary shall consider

C8.4.3.2.1. Whether the jurisdiction that encompasses the property authorizes such a covenant or easement, and

C8.4.3.2.2. Whether the Secretary can give or assign to a third party the responsibility for monitoring and enforcing such a covenant or easement.

C8.4.3.3. In addition, the Military Department should ensure (without providing tax advice) that the recipient is aware of potential tax advantages of receiving the property without enforceable restrictions, thereby enabling the recipient to grant historic preservation easements and obtain available tax advantages.

C8.4.3.4. See Appendix AP1 for other laws that impact natural and cultural resources.

C8.5. COMPLYING WITH LAWS PERTAINING TO CLEANUP OF HAZARDOUS SUBSTANCES AND PETROLEUM PRODUCTS

The Department of Defense must ensure that appropriate response or corrective actions related to petroleum products or their constituents and hazardous substances have been taken, or will be taken, to protect human health and the environment on property that is to be transferred. These response or corrective actions and transfer are intertwined and the requirements can be complex. Refer to Appendix AP1 for a list of the primary Federal laws and regulations that pertain to the cleanup of DoD property.

C8.5.1. Determination of Cleanup Responsibilities.

C8.5.1.1. In coordination with environmental regulatory agencies and the local government, the Military Department will make decisions as early as possible on which contaminated sites on BRAC property will have response actions completed by the Department of Defense or by the new owner in coordination with environmental regulatory agencies and the local government. When a Military Department retains responsibility for response actions, the actions will be completed as soon as possible, consistent with budget parameters and existing response or corrective action permits. As these decisions are being made, the Military Departments must consider Interagency Agreements (IAGs) and other cleanup agreements that are in place at the facility with the environmental regulatory agencies and the effect these decisions will have on those agreements. If any schedule changes are expected for environmental restoration activities, discuss them early in the process with the regulators.

C8.5.1.2. Historically, remedy selection based on current or historic use helps speed cleanup and redevelopment, as does reuse planning that incorporates special environmental conditions (e.g., landfills or industrial areas). A new owner or LRA, when planning how to redevelop BRAC properties, may benefit from these concepts. Response actions at levels that

support less restricted uses of the property are a business decision to be normally made by the new owner of the property with realization that cleanup costs associated with less restricted property usage may be borne by the new owner as part of the redevelopment of the property for new uses. Therefore, for BRAC properties the Department of Defense prefers that Military Department cleanup decisions be based on current use of the property.

C8.5.1.3. For facilities such as former ranges that have unique military characteristics, the Department of Defense prefers the remedy selection be based upon future use as open space. Open space includes wildlife refuges, endangered and threatened species habitat, conservation areas, carbon sequestration areas, and limited recreation areas. The most common types of such properties are impact areas for former ranges and demilitarization areas for open burning or detonation of military munitions.

C8.5.1.4. Where response action responsibilities will be implemented by a new owner, the Military Department shall disclose to the new owner all known information regarding environmental restoration, waste management, and environmental compliance activities relating to the property or facilities. This information shall include a description of any long-term remedies (including land-use controls) and a description of the new owner's responsibility for maintenance and reporting.

C8.5.1.5. The Department of Defense uses RABs to improve communication and cooperation with communities, regulators, and other stakeholders surrounding military facilities requiring environmental restoration. RABs bring together people who reflect the diverse interests within the local community, enabling the early and continued flow of information among the affected community, DoD, and environmental oversight agencies. The Department of Defense utilizes RABs as a forum to share information on the environmental restoration process, remediation technologies, and restoration progress. RABs offer an opportunity for members of communities affected by cleanup to provide advice to decision makers on restoration issues, ask questions, and share ideas. Where there is a DoD-recognized LRA, it should be a RAB participant.

C8.5.2. Obligations for Restoration of Property Being Transferred by Deed.

C8.5.2.1. Whenever a Military Department enters into a transfer of real property outside the Federal government where CERCLA 120(h)(3)) (reference (f)) hazardous substances were stored for 1 year or longer, known to have been released, or disposed of, Section 120(h) of CERCLA (reference (f)) applies. The Department of Defense has no authority under Section 120(h) (reference (f)) to increase or decrease the commitment required by that section.

C8.5.2.2. Any deed transferring title to real property shall contain, to the extent required by law, the notices, descriptions, and covenants specified in Section 120(h) of CERCLA (reference (f)). Check current DoD issuances for additional guidance on the subject of covenants under section 120(h).

C8.5.2.3. While all property must comply with CERCLA 120 requirements for transfer, the cleanup itself may proceed under CERCLA or RCRA, when appropriate. RCRA establishes requirements for operating facilities and provides a comprehensive framework for a cradle-to-

grave hazardous waste management program. In 1984 RCRA was expanded by adding corrective action authority to compel cleanup of past contamination at RCRA facilities. Cleanup conducted pursuant to RCRA corrective action or CERCLA will substantially satisfy the requirements of both programs. EPA, in its "Improving RCRA/CERCLA Coordination at Federal Facilities" policy memorandum issued in December 2005, is committed to the principle of parity between RCRA Corrective Action and CERCLA programs and to the idea that the programs should generally yield similar remedies in similar circumstances.

C8.5.3. Munitions Hazards. Where munitions and explosives of concern are known or suspected to be present on the property and to pose a threat to human health and safety, the Military Department shall take appropriate measures to address such hazards before transferring the property.

C8.5.4. Requirements for Different Types of Response Action/Transfer Scenarios. Described below are a range of likely scenarios and potential approaches for the conduct of response actions and transfer of BRAC property. While the response action scenarios below are written in a CERCLA context, they are equally applicable to RCRA. For this purpose, the term "appropriate regulators" means regulators from whom concurrence is required under a permit, enforcement order, or site-specific binding agreement pertaining to the property.

C8.5.4.1. Uncontaminated Property. In the case of a parcel where no CERCLA hazardous substance or petroleum products or their derivatives are known to have been released or disposed of, the Military Department shall forward a Request for Identification of Uncontaminated Property to EPA (for National Priority List or NPL sites) or the State (for non-NPL sites) pursuant to criteria in Section 120(h)(4) of CERCLA (reference (f)) (see following quote for additional detail). In the case of a concurrence that is required from a State official, the concurrence is deemed to be obtained if, within 90 days after receiving a request for the concurrence, the State official has not acted (by either concurring or declining to concur) on the request. EPA must concur not later than 9 months after submittal to the base transition coordinator for a specific proposed use for the parcel, or 18 months after the date of approval of base closure recommendations. Therefore, expeditious action is required by the base transition coordinator. If concurrence cannot be obtained within the specified period of time, the Military Department should elevate the issue to the Component political level for resolution.

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"The identification by the Secretary of Defense required under section 120(h)(4)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)(4)(A)), and the concurrence required under section 120(h)(4)(B) of such Act, shall be made not later than the earlier of—

(1) the date that is 9 months after the date of the submittal, if any, to the transition coordinator for the installation concerned of a specific use proposed for all or a portion of the real property of the installation; or

(2) the date specified in section 120(h)(4)(C)(iii) of such Act."

C8.5.4.2. No Remedial Action Required. In the case of a parcel where:

C8.5.4.2.1. CERCLA hazardous substances or petroleum products or their derivatives have been released or disposed of; and

C8.5.4.2.2. CERCLA or petroleum investigations were completed (for hazardous substances at NPL sites) and a no-action decision document was completed and concurred in by EPA or other appropriate regulators—

no further action is required for transfer of the property.

C8.5.4.3. Remedy Completed by the Department of Defense. In the case of a parcel where:

C8.5.4.3.1. CERCLA hazardous substances or petroleum products or their derivatives were known to have been released or disposed of;

C8.5.4.3.2. CERCLA or petroleum investigations have been completed;

C8.5.4.3.3. an environmental response (removal or remedial action) was found necessary;

C8.5.4.3.4. the required environmental response was completed before property transfer; and

C8.5.4.3.5. remedy completion was concurred in by EPA (for hazardous substances at NPL sites) or other appropriate regulators—

no further action is required for transfer of the property.

C8.5.4.4. Remedy in Place by the Department of Defense. In the case of a parcel where:

C8.5.4.4.1. CERCLA hazardous substance or petroleum products or their derivatives were known to have been released or disposed of;

C8.5.4.4.2. CERCLA or petroleum investigations have been completed;

C8.5.4.4.3. an environmental response (removal or remedial) action was found necessary; and

C8.5.4.4.4. the selected remedy has been constructed and is operating properly and successfully—

the property will be transferred before the environmental response action has been completed, but the remedy is in place and operating successfully.

C8.5.4.4.5. The Military Department should obtain concurrence from EPA before transfer that the hazardous substance remedy is “operating properly and successfully” (OPS) except where Early Transfer/Covenant Deferral applies.

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C8.5.4.4.6. An OPS demonstration is not required for transfers from the Department of Defense to other Federal agencies or for responses to petroleum products or their derivatives. After remedy completion, the Military Department should obtain concurrence from EPA (for hazardous substances at NPL sites) or other appropriate regulators that the remedy has been completed.

C8.5.4.5. Early Transfer; the Department of Defense Completes the Response or Corrective Action. In the case of a parcel where:

C8.5.4.5.1. CERCLA hazardous substances or petroleum products or their derivatives were known to have been released or disposed of;

C8.5.4.5.2. CERCLA or petroleum investigations have been completed;

C8.5.4.5.3. an environmental response (remedial or removal) action was found necessary; and

C8.5.4.5.4. the Department of Defense will complete the response or corrective action after property transfer—

the Military Department shall submit to the State and, if an NPL site, to EPA, a Covenant Deferral Request for hazardous substances (not petroleum products).

C8.5.4.5.5. The request shall contain sufficient information to satisfy the criteria in Section 120(h)(3)(C) of the CERCLA (reference (f)). Covenant Deferral Requests are not required for early transfers from the Department of Defense to other Federal agencies. After remedy completion, the Military Department shall seek concurrence from EPA (for hazardous substances at NPL sites) or other appropriate regulators that the remedy is complete. See "Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property" (reference (bj)) for guidance.

C8.5.4.6. Early Transfer; Privatization of Response or Corrective Action. In the case of a parcel where:

C8.5.4.6.1. CERCLA hazardous substances or petroleum products or their derivatives were known to have been released or disposed of;

C8.5.4.6.2. CERCLA or petroleum investigations have been completed;

C8.5.4.6.3. an environmental response (remedial or removal) action was found necessary and a remedy was selected; and

C8.5.4.6.4. the new property owner will complete the selected response or corrective action after property transfer, as required by a transfer agreement, contract, or State law cleanup program, and obtain all necessary concurrences—

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The Military Department shall submit to the State and, if an NPL site, to EPA, a Covenant Deferral Request for hazardous substances (not petroleum products), to the extent required by CERCLA 120(h)(3) (reference (f)).

C8.5.4.6.5. The request shall contain sufficient information to satisfy the criteria in Section 120(h)(3)(C) of CERCLA (reference (f)). Where there is an existing and enforceable agreement, permit, order, or a response action is proceeding under a State law program, the Military Department shall seek to have the responsibilities transferred to the new owner or operator.

C8.5.4.7. Early Transfer; Privatization of Response or Corrective Selection and Action. In the case of a parcel where:

C8.5.4.7.1. CERCLA hazardous substances or petroleum products and their derivatives were known to have been released or disposed of;

C8.5.4.7.2. CERCLA or petroleum investigations have not all been completed or all remedies have not yet been selected; and

C8.5.4.7.3. the new property owner will complete the required environmental response or corrective action (perform the investigation, implement the remedy, complete the remedial action, and obtain necessary concurrences as required by any transfer agreement, contract, response action agreement with Federal or State regulators)—

the Military Department shall submit to the State and, if an NPL site, to EPA, a Covenant Deferral Request for hazardous substances (not petroleum products), to the extent required by CERCLA 120(h) (3) (reference (f)).

C8.5.4.7.4. The request shall contain sufficient information to satisfy the criteria in Section 120(h)(3)(C) of CERCLA (reference (f)). Where there is an existing and enforceable agreement, permit, or order, or a response action is proceeding under a State law program, the Military Department shall seek to have the responsibilities transferred to the new owner or operator.

C8.5.5. Finding of Suitability to Transfer or Lease.

C8.5.5.1. Before transfer or lease of BRAC property, the Military Department shall ensure all applicable statutory and regulatory requirements have been satisfied. The FOST/FOSL will substantially follow the outline provided in Appendix AP3. The Military Departments may use conforming checklists or questionnaires for this purpose. For matters specifically related to hazardous substances, petroleum products, and other regulated materials (e.g., asbestos) on the property, the Military Department shall prepare a Finding of Suitability to Transfer/Lease (FOST/FOSL) summarizing how the applicable requirements and notifications for these substances and materials have been satisfied in order for DoD to provide the applicable CERCLA 120(h)(3) or CERCLA 120(h)(4) covenants (reference (f)). The FOST/FOSL shall state the property is environmentally suitable for transfer or lease and contain a description of any long-term remedies (including land-use controls) and responsibilities for their maintenance and reporting. The FOSL will document that the property is suitable for lease in that the uses

contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that all necessary remedial action has been taken or will be taken after the execution of the lease.

C8.5.5.2. The FOST shall be forwarded to the State and, if an NPL site or EPA permitted RCRA site, to EPA, for review and comment. While resolving adverse comments is desirable, such resolution is not required for transfer. For leases, providing the FOSL to EPA for comment satisfies the consultation requirement of CERCLA, Section 120(h)(3) (reference (f)), and 10 U.S.C. Section 2667(f)(2) (reference (bk)). While resolving adverse comments from regulators is desirable, such resolution is not required for leases. The process for review and comment on the FOST may be modified if the FOST is used to also satisfy Resource Conservation and Recovery Act (RCRA) (reference (v)) corrective action closure requirements.

C8.5.6. Coordination with Regulatory Agencies.

C8.5.6.1. Installations selected for closure in the BRAC 2005 round may have established relationships with Federal and State regulators for environmental matters. They may also have cleanup programs in progress or completed. Existing procedures and relationships related to regulatory oversight should be maintained for closing installations, and until the property is transferred to a new property owner.

C8.5.6.2. Existing permits and cleanup agreements shall be maintained and responsibilities fulfilled pursuant to the terms of the permit or agreement unless, consistent with such permit or agreement, responsibility is transferred to the new owner, or other arrangements are made with the regulatory agencies. Those other arrangements could include removal of certain property from a RCRA, Part B, or issuance of a closure permit to facilitate property transfer.

C8.5.6.3. The Military Department should maintain oversight reimbursement in both pre- and post-transfer situations where it retains response action responsibilities, such as cleanup after early transfer and 5-year reviews for remedies. Where cleanup actions have been assumed by another party, payment of oversight expenses or fees to environmental regulators may be assumed by the transferee and eventually by the new owner in the case of land-use controls.

C8.6. OTHER PLANNING AND FUNDING CONSIDERATIONS

C8.6.1. Other environmental actions will be required as a consequence of the base closures and realignments. A host of other environmental requirements may apply to a given base. Subject matter experts within the Military Department are available to help determine the applicability and required actions. In the case of interservice realignments, if the new function being relocated to the installation causes an additional expenditure to acquire new permits or to significantly modify existing permits, the Military Department that is being relocated is responsible for providing the resources necessary to satisfy the new permit requirement. Additional potential applicable requirements are summarized in the following subsections.

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C8.6.2. Hazardous Waste Generation. The closure of an installation could result in a significant increase in the generation of hazardous waste. The Military Department may need to expand its hazardous waste contract to cover the increase and to remove wastes more frequently and from different locations (including sites not previously listed in the contract.).

C8.6.3. Resource Conservation and Recovery Act Permit. The Military Department may need to close or transfer a hazardous waste treatment, storage, or disposal facility at an installation. Such an action requires formal procedures and written approval from EPA or the State exercising authority under RCRA (reference (v)). If a permit renewal is due prior to the departure of a military unit, facility personnel should consult with the military property disposal office. The property disposal office should attempt to negotiate modifications to the permit, as necessary, to remove as much of the base closure property as possible from the permit to help facilitate future property transfer.

C8.6.4. Above/Underground Storage Tanks. The closure and documentation of closure for underground storage tanks is another important task, particularly tanks that contain hazardous wastes or regulated substances (as defined in the Solid Waste Disposal Act (reference (bl)) hazardous waste or underground storage tank provisions). Regulatory procedures for such closures are set forth in 40 CFR 264 (Hazardous Wastes at Permitted Facilities); 40 CFR 265 (Hazardous Wastes at Interim Status Facilities); 40 CFR 280 (Regulated Substances Subject to the Underground Storage Tank Provisions) (reference (bl)); and in the corresponding provisions of State regulations.

C8.6.5. Clean Air Permits and General Conformity Requirements.

C8.6.5.1. The CAA (reference (d)) establishes a system for identifying and reducing air emissions to protect human health. It requires that permits be obtained for stationary sources of air pollution; typically one overall permit for an installation and one for each new source. Reuse activities must obtain air permits from the local air authority before they can start operating. In some cases, the local air authority may allow the Military Department to transfer existing permits with the source. In other cases, the air authority may require the creation of emission credits, while in still others a pressing military requirement in the area may require support of an ongoing or expanding mission. The Military Department must contact the DoD Regional Environmental Coordinator to coordinate its actions regarding air emissions and emissions credits. Disposition of emission credits is also discussed in Chapter 6 of this Manual. (See Section C6.5 for supporting details.) Some of the Military Department's actions will include surveying and documenting all existing CAA permits, including size and expiration data; conducting inventories of all mobile sources; contacting the local air authority to find out what options and restrictions exist; and coordinating emission issues with the LRA.

C8.6.5.2. CAA General Conformity requirements apply to realignment actions that occur in certain areas of the country. EPA's National Ambient Air Quality Standards Disposal actions are exempt from those requirements. To ensure Federal activities do not hamper local efforts to control air pollution, the CAA prohibits Federal agencies from engaging in, supporting, licensing, or approving any action that does not conform to an approved State air quality plan: the State Implementation Plan or SIP. If the property will be reused by a Federal agency or if Federal agency approval is required for the reuse (such as an FAA-approved airport), the Federal

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agency may need to comply with all applicable conformity requirements for the proposed reuse. The air conformity analysis can be complex and time consuming and must be completed before the Federal action can proceed. The conformity analysis and any necessary Conformity Determination is generally included in the NEPA documentation.

C8.6.6. Clean Water Act (reference (m)) and Safe Drinking Water Act (reference (w)) Permits. Utilities such as wastewater collection, treatment, and discharge systems; storm water collection, treatment, and discharge systems; and drinking water reservoir, treatment, storage, and distribution systems and their ancillary fire protection systems often transfer to the local municipality, utility district, or, in the case of some isolated bases, the new owner or developer. Installation personnel in the public works and environmental departments should work with the Federal or State permitting authority and the receiving municipality, utility district, or owner to facilitate the transfer of permits to the new owner or operator. If the closing base will be placed in caretaker status, the permitting authority may require some regulated utilities to be closed and their wastes disposed of in accordance with the requirements established by the permitting authority. For realigning bases that gain missions, the public works and environmental personnel should evaluate if the new missions and increased utility requirements will require applications for new or modifications of existing direct, indirect, or storm water discharge permits or safe drinking water permits. These individuals must coordinate all changes with the permitting authority and receiving municipality or utility district.

C8.6.7. Asbestos Containing Material.

C8.6.7.1. Some buildings and facilities on BRAC property may contain asbestos containing materials (ACM) that must be addressed in accordance with DoD policy as set forth in an Office of USD (AT&L) memorandum dated October 31, 1994 (reference (bm)).

C8.6.7.2. Prior to property disposal, all available information as described in Appendix AP.2 on the existence, extent, and condition of ACM shall be incorporated into the Environmental Condition Property report.

C8.6.7.3. Reference (bm) directs that ACM not in compliance with applicable laws, regulations, and standards or that poses a threat to human health at the time of transfer shall be remediated by the Military Department, or by the transferee under a negotiated requirement of the contract for sale or lease. However, remediation of ACM that poses a threat to human health will not be required when the buildings are scheduled for demolition by the transferee; the transfer document prohibits occupation of the buildings prior to demolition; and the transferee assumes responsibility for the management of any ACM in accordance with applicable laws.

C8.6.8. Lead-Based Paint.

C8.6.8.1. In response to the Lead-Based Paint Poisoning Prevention Act (reference (q)) and Residential Lead-Based Paint Hazard Reduction Act (Title X) (reference (bn)), DoD policy is set forth in the Office of the USD (AT&L) memorandum of January 7, 2000 (reference (bo)), and Lead-Based Paint Guidelines for Disposal of DoD Residential Real Property: A Field Guide (Interim Final-December 1999) (reference (bp)). That policy calls for DoD Components to manage lead-based paint (LBP) in a manner protective of human health and the environment,

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and to comply with all applicable Federal, State, and local laws and regulations governing LBP hazards.

C8.6.8.1.1. Abate soil-lead surrounding housing constructed between 1960 and 1978 (Title X requires abatement of LBP hazards in target housing constructed prior to 1960). The transfer agreement may require the purchaser to perform the abatement activities.

C8.6.8.1.2. Evaluate the need for interim controls, abatement, or no action for bare soil lead concentrations between 400 and 2000 ppm (excluding children's play areas) based on the findings of the LBP inspection, risk assessment, and criteria contained in the Field Guide.

C8.6.8.1.3. Evaluate and abate LBP hazards in structures reused as child-occupied facilities located on residential real property. Child-occupied facilities are day care centers, preschools, and kindergarten classrooms visited regularly by children under 6 years of age.

C8.6.8.1.4. Evaluate and abate soil-lead hazards for target housing demolished and redeveloped for residential use following transfer. Under Title X, residential dwellings that are demolished or not intended for occupancy after transfer do not require an inspection and risk assessment or LBP control and hazard abatement. However, DoD requires that the terms of property transfer include a requirement for the transferee to evaluate and abate any soil-lead hazards prior to occupancy of any newly constructed dwelling units.

C8.6.8.2. The Federal requirements for residential structures and dwellings with LBP on BRAC properties differ depending on the date of construction of the residential housing being transferred. These requirements may include inspection, notice, and abatement. However, inspection and abatement are not required when the building is scheduled for demolition, non-residential use, or non-child-occupied facilities, or when the transferee conducts renovation consistent with regulatory requirements for abatement of LBP hazards. Local requirements may also apply and they may be more stringent.

C8.6.9. Polychlorinated Biphenyls. The Toxic Substances Control Act (TSCA) (reference (bp)) generally bans the use, manufacture, processing, and distribution in commerce of polychlorinated biphenyls, or PCBs. While EPA allows transfer prior to cleanup, buyers or sellers need to work with their EPA regional PCB contact to establish a cleanup plan prior to property transfer. The Military Department should review all appropriate electrical equipment on the installation scheduled to be closed or realigned to ensure that they are appropriately classified as PCB, PCB-contaminated, or non-PCB (40 CFR 761.30) (reference (bq)) (see Appendix AP2).

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C9. CHAPTER 9

BRAC ACTIONS CAUSING GROWTH

C9.1. GENERAL

This chapter focuses on community considerations, actions, and opportunities where BRAC decisions direct realignment actions that increase military missions and functions and personnel levels at existing bases. At those bases, the community and the installation take advantage of existing capacity to host the additional military missions, personnel and families. The receiving bases may involve moves with minimal impact due to community excess capacity and near-term capability for expansion. Other receiving locations may involve large personnel movements, particularly in relatively isolated locations. These larger relocations require an active and supporting partnership between the gaining military installation and the local community. When a military base experiences significant mission and personnel increases, the associated population increase has the potential to affect the environment, transportation, and other community infrastructure and place direct and significant demands on surrounding community infrastructure and services. This chapter outlines some of the actions that can be taken to minimize the negative effects of these demands.

C9.2. PLANNING FOR GROWTH

C9.2.1. Organizing for Growth.

C9.2.1.1. Large, rapid influxes of personnel and missions create the need for an immediate partnership between community leaders and installation leaders to manage the changes. Coordinated management of change provides an opportunity to minimize the negative effects on the community while enhancing the long-term quality of life environment for defense personnel and community residents. Communities require time to plan, budget for, and construct necessary improvements and facilities. See excerpt from Public Law 109-163 (reference (br)) below.

> Public Law 109-163 Section 2835. Required consultation with State and local entities on issues related to increase in number of military personnel at military installations.
>
> If the base closure and realignment decisions of the 2005 round of base closures and realignments under the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note) or the Integrated Global Presence and Basing Strategy would result in an increase in the number of members of the Armed Forces assigned to a military installation, the Secretary of Defense, during the development of the plans to implement the decisions or strategy with respect to that installation, shall consult with appropriate State and local entities to ensure that matters affecting the community, including STAT.3522 requirements for transportation, utility infrastructure, housing, education, and family support activities, are considered.

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C9.2.1.2. A growth-planning partnership with the military installation is an effective and proven approach to cope with a growing installation (see Section C9.3). Such a partnership can help a community assess its absorption capacity, formulate an adjustment strategy, and develop and implement an action plan to accommodate off-base requirements while maintaining the quality of life for arriving DoD personnel, their families, and the affected community. The strategy should seek to achieve a community-wide consensus on an action plan for managing the influx of new DoD personnel into the community. The key to the success of such a partnership is the inclusion of all relevant interests and stakeholders (i.e., utility, education, childcare, fitness, medical care and housing providers) in the planning and facilities-programming processes.

C9.2.1.3. In base realignments, a single local organization is essential for the coordination of a diverse array of actions and the participation of local governmental bodies and members of the public. Such an organization has historically been an ad hoc advisory council or steering committee. Members come from the public and private sector, plus installation representatives. Sometimes State representatives are involved, especially if school capital budgets for construction come from the State. The organization's role is to assess the likely growth effects, delineate gaps in local development needs, and prepare a strategy and coordination mechanism for meeting these needs and then ensure that community facilities and services will be ready when the influx occurs.

C9.2.2. Issues to Consider. Community leaders and the growth management organization should begin working with installation officials on the timing of the personnel, mission, and demographic changes caused by inbound personnel as soon as the BRAC realignment decisions are final. Community leaders need to appreciate the difficulty and limitations of the BRAC decision process in terms of the detailed scheduling for specific unit moves and the resulting effects on the local community.[3]

C9.2.2.1. Location of Growth. The location of growth can be just as important as the magnitude of growth in terms of impacts. For example, if all growth occurs in already developed areas that have sewer, water, and other infrastructure, the financial, social and environmental impacts of this growth will be very different from growth that occurs in undeveloped areas. Furthermore, the location of growth may have a significant effect on the capacity of the transportation system. For example, residential growth that occurs at the fringe of the community or in outlying communities will put more pressure on the road network than growth that occurs close to the base, as well as stores and services.

C9.2.2.2. Housing.

C9.2.2.2.1. Community leaders should explore housing options for inbound military personnel with the installation commander, who needs to be proactive in this area because there could be a period where demand will exceed supply. During this period, escalating housing

[3] For additional guidance, see the OEA website (www.OEA.gov) guide for the "Managing Growth" technical bulletin.

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costs affect not only the military personnel but the civilian personnel moving to the area as well as community residents not associated with the installation.

C9.2.2.2.2. Longstanding DoD policy (see references (bs) and (bt)) requires primary reliance on the private sector for housing military families. Installation commanders should work with local communities to ensure processes are in place to provide incoming personnel with sufficient information to obtain housing upon arrival. The Military Department should conduct a housing requirement market analysis (HRMA) to determine the new housing requirement. The HRMA should take into account the impact the increased military demand will have on the private-sector housing supply and estimate a reasonable market response that is in general greater than historic housing supply growth trends. After completing the HRMA, the Military Department may choose to pursue privatized housing options or may believe that existing housing stocks are, or will be, sufficient.

C9.2.2.3. Schools and Medical and Other Support Facilities.

C9.2.2.3.1. Closely related to the housing analysis planning process are planning needs for schools, medical treatment facilities, support facilities such as child development centers and fitness centers, and recreational support facilities for the military members and families. Local school districts need to be involved. Prompt decisions regarding future housing needs and locations will help school districts in their planning process. States may play a primary role in school construction, while other localities may need to prepare school construction bond proposals for taxpayer consideration. Federal School Impact Aid changes also need to be considered. The installation commander should coordinate with local school districts regarding increases in student populations and advise military personnel that there could be a lag until school districts can respond with increased facilities, teachers, and support facilities. The commander may also need to consider other school options, such as charter and private schools, to support the military and the surrounding communities.

C9.2.2.3.2. Medical treatment facilities are also frequently stressed when large realignments occur in rural or isolated locations. Although military personnel use the TRICARE insurance program (the Department of Defense's worldwide health care program for active duty and retired uniformed services members and their families) to pay for their services, community and military leaders should consider how to address shortages of particular medical specialties and services. Shortages of critical services, unless addressed, could place undue hardships on both military and civilian personnel.

C9.2.2.4. Utility Systems. A large influx of personnel could overtax existing utility systems, if capacity is at or near design limits. Even if electric generating capability is available, installation engineers and local community engineers must also address the transmission network capacities. While military installations place increasing reliance on local services providers for needed utility support, the lead-time to increase capacity (including transmission) modes can be years in planning, design, and construction before the actual increase in capacity is provided. This situation could potentially influence overall success of the realignment and could adversely impact the surrounding civilian community as well if not recognized and planned in advance, with assistance from community and utility providers during the growth management planning process.

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C9.2.2.5. New Construction and Facilities. The Military Department will plan for new construction or renovation to meet the additional requirements of missions and personnel transferred to an installation. A primary reliance is placed on the department's standard acquisition and construction practices. However, alternative methods, such as Enhanced Use Leasing (EUL), may give an installation commander the ability to leverage private-sector expertise and financial resources to build or redevelop existing land, buildings, and other real estate assets. EUL, which is part of 10 U.S.C. 2667 (reference (bk)), allows a Military Department to lease real property in exchange for certain services, supplies, and facilities.

C9.2.2.6. Business and Workforce Development. The influx of new residents into a community will likely increase the demand for business and commercial development to provide retail establishments, services, dining, and recreation opportunities. The workforce investment system is a valuable resource for communities experiencing economic growth. In these communities, workforce challenges will surface as businesses need additional workers. Many of these services will also afford job opportunities for spouses and dependents of military and civilian personnel. There may be a new demand for a greater variety and different quality of establishments as well.

C9.2.2.7. Community Planning. Dramatic demographic changes will require a fresh look at local general plans, zoning ordinances, building code requirements, and approval processes so that the increased demand for residential, commercial, and public facility development can be accommodated in a smart, orderly fashion. In some cases, the States may need to give local jurisdictions the authority to plan and implement planning or to create special districts. With good planning and efficient development practices, communities may be able to absorb the new residents and businesses into existing neighborhoods, with little or no expansion of infrastructure. In other cases, local jurisdictions may need to annex adjacent unincorporated areas so that appropriate oversight for development is possible. Changed or increased installation missions also may require attention to compatible land uses near parts of the installation that generate or are affected by noise or other environmental factors.

Public Law 109-163 Section 2836 (b) Sense of Congress.

It is the sense of Congress that the Secretary of Defense should seek to ensure that the permanent facilities and infrastructure necessary to support the mission of the Armed Forces and the quality-of-life needs of members of the Armed Forces and their families are ready for use at receiving locations before units are transferred to such locations as a result of the 2005 round of base closures and realignments and the Integrated Global Presence and Basing Strategy.

C9.2.2.8. Quality of Life. Realignment actions could also influence the overall quality of life associated with the installation and the surrounding community, such as increasing commute times and stimulating development of a wider range of cultural, commercial, housing, and professional services alternatives, benefiting both new and existing residents. Some of the

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quality of life factors to be considered that can be affected by an expanding installation include the following:

C9.2.2.8.1. Quality and accessibility to public, private, and charter schools.

C9.2.2.8.2. Housing availability and affordability.

C9.2.2.8.3. Standard of living, service members' ability to support themselves and their families.

C9.2.2.8.4. Recreation and leisure.

C9.2.2.8.5. Fitness.

C9.2.2.8.6. Healthcare.

C9.2.2.8.7. Crime and safety.

C9.2.2.8.8. Spouse employment.

C9.2.2.8.9. Affordable, high-quality childcare.

C9.2.2.8.10. Continuing education for adults.

C9.2.2.8.11. Commercial aviation support.

C9.2.2.8.12. Natural and environmental resources.

C9.2.2.8.13. Accessibility of parks and open spaces.

C9.2.2.8.14. Accessibility to community services, via a range of transportation options (walking, public transportation, biking, automobiles).

C9.2.2.8.15. Level of traffic and access to public transportation.

C9.2.2.9. Security. New missions may change the overall security environment of the installation. The result could be increased time to accomplish previously routine actions such as accessing the installation and visiting support facilities such as the personnel office or exchange.

C9.3. PLANNING ASSISTANCE

There are two primary options for helping the installation commander and local community leaders make effective decisions.

C9.3.1. Internal Military Planning Assistance. As soon as the President forwards his closure and realignment recommendations to the Congress, the installation commander should establish a planning team to address local issues and needs. This team should be charged with proposing

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solutions that minimize the effects on both the installation and the community of an expanded mission.

C9.3.2. Community Planning Assistance. An equally important tool for the local community and the installation is the growth management planning assistance available from OEA. Technical and financial assistance to eligible communities can be invaluable in organizing and developing a coordinated community response. This assistance should focus on a single local organization that would partner with the installation's planning activities to develop an overall growth management strategy for addressing local expansion needs. Financial assistance can only be provided where there is a "direct and significantly adverse consequence" resulting from a substantial realignment action and the legislative authorization parameters can be met.

C9.4. NATIONAL ENVIRONMENTAL POLICY ACT REQUIREMENTS (reference (t)).

The Military Department will address the impact of the expanded mission on the installation and the local community as part of complying with NEPA requirements. Under NEPA, the Military Department will not assess the realignment decision, only how to implement the decision. As part of an active partnership with local community leaders, the installation commander can facilitate this process by inviting them to participate in the NEPA process. This includes ensuring they are aware of options about the public notice process, issues identification, and other opportunities for public participation in the process. See Section C8.2 for a more detailed discussion of NEPA requirements.

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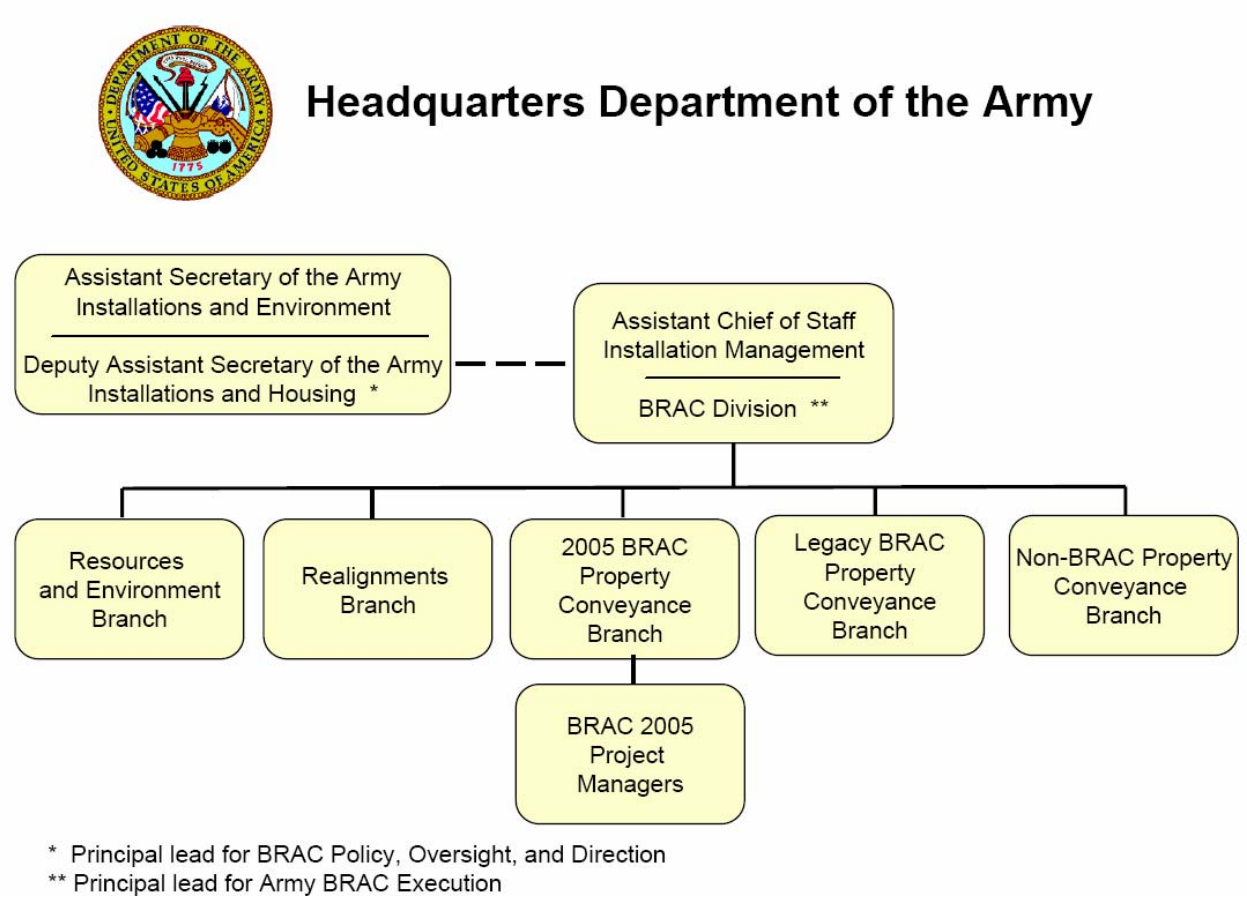
C10. CHAPTER 10

CONTACT INFORMATION

This chapter provides contact information for individuals seeking further information regarding specific aspects of base closure and reuse planning. As a first step, interested individuals should refer to the Web sites for particular organizations. Those sites contain useful data, contact information, and links to additional material. If information is required on specific installation issues, individuals should contact the installation.

C10.1. DEPARTMENT OF THE ARMY

C10.1.1. Organizational Structure.



C10.1.2. Web Site.

http://www.hqda.army.mil/acsim/brac/braco.htm

C10.1.3. E-mail Contact.

ArmyBRAC2005@hqda.army.mil

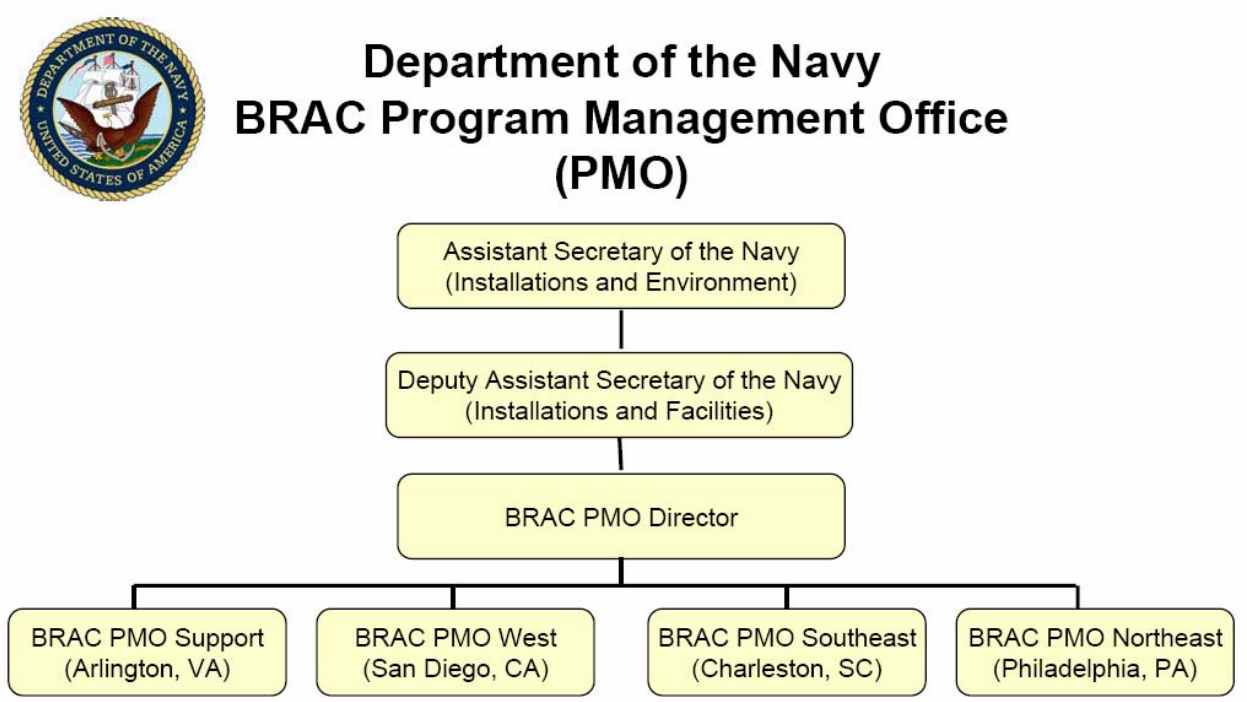
C10.1.4. Address.

Army BRAC Division
Assistant Chief of Staff for Installation Management DAIM-BD
600 Army Pentagon
Washington, DC 20310-0600

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C10.2. DEPARTMENT OF THE NAVY

C10.2.1. Organizational Structure.



C10.2.2. Web site.

http://www.navybracpmo.org/

C10.2.3. E-mail Contact.

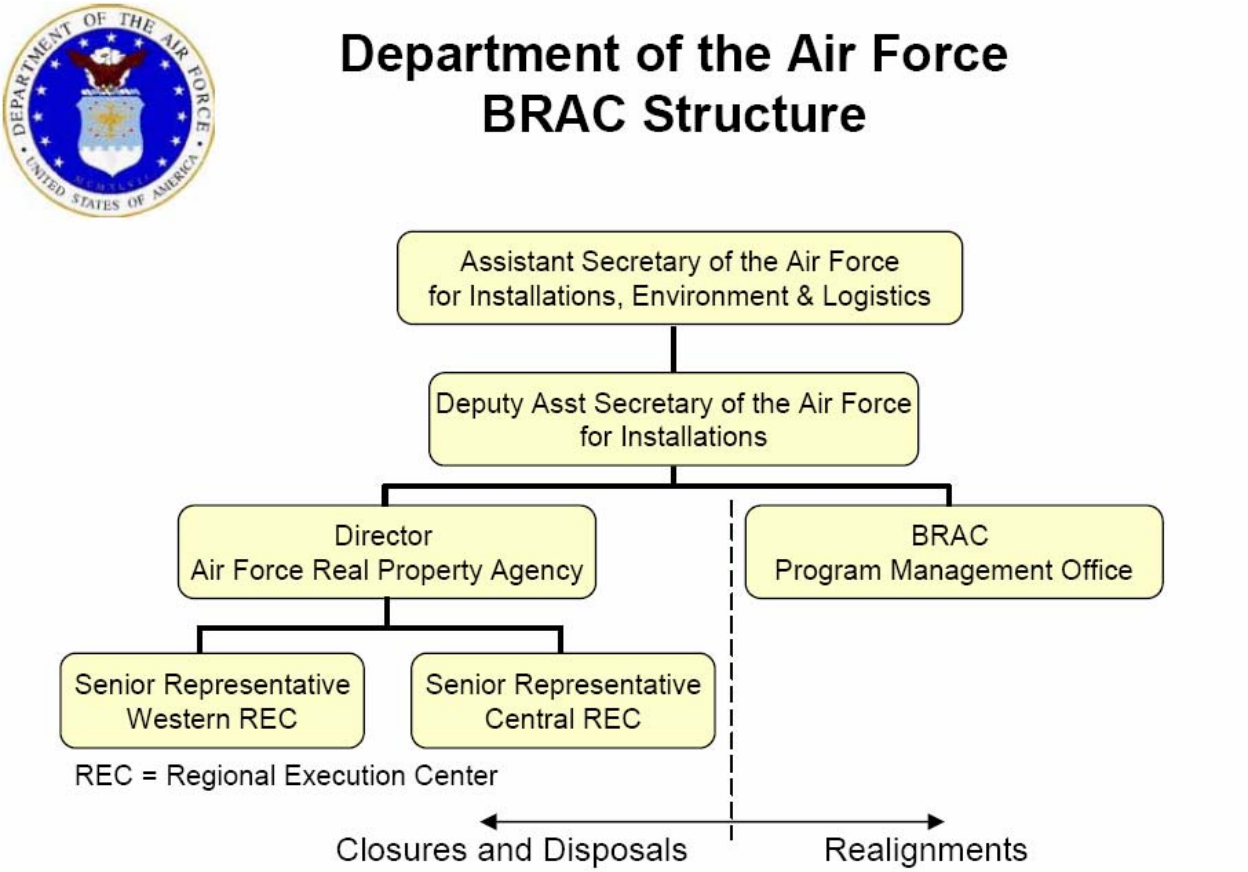
Melanie.Ault@navy.mil

C10.2.4. Address.

Department of the Navy, BRAC Program Management Office
1230 Columbia Street, Suite 1100
San Diego, CA 92101

C10.3. DEPARTMENT OF THE AIR FORCE

C10.3.1. Organizational Structure.



C10.3.2. Web Sites.

Air Force Real Property Agency: http://www.afrpa.hq.af.mil/

Western REC: http://www.afrpa.hq.af.mil/mcclellan/

Central REC: http://www.afrpa.hq.af.mil/kelly/

C10.3.3. Addresses.

BRAC Policy: SAF/IEI, 1665 Air Force Pentagon, Washington, DC 20330-1665

BRAC Disposal: AFRPA/DR, 1700 N. Moore St., Suite 2300, Arlington, VA 22209-2802

BRAC Realignment: SAF/IEI, 1665 Air Force Pentagon, Washington, DC 20330-1665

C10.3.4. Telephone Contacts.

BRAC Policy & Realignments: 703-695-3592

BRAC Disposal: 703-696-5501

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C10.4. DEFENSE LOGISTICS AGENCY

C10.4.1. Organizational Structure.



C10.4.2. E-mail Contact.

BRAC2005@dla.mil

C10.4.3. Address.

DLA BRAC Office
8725 John J. Kingman Road, Stop 6220
Fort Belvoir, VA 22060-6221

C10.4.4. Telephone Contacts.

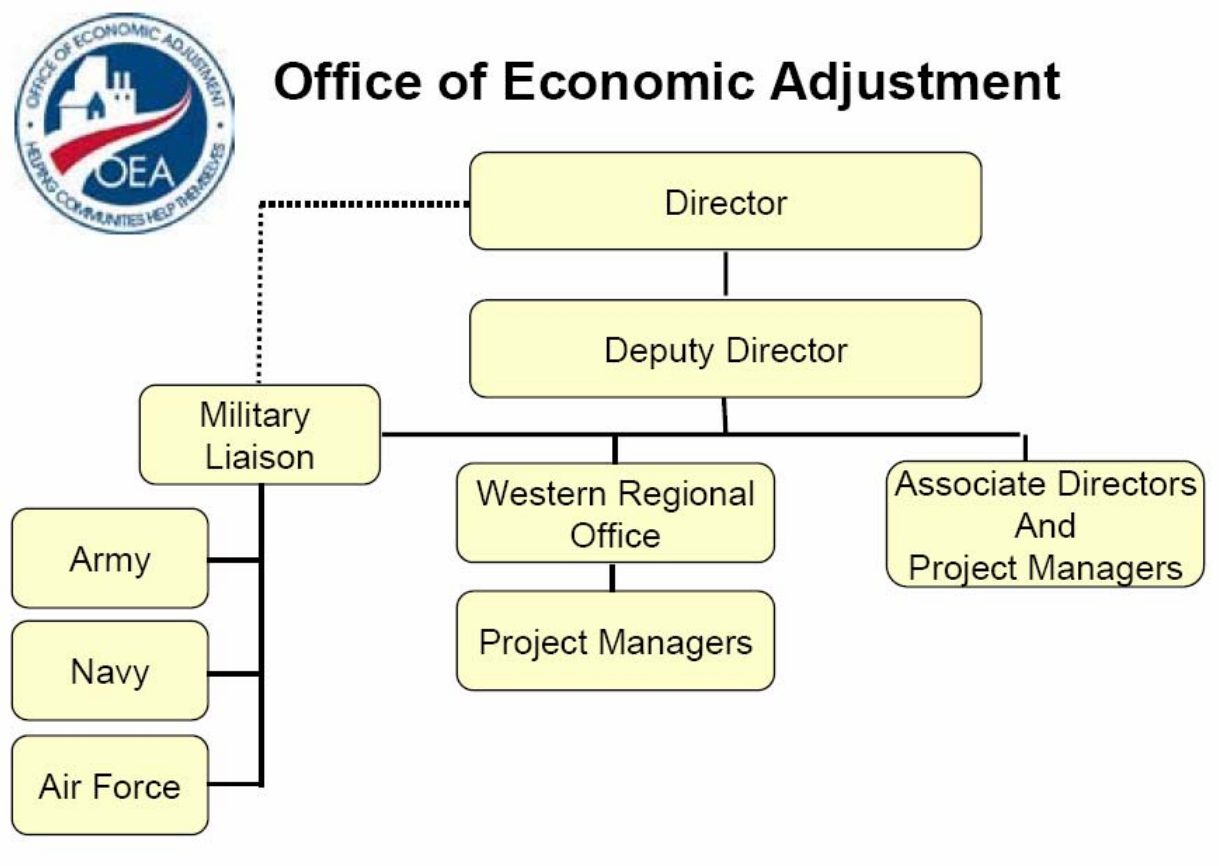
703-767-2470

703-767-2672

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C10.5. OFFICE OF ECONOMIC ADJUSTMENT

C10.5.1. Organizational Structure.



C10.5.2. Web Site.

http://www.oea.gov/

C10.5.3. General E-mail.

oeafeedback@wso.whs.mil

C10.5.4. Addresses.

Office of Economic Adjustment
400 Army Navy Drive, Suite 200
Arlington, VA 22202-4704

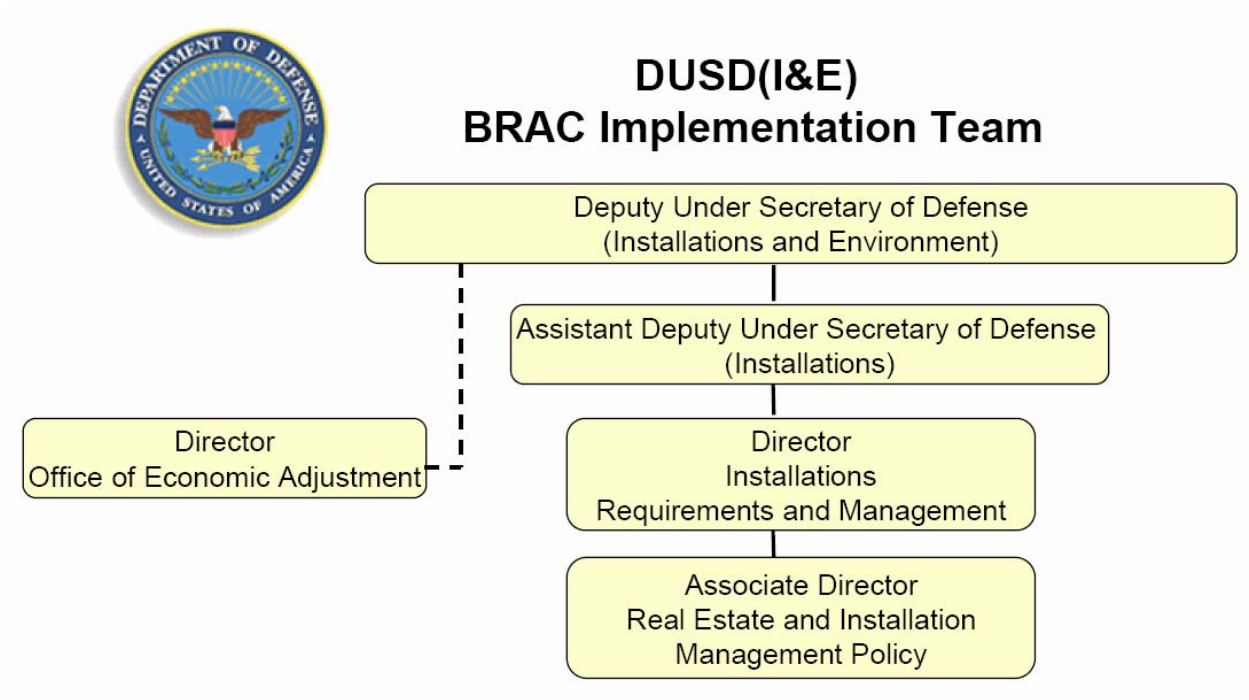
Office of Economic Adjustment
Western Regional Office
1325 J Street, Suite 1500
Sacramento, CA 95814

C10.5.5. Telephone Contacts.

Arlington, VA: 703-604-6020
Western Regional Office: 916-557-7365

C10.6. OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT

C10.6.1. Organizational Structure.



C10.6.2. Web Site.

http://www.acq.osd.mil/ie/

C10.6.3. Address.

Office of the Deputy Under Secretary of Defense
(Installations and Environment)
3400 Defense Pentagon, Room 5C646
Washington, DC 20301-3400

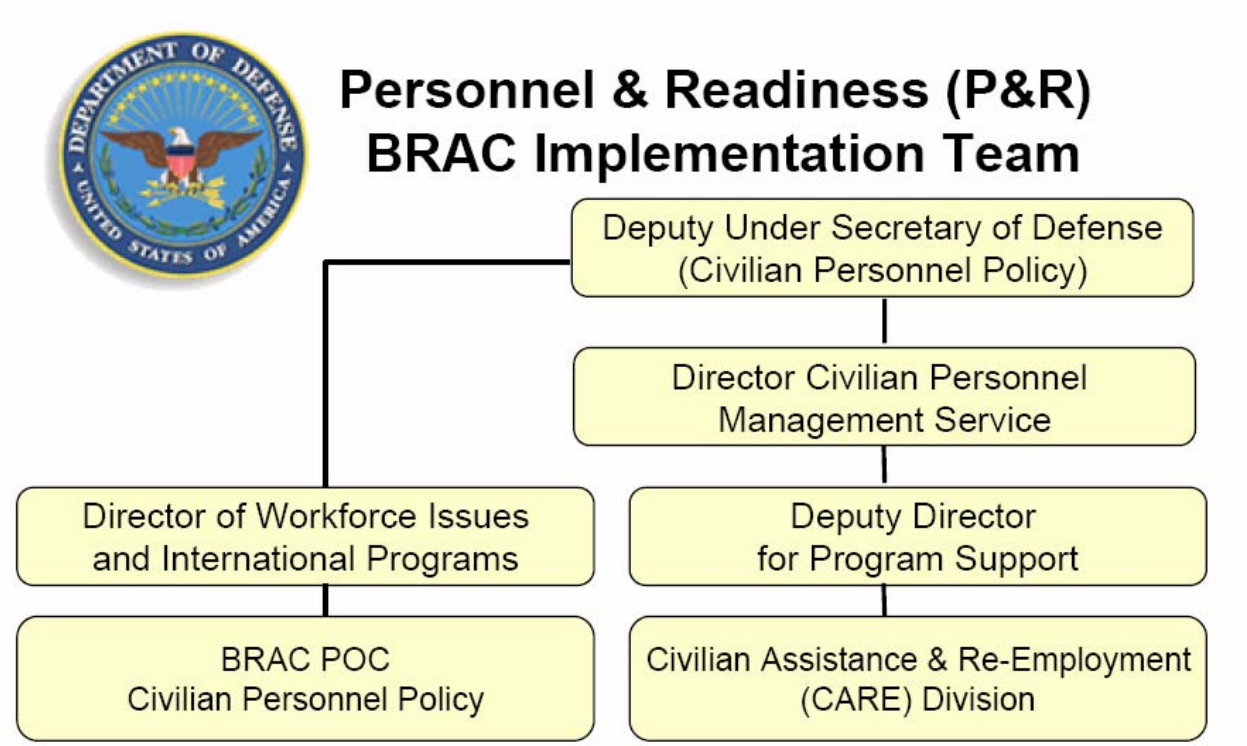
C10.6.4. E-mail Contact.

Steve.Kleiman@osd.mil

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C10.7. OSD PERSONNEL AND READINESS OFFICE

C10.7.1. Organizational Structure.



C10.7.2. Web Site.

http://www.cpms.osd.mil/bractransition/

C10.7.3. Telephone contacts.

Civilian Personnel Policy: 703-571-9287

CARE Division: 703-696-1799

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C10.8. HOMEOWNERS ASSISTANCE PROGRAM

C10.8.1. This program is discussed in detail in Chapter 4. Further information can be found at www.hq.usace.army.mil/hap/. The three field offices below are tasked with implementing the Homeowners Assistance Program:

C10.8.1.1. U.S. Army Engineer District, Savannah, CESAS
P.O. Box 889
Savannah, GA 31402-0889
912-652-5020
800-861-8144

The geographic area for this office includes Georgia, North Carolina, South Carolina, Alabama, Mississippi, Tennessee, Florida, Illinois, Indiana, Kentucky, Michigan (except Sawyer and Wurtsmith Air Force Bases), Ohio, Tennessee (Fort Campbell only), Maryland, Delaware, District of Columbia, Pennsylvania, Virginia, Rhode Island, New York, Vermont, New Hampshire, Massachusetts, Connecticut, Maine, New Jersey, West Virginia, and Europe.

C10.8.1.2. Army Engineer District, Sacramento, CESPK
1325 J Street
Sacramento, CA 95814-2922
916-557-6850
800-811-5532

The geographic area for this office includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and the Pacific Ocean.

C10.8.1.3. Army Engineer District, Fort Worth, CESWF
P.O. Box 17300
Fort Worth, TX 76102-0300
817-886-1209
888-231-7751

The geographic area for this office includes Arkansas, Louisiana, Oklahoma, Texas, New Mexico, Colorado, Iowa, Nebraska, Michigan (Sawyer and Wurtsmith Air Force Bases only), Minnesota, North and South Dakota, Wisconsin, Wyoming, Kansas, and Missouri.

C10.8.2. The Department of Defense has appointed the U.S. Army Corps of Engineers to be the executive agent for the Homeowners Assistance Program. The following contact information is provided for the National Program Manager:

National Program Manager
Department of Defense Homeowners Assistance Program
Headquarters, U.S. Army Corps of Engineers
Military Programs/Real Estate (CEMP-DD)
441 G Street, NW
Washington, DC 20314-1000

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Phone: 202-761-0967
DSN: 314-763-0967
Fax: 202-761-4891

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AP1. APPENDIX 1

PUBLIC LAWS, FEDERAL REGULATIONS, AND OTHER AUTHORITIES.

AP1.1. This Appendix provides a summary of various laws, regulations, and other authorities that direct BRAC efforts.

TABLE AP1.T1. Public Laws, Federal Regulations, and Other Authorities

Law/Regulation/Authority	Summary of Key Provisions	Reference
Defense Base Closure and Realignment Act of 1990 (DBCRA 90), Pub. L. 101-510, 10 U.S.C. § 2687 note	Provides a process designed to result in timely closure and realignment of military installations	(c)
32 CFR Part 174, Revitalizing Base Closure Communities and Addressing Impacts of Realignment	Establishes policy and assigns responsibilities to implement base closures and realignments, including disposal of real and personal property	(e)
32 CFR Parts 176, Revitalizing Base Closure Communities - Community Redevelopment and Homeless Assistance	Implements the Base Closure Community Redevelopment and Homeless Assistance Act, as amended (10 U.S.C. 2687 note), which instituted a new community-based process for addressing the needs of the homeless at base closure and realignment sites	(e)
National Defense Authorization Act for Fiscal Years 1992 and 1993 (NDAA 92/93), Pub. L. 102-190 §§ 334(a), 2821, 2827	Requires draft final RI/FSs for BRAC 88 bases on the NPL be submitted to EPA by 4 December 1993 and draft final RI/FSs for BRAC 91 bases on the NPL must be submitted to EPA by 4 December 1994 Allows for a 6-month extension under certain conditions Amends DBCRA 90 to clarify requirements of the Commission and to establish the BRAC account as the sole source of environmental restoration funding	(bu)
National Defense Authorization Act for Fiscal Year 1993 (NDAA 93), Pub. L. 102-484	Makes funds available to the Economic Development Administration (EDA) for economic adjustment assistance with respect to base closures	(bv)
National Defense Authorization Act for Fiscal Year 1994 (NDAA 94), Pub. L. 103-160, Title XXIX, §§ 2901–2930; 32 CFR Parts 174, 175	Amends BCRA 88, DBCRA 90, 10 U.S.C. § 2667, 10 U.S.C. § 2391(b), FPASA, and NDAA 92/93; amendments are specific to personal property, real property screening, McKinney Act compliance, leasing, contracting with communities or small/disadvantaged businesses, transferring property at less than fair market value, and economic adjustment assistance Contains provisions for base transition coordinators, CERCLA § 120(h)(4) compliance, and NEPA compliance	(ad)
National Defense Authorization Act for Fiscal Year 1995 (NDAA 95), Pub. L. 103-337	Provides assistance for public participation in DoD environmental restoration activities Includes clarifying and technical amendments to BCRA 88 and DBCRA 90	(bw)
National Defense Authorization Act for Fiscal Year 2005 (Sections 2400 of Public Law 108-375, as amended)	Establishes a new process to streamline real property transactions Eliminates delays in the assignment of real property to Federal sponsoring agencies for public benefit conveyances	(bx)

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Law/Regulation/Authority	Summary of Key Provisions	Reference
National Defense Authorization Act for Fiscal Year 2006 (NDAA 06), Pub. L. 109-163	Requires consultation with State and local entities on issues related to increase in number of military personnel at military installations	(bs)
Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Redevelopment Act), Pub. L. 103-421	Exempts BRAC 95 installations from the Stewart B. McKinney Homeless Assistance Act Establishes a new process for LRA accommodation of homeless assistance needs during redevelopment planning	(by)
National Defense Authorization Act for Fiscal Year 1996 (NDAA 96), Pub. L. 104-106	Provides for longer term interim leases Amends the Redevelopment Act Establishes a new property transfer authority Allows the Department of Defense to transfer BRAC property in exchange for the construction of family housing	(bz)
National Defense Authorization Act for Fiscal Year 1997 (NDAA 97), Pub. L. 104-201	Allows the Department of Defense to contract for police and fire protection at facilities remaining on property not yet transferred Allows property to be transferred before cleanup is complete	(ca)
Federal Property Management Regulations 41 CFR Part 101-47 (Real Property) and 41 CFR Parts 101-43–101-45 (Personal Property)	Provides a mechanism for: utilizing excess Federal property disposing of surplus Federal property procuring and supplying personal property and non-personal services performing records management	(cb)
Surplus Property Act (SPA), 50 U.S.C. App. § 1622(d) and 49 U.S.C. §§ 47151–47153	Governs power transmission line disposals in cases of surplus Federal property, and provides for conveyance of surplus Federal property for use as a public airport (subject to approval by FAA)	(cc)
Act of May 19, 1948, 16 U.S.C. § 667b-d	Provides for transfer of Federal property to state agencies or the Department of the Interior for wildlife conservation purposes	(cd)
Stewart B. McKinney Homeless Assistance Act (McKinney Act), 42 U.S.C. § 11301 et seq.	Requires DoD Components to identify unutilized, underutilized, excess or surplus property (e.g., housing at installations being closed) that may be suitable for use by the homeless Requires notification to HUD, which informs the Department of Health and Human Services of property suitable for the homeless Does not apply to BRAC 95 bases, which are specifically exempted by the Redevelopment Act	(k)
10 U.S.C. § 2667	Provides authority to lease non-excess DoD property to non-Federal entities. Includes various incentives to allow use of proceeds to obtain certain services, supplies, and facilities.	(bk)
10 U.S.C. § 2694a (Conveyance for Conservation)	Authorizes no-cost conveyances to state and local agencies and nonprofit conservation entities: Includes perpetual conservation restrictions Allows reconveyance, with conservation restriction Permits sale of property, with DOI approval and DOD reimbursement, if property loses conservation value Extends cooperative agreement authority to nonprofit groups to perform site cleanup and monitoring	(ao)
Indian Self-Determination Act, 25 U.S.C. §§ 450f–450n	Provides for grants or contracts with tribal organizations for educational or health purposes or for strengthening tribal governments Authorizes the Secretary of the Interior to acquire property in trust for such purposes	(ce)

Law/Regulation/Authority	Summary of Key Provisions	Reference
Indian Reorganization Act, 25 U.S.C. §§ 461–479	Provides for reorganization of tribal and non-tribal lands Authorizes the Secretary of the Interior to acquire land to be held in trust for tribes	(cf)
Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a–1975d, 2000a– 2000h-6	Provides for enforcement of voting rights Prohibits discrimination in places of public accommodation and public facilities	(cg)
Rehabilitation Act of 1973, 29 U.S.C. §§ 701–709, 720–724, 730–732, 740, 741, 750, 760–764, 770–776, 780–787, 790–794	Guarantees equal opportunity for individuals with handicaps in order to maximize their employability and integration into the workplace and community	(ch)
Stevenson-Wydler Technology Innovation Act of 1980 (Pub. L. 96-480, as amended), 15 USC 3710(i)	Authorizes the transfer of excess research equipment to educational institutions and nonprofit organizations	(bc)
Public Buildings Cooperative Use Act (PBCUA), 40 U.S.C. §§ 490, 601a, 606, 611, and 612a	Encourages reuse of historic buildings as administrative facilities for Federal agencies or activities	(ci)
10 U.S.C. § 2391 (Military Base Reuse Studies and Community Planning Assistance)	Authorizes the Secretary of Defense to make grants to state and local governments, and regional organizations, to assist them in planning community adjustments in response to base closures	(cj)
National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 et seq.	Provides a process to help Federal officials make decisions that are based on an understanding of environmental consequences Requires DoD Components to analyze potential environmental impacts of proposed actions and alternatives for base disposal decisions	(t)
Comprehensive Environmental Response, Compensation and Liability Act of 1980(CERCLA), 42 U.S.C. § 9601et seq.	Requires the conduct of any needed response actions to clean up contamination, threatening risks to human health and the environment posed by past releases of hazardous substances Section 120(h) governs the identification of uncontaminated parcels and covenant requirements for deed transfers of contaminated parcels.	(f)
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq.	Requires the establishment of management systems for hazardous waste, nonhazardous solid waste, and underground storage tanks Provides corrective action authority for cleanup of solid waste management units	(v)
Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387;	Establishes controls on point source and nonpoint source discharges to surface waters under the National Pollutant Discharge Elimination System	(m)
Executive Order 11990 (Protection of Wetlands)	Establishes permitting requirements for construction activities in waterways and wetlands	(bf)
Clean Air Act (CAA), 42 U.S.C. § 7401 et seq.	Mandates improvements to air quality through establishment of National Ambient Air Quality Standards; nonattainment requirements; technology and risk standards for air toxics; permit requirements for sources of air emissions; state implementation plans for complying with standards; and conformity determinations for Federal agency actions except base closure final disposals	(d)
Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j- 26	Defines substances for which EPA must set drinking water standards Authorizes establishment of underground injection controls on wells used for waste disposal	(w)

Law/Regulation/Authority	Summary of Key Provisions	Reference
Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2671	Provides for the specific regulation of PCBs and asbestos Requires maintenance of an inventory of manufactured chemicals and filing of a premanufacture notification for chemicals not in the inventory	(x)
Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641–2655; 40 CFR Part 763	Amends TSCA to govern inspection of asbestos containing materials in schools and completion of appropriate response and abatement activities	(ck)
Lead-Based Paint Poisoning Prevention Act (LBPPPA), 42 U.S.C. §§ 4801–4846	Requires establishment of procedures for eliminating immediate hazards related to lead-based paint and for notifying purchasers of the presence of lead-based paint Eliminates use of lead-based paint	(q)
Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA), Title X of Pub. L. 102-550	Governs transfers of pre-1978 Federal property for residential use Requires inspection and notification for post-1960 structures Requires inspection and abatement for pre-1960 housing	(bn)
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq.	Establishes a registration program for pesticide and other substances Governs disposal of pesticides and pesticide containers	(p)
American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996	Protects and preserves religious freedoms of Native Americans, including access to religious sites	(cl)
Archaeological and Historic Preservation Act (AHPA), 16 U.S.C. § 469	Governs activities that may affect historic or archaeological resources Directs Federal agencies to coordinate with the Department of the Interior	(aw)
Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668	Governs activities and facilities that may threaten protected birds	(l)
Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451–1464	Encourages states along oceans and the Great Lakes to adopt Coastal Zone Management Plans (CZMP), which require any applicant for a Federal permit to certify that its project is consistent with the applicable plan	(n)
Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544	Requires protection of threatened or endangered species by prohibiting activities and facilities that would have an adverse effect on them	(o)
Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 661–666	Requires persons to consult with Federal and state agencies when modifying, controlling, or impounding a surface water body over 4 hectares in size	(cm)
Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1421	Governs activities that may affect or harass marine mammals	(cn)
Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712	Governs activities that may affect or threaten migratory birds or their habitats	(r)
Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013	Governs discovery and handling of Native American human remains and objects	(s)
National Historic Preservation Act (NHPA), 16 U.S.C. § 470	Establishes a program for the preservation of additional historic properties throughout the nation Establishes a process to identify conflicts between historic preservation concerns (e.g., properties included or eligible for the National Register of Historic Places) and Federal undertakings	(u)

Law/Regulation/Authority	Summary of Key Provisions	Reference
Watershed Protection and Flood Prevention Act (WPFPA), 16 U.S.C. § 1001 et seq.; 33 U.S.C. § 701-1; Executive Order 11988 (Floodplain Management)	Governs reservoir development and stream modification projects including specific wildlife habitat improvements	(co)
Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 et seq.	Preserves and protects the free flowing condition of selected rivers Establishes a national Wild and Scenic Rivers System	(cp)
Executive Order 12088	Establishes a process for ensuring Federal agency compliance with Federal, state, and local pollution control requirements Outlines a process for resolving disputes between EPA and Federal agencies, specifying the Office of Management and Budget as dispute resolution agent	(cq)
Executive Order 12372 (as amended by Executive Order 12416)	Requires Federal agencies to provide opportunities for consultation by elected officials of state and local governments	(cr)
Executive Order 12580	Addresses delegation of certain duties and powers assigned to the President in CERCLA to heads of Federal agencies	(cs)
Executive Order 12788, January 15, 1992, as amended by Executive Order 13378	Creates the Defense Economic Adjustment Program to coordinate economic adjustment assistance for communities affected by Defense downsizing	(ct)
Executive Order 12999, Improving Mathematics and Science Education in Support of the National Education Goals	Gives preference to elementary and secondary schools in the transfer or donation of education-related Federal equipment such as computers	(bd)
Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations	Requires the creation of an Interagency Working Group on Environmental Justice to develop guidance for Federal agencies on environmental justice strategies Requires Federal agencies to include diverse segments of the population in research, data collection, and analysis Requires Federal agencies to solicit public views and to consider environmental justice values in decision-making	(cu)
Executive Order 13089, Coral Reef Protection	Requires all Federal agencies whose actions may affect U.S. coral reef ecosystems to (a) identify their actions that may affect U.S. coral reef ecosystems; (b) utilize their programs and authorities to protect and enhance the conditions of such ecosystems; and (c) ensure, to the extent permitted by law, that any actions they authorize, fund, or carry out will not degrade the conditions of such ecosystems	(cv)
DoD Directive 3030.1	Updates the mission, responsibilities, functions, relationships, and authorities of the Office of Economic Adjustment (OEA).	(cw)
DoD Directive 4165.6	Real Property	(bs)
DoD Directive 4165.63	Housing	(bt)
DoDI Directive 4715.4	Hazardous Material Pollution Prevention	(cx)
DoD Directive 4500.34	DoD Personal Property Shipment and Storage Program	(cy)
DoD Directive 5134.01	Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L))	(a)
DoD Directive 5410.12	Economic Adjustment Assistance to Defense- impacted Communities	(cz)

Law/Regulation/Authority	Summary of Key Provisions	Reference
DoD Instruction 4165.68	Revitalizing Base Closure Communities and Community Assistance - Community Redevelopment and Homeless Assistance Implements the Redevelopment Act, as amended, codified at 32 CFR Part 176	(da)

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AP2. APPENDIX 2

ENVIRONMENTAL CONDITION OF PROPERTY REPORT OUTLINE

AP2.1. PURPOSE

AP2.1.1. This section will discuss the purpose of the ECP Report as:

AP2.1.1.1. Providing the DoD Component with the information it needs to make disposal decisions regarding the property;

AP2.1.1.2. Providing the public with information relative to the environmental condition of the property;

AP2.1.1.3. Assisting the local government in planning land reuse activities;

AP2.1.1.4. Assisting Federal agencies during the Federal property screening process;

AP2.1.1.5. Providing information to prospective buyers;

AP2.1.1.6. Assisting new owners in meeting their environmental obligations; and

AP2.1.1.7 Assisting in determining appropriate responsibilities, asset valuation, liabilities, and costs with other parties to a transaction.

AP2.2. BACKGROUND

This section will provide a brief discussion of the existing environmental conditions of the property, including the scope of contamination from hazardous substances or petroleum products and current cleanup activities. The background section should also include a brief description of the property's historic and current land uses.

AP2.3. PROPERTY DESCRIPTION

This section will describe the property including acreage, geographic coordinates, a summary of the natural physical environment, a summary of known cultural and historic resources, and site maps.

AP2.4. ENVIRONMENTAL CONDITION OVERVIEW - EXISTING ENVIRONMENTAL INFORMATION (ECP REPORT)

This section will rely on existing information and, if necessary, new information that is readily

available to provide a more accurate summary of the environmental condition of the property. It will summarize the historical, cultural, and environmental conditions of the property. For each environmental statutory or regulatory requirement identified in Table AP2.T1, Part I, a summary of activities relevant to the property, or notation that this requirement does not apply, will be provided. This section will also reference all related publicly available documentation including, but not limited to permits, surveys and inventories, management plans, reports, reviews, and assessments. Information related to the statutory and regulatory requirements identified in Table AP2.T1, Part II, as they apply, should also be provided here.

AP2.5. ENVIRONMENTAL CONDITION OVERVIEW - NEW ENVIRONMENTAL INFORMATION (UPDATE TO ECP REPORT)

This section, if applicable, will include any new or updated information.

AP2.6. CERTIFICATION

This section will contain a signed statement certifying that all information/documentation provided accurately reflects the property's condition.

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TABLE AP2.T1. Environmental Condition of Property

.

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Part I: Minimum Requirements to be Addressed in ECOP Reports			
Archeological Resources Protection Act (reference (ax))	• Archeological land surveys • Integrated Natural Resource Management Plan (INRMP)	• Information about known archeological resources	
Asbestos (Toxic Substances Control Act) (reference (x))	• Previous Environmental Baseline Survey (EBS) reports • Abatement action reports • Inspection reports or logs	• All available information on the existence, extent, and condition of Asbestos Containing Material I • If present, information on the location, type, and condition of asbestos • Information on any control or mitigation measures taken at property to remove or treat any asbestos or asbestos containing materials • Any known compliance requirements for new owners of property with facilities containing asbestos	
Clean Air Act, as amended (CAA) (reference (d))	• Permits, past and present • Title V Operating Permits, State minor source operating permits, PSD permits, New Source Review permits • CAA General Conformity Determination, if applicable	• Emission inventories for a criteria pollutants, and/or hazardous air pollutants (HAPs) • Information on compliance with State Implementation Plan (SIP) nonattainment requirements	

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Clean Water Act, as amended (CWA) (reference (m))	• Permits, past and present (i.e., Publicly Owned Treatment Works (POTW), National Pollution Discharge Elimination Systems (NPDES))	• Information on direct and indirect discharges	
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (reference (f)), including the Community Environmental Response Facilitation Act (CERFA) (reference (g))	• Copy of the Hazardous Substance Activity Certification • CERCLA studies/process documents (i.e., PA/SI, RI/FS, five-year reviews). • Copy of correspondence with environmental regulators relating to presence of hazardous substances • Previous EBS reports • Copy of all environmental studies conducted by the landholding agency and others relating to presence of hazardous substances • Administrative Record for the site	• Identification of the property's National Priority List status • Information indicating whether hazardous substance activity took place • Information on substances released, disposed of, or stored for a year or more • Status of response actions at all sites identified under CERCLA • Sampling Information	• EnviroMapper for Superfund (http://www.epa.gov/enviro/sf/) • CERCLIS Database (http://ww-w.epa.gov/superfund/sites/cursites/)
Endangered Species Act (ESA) (reference (o))	• Environmental Impact Statement (EIS) or Environmental Assessment (EA) • Biological Opinion (BO) • Biological Assessment (BA) • Biological Evaluation (BE) • Concurrence letter • INRMP • Endangered Species Management Plan (ESMP)	• Information on presence or potential presence of Federally listed endangered species • Information on critical habitats located on property	• USFWS Endangered Species (http://www.fws.gov/endangered/) • NOAA-Fisheries (www.nmfs.noaa.gov)

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Floodplains (Executive Order 11988) (reference (be))	• Flood map	• Information about known flood hazards (i.e., the probability of meeting or exceeding a certain level of flooding per year) • Location of floodplains • List of flood-related restrictions on land use under Federal, state, and local regulations • Any other relevant use restrictions	• NOAA River Flood Outlook (http://www.hpc.ncep.noaa.gov/nationalfloodoutlook/) • FEMA Flood Insurance Rate Map (http://www.fema.gov/fhm/)
Pesticides (Federal Insecticide, Fungicide, and Rodenticide Act) (reference (p))	• Pest Management Plans	• Information on use and management of pesticides on property, including documentation that no known misapplication of such pesticides occurred, and that all applications were in accordance with FIFRA	• http://www.epa.gov/pesticides/ • http://www.afpmb.org
Lead-Based Paint (Residential Lead-Based Paint Hazard Reduction Act, Title X) (reference (bn))	• Lead survey reports • A completed risk assessment and paint inspection for 1960-1978 housing • Lead-based paint abatement reports	• Inventory of all buildings constructed before 1978 • Information on the location of LBP hazards • Any known compliance requirements for new owners of property with facilities containing LBP	

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
National Historic Preservation Act (NHPA) (reference (u))	• Integrated Cultural Resource Management Plan (ICRMP) • Programmatic Agreement, Memorandum of Agreement, or Comprehensive Agreement • Documentation of agreements with any off-site curation facilities	• List of the property's' historic and archeological resources, whether the property is listed on or has been nominated for listing on the National Register of Historic Places • Information available about any effort by the public to have the property listed	
Native American Graves Protection and Repatriation Act (reference (s))	• Surveys and inventories • Secretarial Notification documents for inadvertent discovery	• Information on Native American human remains and associated funerary objects	
Polychlorinated Biphenyls (Toxic Substances Control Act) (reference (x))	• PCB annual logs • Notification of PCB Activity form (EPA form 7710-53) (http://www.epa.gov/pcb/7710-53.pdf) • Certification that property does or does not contain PCB transformers or other PCB-containing equipment	• Inventory of PCB equipment • Any known compliance requirements for new owners of properties with facilities containing PCBs	
Radon (DoD Policy on Radon)	• Existing DoD Radon assessment data • Existing Radon survey reports	• Provide any information on the presence of radon on or around the property • Provide information on radon tests	
Resource Conservation and Recovery Act (RCRA) (reference (v))	• Permits, past and present, (i.e., Hazardous Waste Treatment, Storage, or Disposal Facility (TSDF))	• History of activities associated with hazardous wastes and materials on property • Status of response actions at all sites identified under RCRC corrective action	• RCRA/Superfund Industry assistance Hotline (1-800-424-9346)

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Safe Drinking Water Act, as amended (SDWA), including requirements for oil/water separators (reference (w))	• Permits, past and present (i.e., water discharge permits) • Closure Reports • NPDES permits	• Information on water discharges • Information on contaminants that may impact drinking water • Information on the point source discharges from oil/water separators	
Underground Storage Tanks/ (Subtitle I under RCRA) (reference (v))	• Installation notification form • Leaking Petroleum Storage Tanks (LPST) Reports • Corrective action reports • Closure reports	• Information on operating, closed, leaking, or inactive USTs (e.g., location, capacity of tank(s), compliance status, number of tanks in use, substances stored)	
Unexploded Ordnance (UXO) or Munitions and Explosives of Concern (MEC)	• Historic land use and operations records • Certificate of Clearance required for Explosive Ordnance Disposal and MEC	• Information about whether training involving munitions was conducted or any other activity in which ordnance, munitions, or explosives were used • If used on site, provide statement explaining the extent of decontamination accomplished or plans for decontamination. • List of any use restrictions	
Wetlands (Executive Order 11990) (reference (bf))	• Permits, past and present (404 permits) • Wetlands delineation study • Wetlands certification	• Presence and location of wetlands • Any known information about wetlands (e.g., permits, certified wetland delineations, listing of restricted uses)	• National Wetlands Inventory (www.nwi.fws.gov)

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Part II: Additional ECOP Report Requirements to Consider			
Coastal Zone Management Act (CZMA) (reference (n))		• Identification of coastal zone areas within or near property • Identification of applicable restrictions for the area (e.g., state CZM restrictions)	
Coral Reef Protection (Executive Order 13089) (reference (cv))	• Integrated Natural Resource Management Plan (INRMP)	• Information on the presence of coral reef ecosystems (also to be identified in the INRMP)	
Magnuson-Stevens Fishery Conservation and Management Act	• ESMP • EFH Assessment	• Information on the presence of essential fish habitat (EFH)	
Marine Mammal Protection Act (reference (cn))	• INRMP • ESMP	• Information on presence or potential presence of protected species (e.g., whales, dolphins, porpoises, seals, and sea lions) • Identification of marine mammals also protected under Endangered Species Act	

Environmental Requirement	Typical Documentation Needed to Determine Environmental Compliance	Environmental Information	Resource Links
Radiological Materials (CERCLA) (reference (f))	• Copy of the Hazardous Substance Activity Certification • CERCLA studies/process documents (i.e., PA/SI, RI/FS, 5-year reviews). • Copy of correspondence with environmental regulators relating to presence of hazardous substance	• Information indicating whether activity took place involving the use of radiological substances or materials • Information on radiological materials released, disposed of, or stored on site	

AP3. APPENDIX 3

FORMAT FOR FINDING OF SUITABILITY TO TRANSFER/LEASE

AP3.1. FOST/FOSL

For matters specifically related to hazardous substances, petroleum products and other regulated materials (e.g., asbestos) on the property, authorized officials shall sign a FOST/FOSL summarizing how the applicable requirements and notifications for these substances and materials have been satisfied.

AP3.2. FOST OUTLINE

The following outline shall be followed for all DoD FOSTs and FOSLs:

AP3.2.1. Purpose

AP3.2.2. Property Description

AP3.2.3. Summary of Environmental Condition and Notifications (see Table AP3.T1)

AP3.2.4. Finding of Suitability to Transfer/Lease with Signature

AP3.2.5. Enclosures:

AP3.2.5.1. Site Map

AP3.2.5.2. References – Documentation Supporting the FOST/FOSL

AP3.2.5.3. Regulatory Comments and Comment Adjudication – Lists the regulatory agencies that commented on the FOST/FOSL, summarizes how the comments were adjudicated, and describes any issues for which the DoD Component may not agree. Comments may be attached as part of the enclosure.

AP3.3. FOST SECTIONS AND CONTENT

AP3.3.1. Purpose – The purpose of the FOST/FOSL is to "summarize how the requirements and notifications for hazardous substances, petroleum products and other regulated materials on the property have been satisfied."

AP3.3.2. Property Description – This section should provide a brief description of the property being conveyed/leased, including acreage, current ownership/leasing, and buildings and utilities present. A legal description is not required.

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AP3.3.3. Summary of Environmental Requirements and Notifications.

AP3.3.3.1. This section should summarize the actions and notifications taken to satisfy requirements related to hazardous substances, petroleum products and other regulated materials. The FOST/FOSL need not repeat information documented elsewhere, but should state the actions taken and provide references to other documents. This section will also summarize any deed/lease restrictions.

AP3.3.3.2. Table AP3.T1 provides the list of topics that shall be addressed. Summaries need only be provided for the topics checked "yes" in Table 1 (i.e., topics that are applicable for the property). If applicable, this section shall incorporate analysis of the environmental impacts caused by adjacent property conditions.

AP3.3.4. Finding of Suitability to Transfer/Lease and Signature – The following standard text shall be used:

AP3.3.4.1. FOST Language: Based on the information contained in this FOST, and the notices, restrictions, and covenants that will be contained in the deed, the property is suitable for transfer.

AP3.3.4.2. FOSL Language: Based on the information contained in this FOSL, the uses contemplated for the lease are consistent with the protection of human health and the environment, and there are adequate assurances that the United States will take all remedial action necessary with respect to any hazardous substance remaining on the property that has not been taken on the date of the lease. The property therefore is suitable for lease.

TABLE AP3.T1. Environmental Requirements and Notifications to Cover in FOST/FOSL

Applicable to Property?		***APPLICABLE TOPICS***
No	**Yes**	
		Presence of Hazardous Substances (Notification)
		CERCLA/RCRA (Response/Corrective Actions)
		Presence of Petroleum Products and Derivatives (Notification)
		UST/AST Storage Tanks (Closure/Removal)
		Munitions and Explosives of Concern – Response Actions
		Asbestos Containing Material (Abatement/Notification)
		Lead-Based Paint, Target Housing and Residential Property (Abatement/Notification)
		PCBs (Notification)

AP4. APPENDIX 4

MILITARY DEPARTMENT IMPLEMENTING GUIDANCE FOR NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

AP4.1. DEPARTMENT OF THE ARMY

32 CFR Part 651 (Army Regulation 200-2) (reference (dd)).

http://www.access.gpo.gov/nara/cfr/waisidx_02/32cfr651_02.html

AP4.1. DEPARTMENT OF THE NAVY

32 CFR Part 775 (reference (dc)).

http://www.access.gpo.gov/nara/cfr/waisidx_02/32cfr775_02.html

AP4.1. DEPARTMENT OF THE AIR FORCE

32 CFR Part 989 (reference (dd)).

http://www.access.gpo.gov/nara/cfr/waisidx_02/32cfr989_02.html

AP4.1. DEFENSE LOGISTICS AGENCY (DLA)

DLA Regulation 1000.22 (reference (de)).

http://www.dlaps.hq.dla.mil/dlar/r1000.22.htm

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NATIONAL LAW ENFORCEMENT AND CORRECTIONS TECHNOLOGY CENTER
A program of the National Institute of Justice

From Summer 2006 *TechBeat*

TECH b•e•a•t

Dedicated to Reporting Developments in Technology for Law Enforcement, Corrections, and Forensic Sciences

Principles of Forensic DNA for Officers of the Court

The Office of Justice Programs' National Institute of Justice is offering a free, online course on the use of forensic DNA in judicial proceedings.

"Principles of Forensic DNA for Officers of the Court" is a 15-module -tutorial developed to educate prosecutors, defense attorneys, and judges on DNA analysis and the legal issues surrounding the use of DNA in the courtroom. Although developed with the criminal justice community in mind, the course, which can be accessed at *www.dna.gov,* will also interest the general public.

DNA (deoxyribonucleic acid) was first introduced as evidence in the United States in a State court in 1987. DNA technology is now widely used by police, prosecutors, defense counsel, and courts in the United States.

Training modules, which include links to online glossary terms, cover the following topic areas:

- **Introduction.** Provides an overview and program objectives.
- **Biology of DNA.** Discusses biological terminology and the basic biology of forensic DNA identity testing.
- **Practical Issues Specific to DNA Evidence.** Discusses crime scene issues related to DNA evidence.
- **Introduction to the Forensic DNA Laboratory.** Discusses the history of forensic DNA analysis and laboratory processes used in forensic DNA analysis.
- **Assuring Quality in DNA Testing.** Discusses quality assurance and standards that apply to DNA testing.
- **Understanding a Forensic DNA Lab Report.** Provides basic elements and common terminology used in a DNA forensic lab report.
- **Statistics and Population Genetics.** Discusses both the statistical interpretation of DNA evidence and the statistical software used.
- **Mitochondrial DNA & Y-STR Analysis.** Discusses the application of mitochondrial DNA and Y chromosome markers in the examination of biological evidence.
- **Forensic DNA Databases.** Discusses how DNA databases can be used to investigate crime.
- **Collection of DNA Evidence From a Suspect or Arrestee.** Discusses how a suspect's DNA is obtained and relevant legal issues.
- **Pretrial DNA Evidence Issues.** Covers discovery issues, expert testimony, and defendant issues.
- **Victim Issues.** Discusses issues important to victims in cases involving DNA evidence, such as privacy concerns.
- **Trial Presentation.** Discusses presentation of DNA evidence to a judge or jury.
- **Postconviction DNA Testing Cases.** Discusses legal and procedural issues that should be considered in State postconviction DNA cases.
- **Emerging Trends.** Discusses new forensic technologies being developed.

This online training course was developed as part of President Bush's DNA Initiative, Advancing Justice Through DNA Technology, a 5-year, $1 billion initiative to improve the use of forensic DNA analysis in the criminal justice system through increased funding, training, and other assistance.

For more information about the initiative, visit dna.gov. For more information about the Principles of Forensic DNA for Officers of the Court and other training courses, visit dna.gov/training.

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PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS

A GUIDE FOR FEDERAL WORKPLACE ADR PROGRAM ADMINISTRATORS

Interagency ADR Working Group
Steering Committee

April 2006

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INTRODUCTION

The Steering Committee of the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG)[1] issues this Guide for use by administrators of workplace alternative dispute resolution (ADR) programs within federal government departments and agencies. Its primary purpose is to provide practical guidance on the application of the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 ("the ADR Act"; 5 U.S.C. § 574) to federal workplace dispute resolution. Others, including administrators of other ADR programs, ADR professionals and anyone interested in ADR, may also find the information contained in the Guide to be valuable when ADR Act confidentiality applies to their practice**.** This Guide encourages the integration of the ADR Act and its legislative intent with agency policy and practice. The Guide is not regulation or policy and is not legally enforceable. The Guide is intended to provide helpful advice on potentially difficult questions, to executive branch ADR program administrators engaged in workplace ADR. [2]

This Guide focuses solely on confidentiality related to the use of mediation in federal workplace disputes. Confidentiality under the ADR Act may apply also to other ADR processes used to address workplace disputes, such as facilitation, conciliation and use of ombuds.

"ADR program administrator" is the term used throughout this Guide to define the individual or individuals in an agency responsible for implementing procedures that allow parties to use ADR. The ADR program administrator's role differs from agency to agency. This is a full-time role in some offices, while in other offices, this is a part-time position. In some agencies and departments the ADR program administrator focuses solely on ADR policy and implementing procedures. In these instances, the program administrator is not a neutral in terms of the confidentiality provisions of the ADR Act. In other agencies and departments, the ADR program administrator is involved in assisting parties in resolving the dispute by serving as the mediator or advising the mediator. In these instances, the program administrator may be a neutral.

This Guide extends the guidance issued by the U.S. Attorney General's Federal ADR Council, *Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996*, 65 Federal Register 83085, December 29,

[1] The Federal Interagency ADR Working Group was established in 1998 by Congress and the President to coordinate, promote, and facilitate the effective use of ADR in the government, pursuant to the Administrative Dispute Resolution Act of 1996 and a White House Presidential Memorandum.

[2] This Guide applies to the internal management of the civilian executive branch. It is not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers or any other person. It is intended to be relied upon as a source of constructive suggestions for the effective administration of agency workplace ADR programs, but is not to be accorded "deference" as an "agency interpretation." Questions regarding interpretations of applicable law, regulation and policy should be raised with the appropriate legal counsel in each department and agency.

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2000 (“the 2000 ADR Guidance”), which may be found at the www.adr.gov, the IADRWG website. It should be used in concert with the confidentiality provisions of the ADR Act as well as agency confidentiality policies and guidance. Another useful resource on this topic for ADR program administrators and general counsel staff is the *Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act*, published by the American Bar Association ("the 2005 ABA Guidance").

Congress enacted the ADR Act to encourage and support the use of ADR within the federal government. The provisions of the ADR Act establish requirements regarding the confidentiality of communication during ADR processes involving federal agencies. These requirements attempt to balance the goals of open government with the need to protect the assurance of confidentiality necessary to encourage free communications within the ADR process. Some of these requirements may differ from the confidentiality provisions under which private practitioners function. This is because various state laws provide different confidentiality protections affecting private neutrals.

Confidentiality is a critical component of a successful ADR process. Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be disclosed to others. Confidentiality also can reduce posturing and destructive dialogue among parties during the resolution process.

It is essential that neutrals and parties be informed of the confidentiality protections available under the ADR Act and of the limitations to that protection. An ADR program administrator should take the steps necessary to assure that both internal and external neutrals understand the confidentiality provisions that apply to federal ADR programs and that parties are adequately informed of these provisions.

Each chapter of the Guide includes a description and discussion of the issues, a legal analysis, and questions and answers related to confidentiality as it pertains to an aspect of a workplace ADR program. The first chapter discusses issues important to remember throughout a dispute resolution proceeding. This chapter covers the various stages – before, during, and after the actual dispute resolution session – of a dispute resolution proceeding. The remaining five chapters discuss particular issues regarding confidentiality – *i.e.*, confidentiality agreements, record-keeping, program evaluation, access requests, and non-party participants. Effort has been taken to minimize repetition of legal analysis and guidance within the chapters of this Guide; however, such repetition has not been removed where the same material is critical to the understanding of multiple issues addressed. In most instances, reference is made to the relevant passage in another chapter where the issue in question is addressed in greater detail.

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CHAPTER I

DISPUTE RESOLUTION PROCEEDINGS

A. OVERVIEW

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during the various stages of a dispute resolution proceeding (*i.e.*, intake, assessment, convening, dispute resolution session, authority clearance and agreement implementation).

General Description

The requirement to maintain the confidentiality of information received by an ADR program depends primarily on whether an ADR program administrator, a member of his/her staff, a volunteer, a collateral-duty person and/or an outside contractor may be deemed a "neutral" for purposes of the particular dispute resolution proceeding. If so, the neutral must – with few exceptions – maintain the confidentiality of information obtained or generated on behalf of parties they assist during the dispute resolution proceeding. As discussed later, the role of a neutral used to support the mediation of federal workplace disputes may take several forms, including intake staff, convenors, assessors and mediators.

The responsibilities of an ADR program administrator include identifying appropriate neutrals, understanding the extent of their obligation to maintain confidentiality, ensuring that neutrals are trained in and understand their responsibilities related to confidentiality, and providing support to the neutrals so that they can maintain this confidentiality. The 2000 ADR Guidance encourages agencies to establish policies and practices that support the terms and legislative intent of the ADR Act.

Legal Analysis

The following are terms and concepts used throughout this Guide. Additional legal analysis will be provided as it is relevant to individual chapters.

A *dispute resolution proceeding* is a process in which:

- an alternative means of dispute resolution is used to resolve an issue in controversy;
- a neutral is used; and
- specified parties participate.

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A dispute resolution proceeding encompasses multiple stages, including intake, assessment, convening, the ADR session and activities necessary to execute a final settlement agreement between the parties (5 U.S.C. § 571(6)).

A *dispute resolution communication* is any oral or written communication prepared for the purposes of a dispute resolution proceeding. The ADR Act states specifically, however, that a written agreement to enter into a dispute resolution proceeding or a final written agreement is *not* a dispute resolution communication.

A *neutral* is a person who:

- functions specifically to aid the parties in resolving an issue in controversy;
- is acceptable to the parties; and
- has no conflict of interest with respect to the issues in controversy, unless such issues are disclosed in writing and the parties agree that the neutral may serve.

A neutral may serve with or without compensation and may be a private individual, or employee of a federal agency, state, local or tribal government, public or private organization (5 U.S.C. §§ 583, 571(9), 573).

The term neutral may be used by an agency to define a staff position with certain responsibilities to protect information pursuant to agency policy and procedures. Though the term is the same, to be considered a neutral under the ADR Act, a person must meet the ADR Act's criteria applied on a case-specific basis.

Neutral's obligation of non-disclosure:

A neutral is held to a high obligation regarding confidentiality. While there are some exceptions, the ADR Act states that a neutral "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral" (5 U.S.C. § 574(a)).

A *party* is:

- a named party in a federal proceeding; or
- for proceedings without named parties, a person who will be significantly affected by a decision of a federal agency and participates in the proceedings.

Parties' obligation of non-disclosure:

While parties also have an obligation of confidentiality, it is less than that of a neutral. Unless the parties and the neutral agree otherwise, the parties may disclose their own communications as well as statements made by other parties while in joint session (*i.e.*, when all the parties are present). Parties may not, however, disclose communications generated by a neutral, even if these communications were made when all parties are present.

Changing the confidentiality procedures of the ADR Act

Parties may, with the consent of the neutral, agree to change the confidentiality provisions of the ADR Act as they pertain to a neutral's obligations and, with appropriate consideration of the possible consequences, as they pertain to their own obligations. Such confidentiality changes are typically accomplished through parties entering a contract generally referred to as a confidentiality agreement. (See Chapter II, Confidentiality Agreements.)

Changing a neutral's confidentiality obligations:

- The extent of a neutral's obligations to maintain confidentiality may be changed under the ADR Act as long as the changes are:
    - made in writing; and
    - signed by the parties and the neutral (5 U.S.C. § 574(a)).
- Parties may also agree among themselves to change a neutral's obligations of confidentiality, but must inform the neutral prior to commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)).

Changing the parties' confidentiality obligations:

- 5 U.S.C. § 574(b)(2) allows parties to decrease or waive the ADR Act's restrictions on disclosure of their dispute resolution communications if all parties consent in writing. This allows parties to expand the types of communications they can disclose without violating the statute.
- The right of parties to agree to increase their own obligations to maintain confidentiality is not provided for by the ADR Act and is an untested point of law. The Federal ADR Council in the 2000 ADR Guidance suggested that parties address the issue through the use of a contract. Practitioners disagree, however, on whether such agreements are enforceable if challenged. Program administrators are advised to carefully balance the considerations noted in the Legal Analysis section of Chapter II, Confidentiality Agreements, in determining whether to enter agreements that increase parties' confidentiality obligations.

Note that an agreement regarding confidentiality does not change the rights of people who did not sign it, such as coworkers. They may still have access – through Freedom of Information Act (FOIA) requests or other legal means – to some of the communications covered by a confidentiality agreement that are not otherwise protected by the ADR Act. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications)

Confidentiality Issues Raised During the Dispute Resolution Proceeding

Q1: When is someone serving as a neutral?

A1: There are three main criteria that must be met for a person to be considered a neutral under the ADR Act.

1. The person must be acting to assist the parties in resolving a specific dispute. Session neutrals, such as mediators, are considered neutrals. Similarly, intake staff and convening professionals supporting parties in their use of ADR should be considered neutrals, as their work is exclusively focused on helping the parties resolve their controversy.

2. The person must be acceptable to all parties. Usually, the process begins with one party contacting an ADR office. The acceptability of the neutral by that party constitutes acceptance of the neutral until such time as other parties are contacted.

3. The person must have no conflict of interest with respect to the issues or parties, such as potentially benefiting from the outcome, having an obligation to enforce related statutes or regulations, or having a close relationship with one of the parties unless the conflicts are disclosed in writing and the parties agree that the neutral may serve.

A neutral may be a private individual or a federal government employee. There may be more than one neutral on a particular ADR case; for instance, there may be a convenor and a session neutral.

ADR program administrators are neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching and preparing them to negotiate, or by assisting the session neutrals in the mediation on behalf of the parties. Likewise, intake staff are neutrals when they are, for example, discussing the particulars of the case with the parties.

ADR neutrals fulfill many roles in assisting the parties. Under most circumstances, a person may be appropriately considered a neutral while serving in the following roles:

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- helping the parties in resolving their dispute; and
- fulfilling at least one of the following functions:
    - discussing information about the dispute with the parties to explore the use of ADR;
    - conducting intake for a specific case going to ADR;
    - helping parties identify and arranging for an appropriate ADR professional;
    - conducting convening (*i.e.*, discussing the case with the parties prior to a session to help them prepare to negotiate effectively); and
    - assisting the parties toward resolving their dispute and/or reaching an agreement.

Q2: **Is an Equal Employment Opportunity (EEO) Counselor a neutral under the ADR Act?**

A2: No, the Equal Employment Opportunity Commission (EEOC) discourages EEO Counselors from acting as neutrals because of the potential perception of bias in favor of the agency (EEO Management Directive No. 110). Implicit in this view is the assumption that EEO Counselors, when acting in their counselor role, are not neutrals as defined under the ADR Act.

Additionally, the EEOC recommends against using EEO Counselors as neutrals except as a last resort. Neutrals are often privy to information protected by the ADR Act, which may compromise their ability to serve as an EEO Counselor. Best practices used in agencies suggest that EEO Counselors should not serve as neutrals in a dispute in which they have provided counseling to an aggrieved individual. Additionally, investigators may not serve as neutrals in cases they are investigating. Likewise, neutrals should not serve as EEO Counselors or investigators in cases in which they are or have served as neutrals.

Dilemma: *Ming spoke with a counselor in the agency EEO Office and requested that his dispute be mediated. The ADR program administrator selected Karen, a trained mediator and full-time EEO Counselor at the agency, to mediate the matter. Is Karen a "neutral" for Ming's dispute?*

Solution: *In accordance with best practices, most agency policies, the EEO laws, and EEOC guidance, Karen, as an EEO*

Counselor, should not serve as a neutral. However, as a last resort, Karen could mediate provided (1) Karen discloses in writing to all the parties that she is a full-time EEO Counselor at the agency, and (2) all parties agree that she may serve.

Q3: How can an ADR program administrator ensure that individuals seeking ADR assistance understand the role and obligations of ADR program staff members who serve as neutrals?

A3: The role and confidentiality obligations of persons who fill neutral functions need to be clearly articulated, whether their duties as neutral are collateral or full-time, and whether they are mediators or ADR program administrators. Relevant agency ADR documents – such as guidance, written procedures, brochures and confidentiality agreements – should explicitly specify the roles of neutrals as part of agency ADR processes.

To ensure that individuals seeking ADR assistance understand the roles and obligations of ADR program staff members who serve as neutrals, an ADR program administrator should consider taking the following steps:

- develop and provide to potential parties a model statement clarifying under what circumstances ADR program staff members are considered neutrals for purposes of the ADR Act;

- post a sign or pledge on the door or the wall that includes the person's title and/or office name, clearly identifies the person as a neutral, and states the information the neutral will/will not keep confidential;

- develop, post and distribute materials – such as brochures, codes of conduct, articles for employee newsletters, or agency-wide email announcements – that include information about confidentiality; and

- create a web site that provides an overview of how confidentiality will be protected.

Special consideration should be taken by the ADR program administrators to assure the shared understanding of confidentiality obligations regarding federal employees of other offices who serve as neutrals on a collateral duty basis. ADR program administrators should consider the general suggestions below.

- Contact the supervisor of the neutral serving on a collateral duty basis to discuss whether the supervisor perceives there to be any obstacles to the individual's

ability to uphold the confidentiality obligations required of neutrals under the ADR Act.

- Discuss with appropriate agency officials whether modifications to the employee's position description, or other means of formalizing the neutral role, would be beneficial. The position description should identify the employee as a neutral and set out expectations regarding confidentiality, including clarification of the circumstances in which this person may act as a neutral.

- Clearly delineate to the neutral, to co-workers, and to potential parties, when the person is serving as a neutral and when she/he has other responsibilities.

Dilemma: *Gloria is a bench scientist at a federal agency and a trained mediator. The ADR program administrator would like to include her on the roster of neutrals for the agency. Assuming Gloria agrees, what steps can the ADR program administrator take to ensure that Gloria will be able to maintain confidentiality within the agency when she mediates?*

Solution: *As part of the supervisory approval process, explain to the supervisory chain that Gloria will be unable to share with her supervisors any information about her mediations other than the time(s) and location of the mediation sessions. The ADR program administrator may also want to consider how she/he can provide to his/her supervisor an evaluation of Gloria's performance as a neutral. Finally, discuss with Gloria's supervisor and the personnel office other ways of clarifying her confidentiality restrictions, such as whether her position description should be modified to reflect her collateral duty status as a neutral, or whether to post the relevant code of conduct on her door.*

Q4: What general actions should an ADR program administrator take to ensure that an appropriate level of confidentiality is maintained in ADR program operations?

A4: An ADR program administrator should be aware of agency policy regarding disclosure of information, and ensure that ADR program practice standards are consistent with the ADR Act. An ADR program administrator can accomplish this by considering:

- limiting email communications to logistics;

- understanding all agency policies that require the disclosure of information by agency staff and ensuring that parties are advised of these policies;

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- preparing model confidentiality agreements that incorporate such policies;

- locating the ADR office and dispute resolution sessions in a manner that protects the privacy and confidentiality of parties (*e.g.*, so that co-workers will not see the parties entering into, participating in, or exiting from rooms in which dispute resolution sessions and related meetings are to be held and so that parties' voices will not be heard from outside of these rooms);

- ensuring that phone, email and other communications are secure; and

- if a computer is to be used in drafting a resolution or settlement agreement, ensuring that it is a secure computer which has an appropriate password protection mechanism or restricted access (*i.e.*, ideally not part of a network, with its own printer) and is not located in a public area.

Q5: What actions should the ADR program administrator take to ensure that an appropriate level of confidentiality is maintained by session neutrals?

A5: There are several steps the ADR program administrator should consider taking in order to ensure appropriate confidentiality by session neutrals, including:

- ensuring that neutrals are trained regarding confidentiality obligations, including:

    - the provisions of the ADR Act,
    - the 2000 ADR Guidance, and
    - relevant agency policy that is incorporated into confidentiality agreements;

- incorporating the role and responsibilities as a neutral in staff personnel position descriptions and performance agreements;

- creating an appropriate work environment for the neutrals addressing issues related to confidentiality (*e.g.*, privacy, records management/storage and database/file security);

- establishing and communicating disciplinary steps/process to address violations of confidentiality by neutrals; and

- developing procedures and ensuring support to assist neutrals subjected to inappropriate demands for access to information.

Q6: May parties or the agency adopt confidentiality protections different from those provided by the ADR Act?

A6: Yes, the parties may provide, by contract, for a greater or for a lesser degree of confidentiality than that provided for in the ADR Act. However, parties should be made aware of the potential enforceability issues associated with such contractual confidentiality agreements. (See the Legal Analysis section above).

Dilemma: *Bill and Tanya have agreed to mediate their very sensitive dispute. They become concerned, though, when they learn that, since they are the only parties, under the ADR Act Bill is permitted to tell his buddies about what Tanya says, and Tanya is permitted to tell her friends what Bill says in the dispute resolution session. They ask the ADR program administrator if there is anything they can do to address their concerns regarding confidentiality.*

Solution: *Before responding, the ADR program administrator should consult with agency legal counsel to determine the agency's position on establishing confidentiality protections beyond those provided for in the ADR Act. (See Chapter II, Confidentiality Agreements.) If the agency policy permits, the ADR program administrator could explain that they can draft and sign a contract that states that both parties agree not to disclose anything said during the mediation, unless this disclosure is to authorize or implement a settlement. The ADR program administrator should clarify, however, the limitations of the contract. For example, the contract may not protect the parties from having to disclose the information if they receive a subpoena from someone not at the table. The contract also will not automatically protect the parties from a FOIA request. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications.)*

Q7: What should an ADR program administrator advise a neutral who has heard from a party that he/she has violated a law?

A7: Under the ADR Act, the neutral may disclose a communication if it is "required by statute to be made public." There are very few statutes that meet this definition. (See 2000 ADR Guidance.) However, even if information is allowed to be disclosed by this exception, the ADR Act underscores that the neutral can make the communication public only if there is no one else who can disclose it.

Additionally, a few statutes have provisions that might require a federal employer to disclose information regarding a violation of law. It is beyond the scope of this guidance to provide an analysis of these statutes and their relationship to the confidentiality provisions of the ADR Act. If an ADR program administrator is concerned about a

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potential statutory conflict, he/she should contact the General Counsel office. Additionally, Chapters III and V of this Guide provide additional information and suggestions on this topic.

Q8: Statutes such as the Inspector General Act and Whistleblower Protection Act may impose an obligation on agency staff to disclose certain classes of information. As a result, some agencies have policies requiring employees to report waste, fraud, abuse, sexual harassment or other forms of misconduct. What should an ADR program administrator advise a neutral regarding obligations to protect such information that is disclosed during a dispute resolution proceeding?

A8: Under the ADR Act, a neutral is precluded from disclosing dispute resolution communications with few exceptions. However, other statutes, such as those mentioned above, may impose obligations to disclose information. The ADR program manager should consider discussing with agency general counsel this potential tension between the ADR Act and other statutes requiring disclosure to determine appropriate agency policy and practice. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications regarding the tension between the ADR Act and other laws or regulations.)

Dilemma: *During a separate meeting with the mediator (i.e., a caucus), Mark discloses to the neutral that he abused his government credit card by using it to buy multiple personal items. The mediator believes that is likely a violation of the government ethics regulation prohibiting waste, fraud, and abuse. During a break, the mediator approaches the ADR program administrator and asks whether to disclose the information. What does the ADR program administrator tell him?*

Solution: *The ADR program administrator should tell him that, under the ADR Act, there is no applicable exception to justify the neutral's disclosure of this information. However, the ADR program administrator should further explain actions he can take based on any agency policy regarding the tension between the ADR Act and other statutes requiring disclosure. For example, if the parties signed a confidentiality agreement stipulating that criminal activity, fraud, waste, and abuse may or must be disclosed, he may disclose the information.*

When a mediator reveals allegation in caucus

Dilemma: *There is a mediation involving three parties: Yasmin, the complainant; Sean, the timekeeper; and Angie, Yasmin's supervisor. There is a joint session in which only the time*

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and attendance disputes were raised. In caucus with the external mediator, Yasmin reveals several allegations of harassment against a manager in another office. Yasmin asks the mediator to discuss the allegations with Angie, her supervisor, but asks that the allegation not be revealed to the offending manager or to anyone else. The mediator goes into caucus with Angie and reveals the allegations of harassment against the other manager, adding that Yasmin does not want the allegations revealed to anyone. Angie, aware of the agency's strict anti-harassment policy, advises the mediator that, under agency policy, he has no choice but to immediately initiate a preliminary inquiry into whether harassment has occurred, and, if the inquiry determines that harassment has occurred, take immediate action to stop such harassment. Under the agency's policy, Angie must also notify the alleged harassing manager's office director. The mediator asks for a break to consult with the ADR program administrator for guidance on whether he should tell Angie that the ADR Act prohibits her from disclosing these dispute resolution communications.

Solution: *The ADR program administrator should advise the mediator to explain to Angie, the supervisor, that 5 U.S.C. § 574(b) of the ADR Act says that, with certain exceptions, parties to dispute resolution proceedings shall not disclose dispute resolution communications from the neutral. None of the exceptions apply here. The ADR program administrator should further advise the mediator on any agency policy regarding the tension between the ADR Act and other statutes requiring disclosure.*

When allegations are made in joint session

Dilemma: *In joint session focused on interpersonal issues, Liam, the complainant tells Andrew, his supervisor, that a co-worker has been harassing him. Andrew informs Liam he will take immediate action to stop the harassment.*

Solution: *The ADR program administrator should be sure that all mediators know and that parties understand that, under 5 U.S.C. § 574(b)(7) of the ADR Act, there is no prohibition on a party disclosing the communications of another party when they are provided to all parties to the dispute resolution proceeding.*

When a joint session is confidential

Dilemma: *The parties, in consultation with appropriate legal counsel, have signed a mediation agreement (i.e., a contract) providing that they will not disclose any communications made by the parties during the dispute resolution proceeding. During joint session the complainant reveals an allegation of harassment. The supervisor says that she would like to report these allegations and address them. What should the ADR program administrator advise the mediator to do?*

Solution: *The ADR program administrator should ensure mediators know that, although the ADR Act does not protect joint session communications, the parties may, in compliance with agency policy, contract independently to keep dispute resolution communications made in joint sessions confidential. (See the Legal Analysis section.) The supervisor, as a party, risks being in breach of the contract if he or she discloses the communication.*

Q9: When may an intake, session or other neutral disclose information protected by the ADR Act to the ADR program administrator?

A9: The neutral may disclose dispute resolution communications, and communications provided in confidence to the neutral, only to other neutrals assisting the parties to resolve this dispute. Before the session neutral makes disclosures of information protected by the ADR Act to the ADR program administrator, consider the following.

- Is the ADR program administrator a neutral with respect to this dispute? If so, the neutral may disclose freely, but the ADR program administrator must maintain the confidentiality of the information consistent with the ADR Act. If the ADR program administrator is a neutral who has the job of supporting and guiding session neutrals, she/he is fulfilling this function by hearing information that the session neutral shares to better assist the parties in resolving their dispute.

- If the ADR program administrator is not a neutral with respect to this dispute, she/he may only obtain and disclose information from the neutral that is not a dispute resolution communication or otherwise provided in confidence to the neutral. For example, an agreement to mediate, information and data that are necessary to document an agreement reached and information for research or educational purposes can be discussed with the ADR program administrator.

Dilemma: *Paul, the ADR program administrator, schedules cases and identifies appropriate neutrals for the agency's workplace*

disputes. His cases are referrals from the agency EEO Office and the personnel office. In this particular matter, Paul has had no contact with the parties other than to confirm date and location. Is Paul a neutral regarding this matter?

Solution: *Paul, who merely schedules cases and does not have contact with the parties other than to confirm date and location, is not a neutral for this particular dispute because he is not aiding the parties in resolution of their dispute. Under these circumstances, the session neutral cannot share any dispute resolution communications with Paul; unless an exception under the ADR Act applies.*

Dilemma: *Elena, the agency ADR program administrator, met with the parties individually prior to the session to help the parties understand the process and focus the issues to be mediated. Is Elena a neutral regarding this matter?*

Solution: *Elena is a neutral for purposes of this particular dispute. The session neutral can freely share any information with Elena regarding the mediation session.*

Dilemma: *Doug is the Director of the small agency EEO office. The only agency workplace ADR function is located in the EEO office, but there is no specified ADR program administrator. Both collateral duty and full time counselors handle incoming cases and offer mediation to the complainants. If the complainant is interested, the counselor sends the information to Doug who arranges the logistics of the mediation. Is Doug a neutral? What can the session neutral discuss with Doug?*

Solution: *This is a difficult situation because Doug directly supervises the session neutral, specifically on her ability to mediate. However, as the office is structured, Doug is not a neutral. He is not functioning specifically to aid the parties in resolving a controversy. He is not engaged in the substance of the dispute, just the logistics. Additionally, as the head of the office charged with implementing the EEO laws, the situation is rife with potential conflicts of interest. Therefore, under these facts, the session neutral may not share dispute resolution communications with Doug.*

To address the concerns, Doug could designate a separate ADR program administrator in or outside his office. That

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person could then serve as a neutral and help to mentor and evaluate the on-staff neutral. Alternatively, the neutral could share information with Doug if all parties to the dispute resolution proceeding and the neutral consent in writing.

Q10: Sometimes the parties or the neutral determine that the participation of an expert or resource person in the ADR process would be helpful. How can the ADR program administrator protect the confidentiality of the process when "outsiders" are brought in?

A10: Under the ADR Act, non-party participants generally are not bound to maintain confidentiality. They may, however, sign a contract binding them to confidentiality if all participants agree. (See Chapter II, Confidentiality Agreements.)

The participation of resource persons may be arranged ahead of time or may be initiated during the session. These individuals may be experts in a substantive area or they may be agency employees with expertise in an area that pertains to the dispute or to the potential resolution (*e.g.*, a pension/benefit expert, if retirement is expected to arise as an issue or option).

Under certain circumstances, non-party participants may be considered "neutrals" under the ADR Act for purposes of the confidentiality provisions. To be considered a neutral, they must:

- either be brought into the proceedings by the session neutral and acceptable to the parties or be brought into the proceedings by the parties jointly; and

- meet the other statutory requirements for "neutral." (See Q1, above.)

If only one party brings the expert or resource person into the session, the person is not a neutral under the ADR Act.

An ADR program administrator should consider briefing resource persons, whether they are "neutrals" or simply non-party participants, on confidentiality provisions prior to their participation in the ADR process. If they are to participate in the session, they should be encouraged to sign the confidentiality agreement. If they are brought in mid-session and are only answering questions and not hearing confidential dispute resolution communications, signing of the confidentiality agreement may not be necessary.

Dilemma: *Bill, an employee who is mentally impaired, has agreed to enter mediation with his supervisor. The parties have agreed that Celia, a vocational rehabilitation counselor with relevant expertise, will participate in the session as a resource person. The mediator asks the ADR program*

administrator whether Celia is a neutral, and, if not, how to ensure the parties' confidentiality.

Solution: *The rehabilitation counselor is a neutral because she will be assisting the parties to resolve their dispute and not serving as an advocate for either party. Both parties agree that Celia should participate. As a best practice, the ADR program administrator or the mediator should spend time with Celia prior to the session explaining confidentiality provisions. Celia should sign the confidentiality agreement, along with the other participants.*

Dilemma: *Ariana, the session neutral, is mediating a dispute between a geologist and his supervisor over the employee's latest performance evaluation. During the session, Ariana proposes bringing in a geologist who has no relationship to either party to advise her on technical issues. The parties concur. Ariana asks the ADR program administrator whether the resource geologist is a "neutral."*

Solution: *The resource geologist is a neutral because she meets all the criteria under the ADR Act and was selected by the neutral. The resource geologist has all the protections and obligations of neutrals under the ADR Act. The resource geologist should sign the confidentiality agreement, along with the other participants.*

Dilemma: *Aron, a manager, and Michael, an employee, are mediating a dispute involving the amount of Michael's pension. Michael has brought a pensions expert to assist him in explaining the technical aspects of his case. The session neutral asks the ADR program administrator whether the pension expert is a neutral.*

Solution: *The pension expert is not a neutral because Michael brought her into the process to assist him. In this capacity, she has neither the obligations nor the protections of the ADR Act. The pension expert should sign the confidentiality agreement, along with the other participants.*

Q11: Does the answer to the question above change if the "outsider" is a personal representative of one of the parties?

A11: Yes. As noted in the 2000 Guidance, consistent with common legal practice, the obligation of parties extend to their representatives and agents. Therefore, a personal representative is held to the same confidentiality obligations as a party.

CHAPTER I

DISPUTE RESOLUTION PROCEEDINGS

B. OVERSIGHT RESPONSIBILITIES BEFORE THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during the intake, assessment and convening stages of the Dispute Resolution Process. It also discusses what to do when an employee first contacts an ADR program staff member seeking general information about the agency's ADR program.

General Description

The confidentiality provisions of the ADR Act are intended to shield from disclosure communications between an employee and an ADR program staff member pertaining to a particular dispute. The confidentiality protections of the ADR Act start when the employee first contacts an ADR program staff member concerning a dispute. 5 U.S.C. § 574(a) and (b) emphasize the integrity of dispute resolution proceedings in general and provide assurance to parties in future cases that their communications will remain confidential.

Intake refers to the process used by the ADR program to capture specific information pertaining to a particular dispute from the individual who initiated contact with the ADR program. Intake activities may include setting the date, time, and place for the dispute resolution session, as well as case development (such as gathering enough information to determine who the right parties are to bring to the table to reach a resolution to the dispute that is effective and can be implemented).

Assessment refers to the process of discussing the ADR options and the processes they entail, and designing the process for use in a particular case, with the participation of the parties. Assessment may also refer to the neutral's review of a case to determine whether it is suitable for resolution through ADR, and, if so, which ADR process is most appropriate.

Convening refers to the process of preparing the parties to participate in ADR. Depending upon the structure of the particular ADR program, some convening tasks may overlap elements of the assessment and/or intake.

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Confidentiality Issues Raised During Initial Contacts and Program Intake

Q1: When an employee contacts an agency ADR program staff member seeking general information about the agency's ADR program, are the communications confidential under the ADR Act?

A1: No, the employee requesting general program information has not indicated an expectation of confidentiality. The employee is not discussing a particular dispute or issue in controversy and therefore not speaking to the ADR program staff member in his/her capacity as a neutral.

Q2: When an employee first contacts an agency ADR program staff member seeking advice about resolving a specific dispute or seeking to enter a workplace ADR process, are the communications confidential under the ADR Act?

A2: Yes, the agency ADR program staff member performing intake duties and responding to questions about ADR could be appropriately identified as a neutral and therefore the communications would be confidential under the ADR Act. The employee has a reasonable expectation that such communication with the ADR program staff member is confidential because the discussion is about a process to resolve a dispute through an ADR process. In other words, the employee does not expect that the ADR program staff member would divulge the information imparted to him/her. (See 2000 ADR Guidance.) Agency policy and practice should dictate that ADR program personnel performing intake duties identify themselves as neutrals and explain to parties seeking assistance the confidentiality of their communications.

Dilemma: *Mary, an employee, contacts her agency ADR program seeking assistance in resolving a dispute and describes a dispute to Joelle, an intake person.*

Solution: *The conversation is confidential because Joelle obtained substantive information about the dispute and is assisting parties in resolving an issue in controversy.*

Q3: Is the completed intake form confidential?

A3: Yes, unlike an EEO intake form, the ADR intake form – used to initiate assistance for the parties – is a dispute resolution communication. It is confidential if the form includes information about a specific individual(s) and/or dispute. The neutral should ensure that the completed intake form remains confidential. The ADR program administrator should be aware of the requirements under the Federal Records Act regarding the intake form. (See Chapter III, Agency Record-Keeping.)

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Q4: Is the information provided to or by a neutral during a convening and case assessment automatically covered by the confidentiality provisions of the ADR Act?

A4: Yes, communications between a neutral and a party during a convening and case assessment to assist in and resolve a dispute are protected by the confidentiality provisions of the ADR Act. Some ADR programs may conduct case assessments and otherwise share information among neutrals in the ADR program as an integral part of its procedures. There may be more than one neutral associated with a case during the course of a dispute resolution process (*e.g.*, an intake neutral, a convening neutral, as well as the neutral that facilitates a face-to-face proceeding). Any such information shared between neutrals for the purpose of assisting the parties is likewise protected.

Q5: Does the ADR Act provide for confidentiality when a non-neutral individual, other than as an ADR party, participates in case assessment or convening?

A5: No, in some cases an agency representative will gather information regarding a dispute to assist the agency in making a determination as to whether to participate in ADR. Such a role might be filled, for example, by the civil right officer or a labor-management representative. That person is acting as an advocate for the agency to determine the best interests of the agency. This is not a neutral function, because the person is not aiding both parties in resolving the dispute, and, therefore, the ADR Act does not provide for confidentiality. To protect the credibility of the ADR program, neutrals should ensure that confidential dispute resolution communications or communications provided in confidence to the neutral will not be shared with non-neutral agency personnel.

Q6: Are written case assessment reports confidential?

A6: Yes, if the assessor is a neutral for that case, the report is protected by the ADR Act. Creation of an assessment report may, however, constitute a record under the agency's record-keeping procedures. An ADR program administrator should evaluate the benefits of having a written report for documentation and evaluation purposes in relation to the requirements to maintain the confidentiality of the report. (See Chapter III, Agency Record-Keeping).

Q7: What can an ADR program administrator do to protect confidentiality when an individual contacts a convenor/assessor informally?

A7: An ADR program administrator should consider advising the convenor/assessor to explain to the individual that she/he is a neutral. It may be helpful for the neutral, even at this informal stage, to take only limited notes. Whether such notes are subject to federal record keeping requirements is discussed in Chapter III, Agency Record-Keeping.

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Q8: Is it necessary for the neutral conducting a convening (convenor) and parties to sign any confidentiality agreement?

A8: No, convenors, who may include persons conducting intake, generally do not sign confidentiality agreements. However, such a practice could constitute an added confidentiality protection. Sometimes convening includes joint discussions, such as conference calls, with the parties to reach agreement on procedures. In these cases, it may be beneficial for the participants to sign the confidentiality agreement before such discussions, to memorialize the parties' expectations regarding confidentiality of dispute resolution communications during convening activities. Because convening may be done telephonically, it may be necessary to create a method for remotely obtaining the signatures of parties, such as through the exchange of confidentiality agreement signature pages via facsimile.

Q9: What actions can an ADR program administrator take to ensure that an appropriate level of confidentiality is maintained for all dispute resolution communications that occur before the dispute resolution session?

A9: An ADR program administrator should consider taking the following steps:

- define the ADR process in all agency documents and information to include intake, assessment, and convening, if such steps are part of the agency's ADR program;
- appropriately identify neutrals who perform intake, assessment, and convening functions to those potentially interested in using ADR;
- train neutrals to inform employees about their role and when confidentiality applies;
- appropriately educate agency staff of the ADR program and confidentiality protections afforded communications;
- identify which records are necessary to ADR program operations and determine how to safeguard the confidentiality documents that must be maintained; and
- establish position descriptions for persons who fill intake/assessor/convenor functions, whether collateral-duty or full-time, which specify and explain that these roles are neutral roles.

Summary

As the ADR program administrator, have I considered:

- Deciding who is authorized to function as a neutral in my program?
- Appropriately identifying the individual(s) as a potential neutral?
- Identifying the neutral(s) in my program to agency staff and potential parties?
- Educating ADR program staff, including those who engage in intake, assessment and convening, about the nature of their confidentiality and record keeping obligations?
- Taking all necessary steps to ensure the program supports the neutral's confidentiality?
- Ensuring that the convening and assessment process is explicitly specified in agency documents and information as part of the ADR process for purposes of confidentiality?
- Ensuring that the parties understand the role of a neutral and their responsibilities for confidentiality?
- The benefits of having the parties sign a confidentiality agreement before substantive discussions begin?
- Educating mediators, agency personnel, and other mediation participants, including resource persons, about the nature of their confidentiality obligations?

C. OVERSIGHT RESPONSIBILITIES DURING THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during a dispute resolution session. A dispute resolution session begins following the appointment of a session neutral or the agreement of the parties to commence proceedings with the session neutral.

General Description

Once the intake and convening stages have been completed, the parties are ready to begin the dispute resolution session stage of the dispute resolution proceeding. This stage is the heart of the dispute resolution proceeding and is also the point at which the neutral and the parties actively work to resolve the dispute through the use of various ADR techniques in joint and private meetings or through telephone conversations. The dispute resolution session phase ends when the dispute is resolved, or the parties agree or neutral determines that the dispute cannot be resolved.

The session neutral may be an employee of the federal government (internal neutral) or a private sector neutral (external neutral).

Confidentiality Issues Raised During the Dispute Resolution Session

Q1: What actions should an ADR program administrator take to ensure appropriate confidentiality of discussions between the neutral(s) and the parties during the dispute resolution session?

A1: An ADR program administrator should consider taking the following steps.

- Ensure that neutrals are trained regarding the confidentiality requirements of the ADR Act and any agency policy that is incorporated into a confidentiality agreement regarding conduct of the dispute resolution session. This includes:
    - having neutrals become familiar with the 2000 ADR Guidance before commencing the dispute resolution session;
    - ensuring that the session neutral appropriately conveys the requirements of the ADR Act to the parties;

- ensuring that the session neutral discusses with the parties the possible implications of modifying the confidentiality provisions of the ADR Act; and

- ensuring that the session neutral advises the parties of the possible need to consult with the ADR program administrator during the session and that the ADR program administrator is bound by the confidentiality provisions of the ADR Act and any agreement he or she signs.

- Recommend that the parties and the session neutral execute a confidentiality agreement prior to the start of the dispute resolution session. (See Chapter II, Confidentiality Agreements.)

- Consider whether the room in which the dispute resolution session is being held provides sufficient protection of confidentiality so that the voices of the session participants will not be heard outside the room.

- If a computer is to be used in drafting a resolution or settlement agreement, ensuring that it is a secure computer which has an appropriate password protection mechanism or restricted access (*i.e.,* ideally not part of a network, with its own printer) and is not located in a public area.

- If the dispute resolution session is conducted by telephone, ensure that the communications are secure.

- Provide to the neutral and each participant a packet of information:

    - summarizing the confidentiality provisions of the ADR Act (including the ability of the parties to modify the confidentiality provisions of the ADR Act) and any agency policy that may be agreed upon and apply at the dispute resolution session;

    - enclosing a model confidentiality agreement; and

    - outlining the key points that the mediator should cover in the opening statement.

- Ensure that the neutral reminds the parties, at the conclusion of the session, of their obligation to maintain the level of confidentiality provided for by the ADR Act or the alternative level of protection, if they have agreed to one.

Q2: During the dispute resolution session, the parties reach an apparent impasse, which the session neutral cannot overcome without consulting with a person outside the session. What direction should the ADR program administrator provide to the neutral?

A2: The ADR program administrator should consider advising the neutral to first seek to have the parties obtain the needed information themselves. In the event that the parties are unable to obtain the information, the neutral should advise the parties of her/his potential need to confer with an ADR professional or non-party subject matter expert during the dispute resolution session. The session neutral may disclose facts to such persons to enable a fruitful discussion of possible approaches to resolve the apparent impasse, so long as the neutral stays within the bounds of the confidentiality requirements of the ADR Act. If the session neutral determines that information protected by the ADR Act needs to be disclosed to the non-party subject matter expert or ADR professional, the session neutral must obtain the permission of the parties before pursuing such consultation further.

Q3: During the dispute resolution session, the session neutral and the ADR program administrator have a routine meeting to discuss the status of the session. What may the neutral disclose?

A3: So long as the ADR program administrator is considered to be a neutral in this matter, the ADR program administrator is already bound to protect the confidentiality of the information presented by the parties. Therefore, the neutral may disclose as much information as she/he thinks necessary for the consultation to be effective.

Q4: During a break in a dispute resolution session, the ADR program administrator is approached by an individual, such as a supervisor, interested in the outcome of the session and asks how the session is going. What may the ADR program administrator disclose?

A4: The ADR program administrator should not disclose anything about the session. However, the ADR program administrator may note that a proceeding has occurred and, if a final settlement was arrived at, discuss the terms of the settlement with the party's supervisor to the extent allowed by agency policy and procedures. The ADR Act does not protect a final settlement agreement from disclosure. If the ADR program administrator has knowledge of what was disclosed during the dispute resolution session, whether by actively participating in the session or by exercising supervisory oversight of the ADR program, the ADR program administrator may not disclose that knowledge.

Q5: What should an ADR program administrator do if an agency policy is found to have reporting requirements that are more detailed than, or in conflict with, the ADR Act? What if the scope of the agency policy is more limited than that of the ADR Act?

A5: Agency policies and guidance may require that certain information obtained by agency staff be disclosed to the agency. However, disclosure of such information will constitute a violation of the ADR Act, unless the parties agree to a modification of the ADR Act's provisions through the incorporation of the agency disclosure requirements into a signed confidentiality agreement. (However, see the Legal Analysis Section, of Chapter II, Confidentiality Agreement.) It is the obligation of an ADR program administrator to ensure that parties are aware of any agency policies incorporated into confidentiality agreements that affect the provisions of the ADR Act.

Q6: Should an ADR program administrator's advice to a neutral be different if the session neutral is an internal agency staff member or an individual from outside the agency?

A6: No, the general obligations of a neutral to ensure the confidentiality of dispute resolution communications is the same regardless of whether the session neutral is an internal agency staff member or an individual from outside the agency.

Summary

As the ADR program administrator, have I considered:

- Determining that the neutral is aware of, and will assist the parties in understanding, the scope of confidentiality protections provided by the ADR Act?

- Ensuring that the neutral specifies to the parties what aspects of agency policy incorporated into a confidentiality agreement of the parties go beyond the ADR Act's confidentiality protections or require the disclosure of information protected by the ADR Act?

- Checking to see that the session neutral has reviewed the 2000 ADR Guidance before commencing the dispute resolution session, and understands the effect of any agency policy regarding confidentiality or requiring the disclosure of certain information?

- Ensuring that the neutral will protect confidentiality through appropriate selection of session rooms, use of telephones, and the use of computers for drafting a resolution or settlement agreement or conveying other dispute resolution communications to parties?

- Ensuring that the neutral's opening statement states that he or she may need to consult with the ADR program administrator, other ADR professionals, or subject matter experts?

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D. OVERSIGHT RESPONSIBILITIES AFTER THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality following completion of the dispute resolution session, but prior to final settlement of the mediated dispute.

General Description

The confidentiality provisions of the ADR Act protect dispute resolution communications that occur prior to the completion of a final agreement between the parties resolving the dispute through mediation. Because resolution of federal disputes typically requires execution of a formal settlement document by the parties and the agency, the final settlement may not occur until sometime after the end of the dispute resolution session. During this period, disclosure of dispute resolution communications may be necessary to allow the agency representative to have appropriate officials sign off on, or otherwise approve, the settlement agreement, and to enable the employee to seek a legal review of the settlement.

Any communications that occur after execution of the final settlement between the parties are not protected by the ADR Act.

Confidentiality Issues Raised After the Dispute Resolution Session

Q1: Upon completion of the dispute resolution session, the parties sign a draft , written settlement agreement and provide a copy to the neutral. What information regarding dispute resolution communications may the parties or neutral provide to agency officials?

A1: A party or neutral may disclose information protected by the ADR Act only to the extent necessary to obtain the required signatures on the settlement agreement (5 U.S.C. § 574(g)).

A best practice used by some agencies is to encourage the parties, rather that the neutral, to disclose information protected by the ADR Act to the extent necessary to obtain approval, *i.e.*, proper signatures on the settlement agreement. Also, some agencies have written agency policies that state that agency personnel who receive information otherwise protected by the ADR Act to review or approve a settlement agreement, will keep this information confidential, or be subject to agency disciplinary proceedings if they do not.

Q2: An agency official poses a question to the ADR program administrator who assisted the parties as a neutral regarding the reasoning behind a particular provision of a settlement agreement. She/he asks the ADR program administrator about the circumstances leading to the agreement. What may the ADR program administrator disclose?

A2: A neutral may not discuss any information disclosed during the dispute resolution session. Consequently, the agency official should be referred to the parties, who may voluntarily disclose information protected by the ADR Act that may be relevant to determining the meaning of the settlement agreement (5 U.S.C. §§ 574(a), 574(b)(6)). If the agency official's need for clarification from the neutral pertains to approval or implementation of the settlement agreement and the neutral has received prior permission from the parties to disclose information for this purpose, then the neutral may disclose the necessary information. If the agency official does not have a legitimate need to know (*e.g.*, she/he is merely curious about the circumstances but can make an approval determination without the requested information), the neutral may not make the disclosure.

Q3: **Following execution of the final settlement agreement between the parties, an agency official asks the ADR program administrator for a copy of this agreement. May the ADR program administrator provide a copy to the official?**

A3: Yes, the ADR Act does not prohibit the disclosure by any party or the neutral of the final settlement agreement between the parties. Therefore, the final formally executed, written settlement agreement may be provided to agency officials. The final settlement agreement is specifically excluded from the definition of a dispute resolution communication protected by the ADR Act (5 U.S.C. § 571(5)). However, agency policy may put restrictions on how and to whom a final settlement agreement can be shared by agency staff.

Q4: Following execution of the final settlement agreement between the parties, one of the parties wants to discuss with the neutral what occurred in the dispute resolution session. What advice should the ADR program administrator provide to the neutral?

A4: The ADR program administrator should consider advising the neutral that if a party wishes to discuss his/her impressions or thoughts about the dispute resolution session with the neutral after the dispute resolution proceeding has concluded with the execution of a final settlement agreement, the neutral should inform the party that the conversation is not confidential.

Q5: Following execution of the final settlement agreement between the parties, a dispute arises between the parties over the implementation of their agreement. One of the parties wants to discuss what occurred in the dispute resolution session with the ADR program administrator who assisted the parties as a neutral in an effort to clarify the intent of the settlement. Is the conversation covered under the confidentiality protections of the ADR Act?

A5: No, if a party wishes to discuss his/her impressions or thoughts about the dispute resolution session with the ADR program administrator after the dispute resolution proceeding has concluded with the execution of a final settlement agreement, the ADR program administrator should inform the party that the conversation is not confidential. For confidentiality to apply to the current situation, the party would have to initiate a new dispute resolution case regarding the current dispute over implementation of the agreement.

Summary

As the ADR program administrator, have I considered:

- Ensuring that the session neutral understands she/he generally cannot disclose dispute resolution communications and communications provided to the neutral in confidence?

- Suggesting that session neutrals have the parties acknowledge either orally or in writing that the neutral may disclose information protected by the ADR Act to the extent necessary to obtain approval of the settlement agreement?

- Drafting an agency policy regarding disclosure of information protected by the ADR Act for purposes of approval of the settlement agreement?

CHAPTER II

CONFIDENTIALITY AGREEMENTS

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when the parties express in writing their mutual understanding on confidentiality as it applies to the dispute resolution proceeding.

General Description

The ADR Act will apply to communications during a dispute resolution proceeding regardless of whether it is invoked by a confidentiality agreement. However, a confidentiality agreement is a way for parties, and the neutral(s) assisting them, to express their understanding and agreement on how communications and documents exchanged during a dispute resolution proceeding will be handled and protected. More formally, it is a contract between the parties that documents this common understanding and agreement. A confidentiality agreement is often incorporated into a broader contractual agreement, typically referred to as a mediation agreement, that outlines the procedures and rules that will be used to conduct a dispute resolution session, such as a mediation.

Legal Analysis

Confidentiality agreements fall into three general classes, those that:

- simply cite the ADR Act,
- decrease (or waive) confidentiality protections, and
- increase confidentiality protections beyond what the ADR Act provides.

Citing ADR Act

Citing the ADR Act in a confidentiality agreement emphasizes the intent of the parties and the neutral to be engaged in a proceeding that is granted the special protection found in the statute.

Decreasing Confidentiality Protections

The ADR Act expressly allows parties by written agreement to waive the confidentiality obligations on themselves. If all parties agree in writing, then the parties may disclose a dispute resolution communication. (See 5 U.S.C. § 574(b)(2)). A waiver agreement could be limited to certain topics, such as issues of national security, sexual harassment or other important agency concerns.

The ADR Act, in two provisions, allows for agreements that free the neutral from confidentiality obligations.

- If the parties and the neutral agree in writing, then a neutral may disclose dispute resolution communications. If the dispute resolution communication in question was provided by a non-party participant, then that participant must also sign the written agreement before the neutral may disclose the communication. (5 U.S.C. § 574(a)(1).

- The parties may also agree to allow the neutral to disclose dispute resolution communications, but they must inform the neutral prior to the commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)(1)) The language of this section does not require that the agreement be in writing or expressly state that the neutral must agree. However, as a best practice, the program administrator should advise the parties to document the agreement in writing. If a neutral does not wish to abide by the agreement, the neutral could withdraw from the dispute resolution proceeding.

Increasing Confidentiality Protections

Parties may agree to increase the neutral's confidentiality obligations, but they must inform the neutral prior to the commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)(1)) (See bullet above)

Whether parties may increase their own confidentiality obligations by written agreement is an untested point of law. Most often such provisions are considered to protect party to party communications in joint sessions. The Federal ADR Council in the 2000 ADR Guidance suggests that parties provide protection for such communications through use of a written confidentiality agreement. Practitioners disagree, however, on whether such agreements may be enforceable. In determining whether to include provisions in a confidentiality agreement to protect the confidentiality of "party-to-party" communications in joint sessions, program administrators should advise parties to balance the following considerations.

Reasons to Consider Including Provisions

- Promotes open discussions and may increase the amount and quality of information exchanged by the parties, leading to potential increase in the quality and number of successful resolutions
- May support a party's willingness to use mediation to resolve a dispute over more adversarial options
- Supports the use of mediation techniques to improve the relationship between the parties through the greater use of joint sessions

Reasons to Consider Not Including Provisions

- Avoids the possibility that the provisions, if challenged, would be found by a court to not be enforceable, potentially resulting in the disclosure of statements presumed to be confidential
- Reduces the time required and responsibility of the program administrator to educate parties appropriately prior to the mediation, since it avoids the need to ensure that the parties are informed of the potential consequences of a possible future challenge to such a provision's enforceability and the relationship of the provision to possible reporting requirements
- Simplifies the drafting of the confidentiality agreement

If a program administrator has considered all of the factors above, using a written confidentiality agreement to increase their own confidentiality obligations might be a way to increase the open exchange of information and the use of mediation techniques which focus more on relationship building.

NOTE: A confidentiality agreement is an agreement of the parties to enter into a dispute resolution proceeding and is, therefore, not protected from disclosure by the ADR Act. 5 U.S.C. § 571(5) specifically excludes such agreements from protection under the ADR Act.

In addition, dispute resolution communications between a neutral and a party that are protected from disclosure by the ADR Act are exempted from disclosure under the Freedom of Information Act. (5 U.S.C. § 574(j)) This FOIA exemption, however, may not apply to communications protected by a confidentiality agreement if such communications are not otherwise protected by the ADR Act. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications)

Confidentiality Issues Raised by a Confidentiality Agreement

Q1: What information might be included in a confidentiality agreement?

A1: A confidentiality agreement should include information to show the understanding of the parties and the neutral about the scope and limitations of confidentiality protection that apply to the dispute resolution proceeding. At a minimum, it should include a simple statement affirming the intention of the parties and neutral that the provisions of the ADR Act apply. Many confidentiality agreements also include information highlighting certain details and limitations of the confidentiality protections of the statute, such as:

- that all forms of communication (written and oral) may be protected;

- that a party's communications made available to all other parties (*i.e.*, communications during a joint session) are not protected from disclosure by a party; and

- that, if agency policy permits, parties have the ability to change the confidentiality protections of the ADR Act.

An ADR program administrator should consider providing parties and neutrals with a model confidentiality agreement to facilitate their discussion and signature.

Q2: What are examples of additional provisions that, if agency policy permits parties to do so, could be included in a confidentiality agreement?

A2: Parties and neutrals assisting them sometimes agree to include provisions in confidentiality agreements that change or enhance protections provided by the ADR Act (see Legal Analysis section, above), such as agreements that specify that:

- communications made by the parties in joint session, or those that are otherwise available to all parties, may not be disclosed by a party

- the parties' communications are also protected by other applicable authorities that restrict disclosures, including the Federal Rules of Evidence or the Administrative Procedure Act;

- the parties will not subpoena the neutral(s) regarding matters relating to the dispute resolution proceeding;

- there will be no verbatim recording of the dispute resolution proceedings such as an audio tape or a stenographic record; or

- aspects of agency policy – including requirements to disclose certain information learned during a dispute resolution proceeding, such as fraud or sexual abuse – are not superseded by ADR Act confidentiality provisions in this particular ADR process.

Q3: Should an ADR program administrator require the use of confidentiality agreements in all disputes?

A3: Yes, although it is not required to obtain the protections of the ADR Act, there are substantial benefits to the parties, neutral(s) and ADR program in having a signed confidentiality agreement. Confidentiality agreements help parties clarify their understanding of confidentiality as it pertains to their dispute resolution proceedings. Confidentiality agreements provide parties an opportunity to craft provisions that meet their needs and ensure a record of their agreement. In addition, confidentiality agreements can allow an ADR program administrator to include additional protections required by some neutrals, such as protection from future subpoenas. A best practice is for the ADR program administrator to require parties and neutral(s) assisting them to enter into a confidentiality agreement in any dispute that, if not resolved, may lead to legal action between the parties. (See Legal Analysis section above.)

Q4: When should a confidentiality agreement be signed?

A4: A confidentiality agreement should be signed at the earliest possible time in the dispute resolution proceeding. This may serve as a way to ensure that the parties and all ADR program staff neutrals assisting the parties are aware of confidentiality requirements and protections. An ADR program administrator should consider presenting a confidentiality agreement for signature of each party and participating members of ADR program staff at the time of intake of the dispute.

Summary

As the ADR program administrator, have I considered:

- Ensuring that the parties and neutral(s) are educated about the purpose, and benefits of signing a confidentiality agreement?

- If parties are considering using a written confidentiality agreement to increase their own confidentiality obligations, ensuring that the parties are aware of and have balanced the considerations noted in the Legal Analysis section above?

- Requiring the signing of a confidentiality agreement in all appropriate disputes?

- Providing parties and neutrals with a model confidentiality agreement that contains the following:

    - a statement of the intent of the parties and neutral(s) that the confidentiality provisions of the ADR Act apply to their communications;

    - an explanation of the scope and limits of the protections provided by the ADR Act and the ability of parties to agree to alternative protections;

    - inclusion of additional provisions, if appropriate, intended to enhance or change the confidentiality provisions of the ADR Act; and

    - an explanation of the impacts on confidentiality of any additional incorporated provisions, including relevant agency policy or guidance and their ability to protect communications from disclosure?

- Retaining the original or a copy of the confidentiality agreement?

CHAPTER III

AGENCY RECORD-KEEPING

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality and meet the requirements of the Federal Records Act.

General Description

Under the Federal Records Act, the records an agency representative creates and maintains are presumed to be federal records, and agencies are required to document many, if not most, of their functions. The ADR Act establishes requirements for ensuring the confidentiality of dispute resolution communications. These responsibilities have ramifications throughout the course of the dispute resolution proceeding, and influence how neutrals (both internal and external), under an ADR program administrator's oversight, perform their dispute resolution duties.

Legal Analysis

Under the Federal Records Act (44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., 3301 et seq.), federal agencies are required to create and maintain records that relate to their official functions. Agency heads are charged with this duty and must establish an effective and sustainable program for records management. Typically, agency heads delegate record keeping responsibilities under the Federal Records Act to program heads, such as the ADR program administrator.

Only documents that are federal records are required to be maintained. Federal records are defined as:

> All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an employee of a federal agency during its official business, and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government, or because of the informational value of data in them.

The Federal Records Act specifically excludes the following from being defined as federal records: library and museum material, made or acquired, and preserved solely for reference or exhibition purposes; extra copies of documents preserved only for convenience of reference; and stocks of publications and processed documents (44 U.S.C. § 3301).

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Once a document is deemed a record, the agency must determine how long it must be kept and whether the record is temporary or permanent; it does so by establishing a retention and disposal schedule to be approved by the National Archives and Records Administration ("NARA"; 44 U.S.C. § 3303a(a),(d)). Most federal records are temporary ("*i.e.*, they do not have sufficient administrative, legal research, or other value to warrant their continued preservation") (36 C.F.R. 1220.14). Some can be disposed of within a matter of days or months, while others must be retained for years. In either circumstance, the agency may dispose of the records according to the time period set out in the retention and disposal schedule approved by the NARA.

While the Federal Records Act would require the maintenance of federal records relating to ADR programs, it does not impact the confidential status of records, which are protected dispute resolution communications under the ADR Act. In other words, federal records may need to be retained in accordance with the Federal Records Act, but if they are dispute resolution communications under the ADR Act, these records are confidential and access to them must be restricted.

Confidentiality Issues Raised Under Federal Record-Keeping Requirements

Q1: Are an internal neutral's notes of the dispute resolution proceeding federal records?

A1: It depends. If the notes are rough notes (the personal recollection or preliminary drafts of the neutral) and the neutral does not circulate the notes to anyone they are not federal records (36 C.F.R. 1222.34(c)). If the notes appear to be formal, *e.g.*, as a specific settlement proposal/options, or are given to any person, including another neutral or the parties, then the neutral's notes are likely to be federal records.

Q2: Are documents given to the internal neutral by the parties federal records?

A2: Documents received by the neutral during the course of the dispute resolution proceeding are not federal records unless they are maintained by the neutral after the conclusion of the dispute resolution proceeding.

Q3: Do the above answers change if the neutral is an external neutral?

A3: Yes, the requirements of the Federal Records Act generally apply only to records made or given to federal employees (44 U.S.C. § 3301). Records received by or notes created by the external neutral are not federal records.

However, occasionally, some contracts pursuant to which the neutral is hired, or an agreement signed by a volunteer, may contain language providing that documents created by a contractor are agency or federal records. In these circumstances, the Federal Records Act would apply in the manner described in A1 & A2, above. An ADR program administrator should consider reviewing such contracts to ensure that an external neutral's notes and other products are not considered agency records.

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Q4: How can an ADR program administrator ensure that documents are maintained in an appropriate manner under the Federal Records Act?

A4: There are a variety of options available to an ADR program administrator for document maintenance that are also consistent with the requirements of the Federal Records Act. An ADR program administrator may require neutrals to submit all of their case files to the ADR program administrator's office, to be maintained in a separate and secure file area. An ADR program administrator would be required to maintain these case files as sealed. However, an ADR program administrator would be prohibited from reading these files (*i.e.*, not have "access" to them), with the exception of case files for cases on which the ADR program administrator was a neutral. Alternatively, an ADR program administrator might require each neutral to maintain case files in a secure and separate area in each neutral's office. Overall, the first option may be preferable, because it is easier to ensure restricted access to confidential federal records in one central area. However, if neutrals are off site and are disbursed in many different locations, it may be more practicable to have each neutral maintain her/his own case files in secure areas with restricted access.

Q5: Are agreements to mediate and settlement agreements federal records?

A5: Yes, because these agreements are entered by federal employees, they are federal records. However, they are not confidential under the ADR Act.

Q6: Are duplicate copies of materials or personal calendars of ADR program staff federal records?

A6: No. 36 C.F.R. § 1222.34(f)(2) states that duplicate copies made only for convenience are not federal records. However, they may be confidential under the ADR Act.

Q7: Are intake case logs and tracking information federal records?

A7: Yes. To the extent that such documents can identify a particular dispute and reveal information protected by the ADR Act, they are confidential under the ADR Act. It is suggested that an ADR program administrator follow the practices suggested in A9, below.

Q8: What advice can an ADR program administrator provide neutrals to ensure that the neutrals' documents do not become federal records?

A8: An ADR program administrator may advise internal neutrals to take only rough notes, and to keep such notes only to themselves. The neutrals should be advised to avoid circulating notes to the parties or other neutrals, unless the neutral deems it necessary. Bear in mind, however, that the more the notes appear to be formal or a detailed explanation of the dispute resolution proceeding and discussions, the more likely they might be deemed federal records.

If an individual neutral believes that some notes may be useful to the parties, *e.g.*, an outline of settlement options, and wants to circulate them to the parties, then the neutral may need to retain these notes as federal records and follow some of the recommendations in A9, below.

Q9: How can an ADR program administrator protect the confidentiality of federal records as ADR program case logs, a neutral's formal notes or notes which are circulated?

A9: An ADR program administrator should consider taking the following actions:

- establish procedures which strictly limit the number of authorized personnel who have access to these documents, such that:
    - neutrals involved in the resolution of a particular dispute would have access to confidential federal records (*e.g.*, case files, notes, *etc.*) relating to that dispute, and
    - ADR program administrators who perform only ministerial tasks in support of the program should not have access to those records;
- mark these documents in large letters "ADR Act CONFIDENTIAL" and maintain them in a secure locked area;
- establish specific retention schedules for all protected documents:
    - for confidential federal records (such as a neutral's formal notes, an ADR program administrator's notes on particular disputes, or case logs which contain confidential, identifying information), short retention schedules should be established that run up until the dispute is resolved or the dispute resolution proceeding is terminated. The schedules should identify the documents as sensitive documents under the Federal Records Act and the schedules should be submitted to NARA for approval (as the law requires); and
    - for non-confidential federal records (such as case logs without identifying information), a longer retention schedule may be appropriate.
- talk to the agency's Privacy Act officer to determine whether your records are considered to be a Privacy Act system and if so, whether they fit under an existing agency system or require a new one to be created. See the Privacy Act, 5 U.S.C. 552a.

Q10: How should an ADR program administrator establish a records retention schedule?

A10: An ADR program administrator should talk with records officials, develop a retention schedule, emphasize the sensitivity of documents, and follow the practices suggested in A9 above. The ADR program administrator should also become familiar with the National Archives and Records Administration General Records Schedule (see http://www.archives.gov/records_management/ardor/grs01.html. Number 27 refers to ADR files.

Dilemma: *The supervisor to whom the ADR program administrator reports requests to see the case files on all cases mediated in the last two years.*

Solution: *The ADR program administrator should explain that all files of dispute resolution proceedings that are still open are in a secure file area. She/he should further explain that there is no access to all open files containing identifying information and neutrals' notes because under the ADR Act, such files are confidential and may only be viewed by neutrals that assist in resolving the issue in controversy. As to case files where the case files are closed, all such files have been disposed of under the approved retention schedule. The ADR program administrator may offer to show the supervisor the case logs with the identifying information excised.*

Summary

As the ADR program administrator, have I considered:

- Identifying a records retention official?
- Maintaining electronic or written data which are likely to be deemed federal records?
- Establishing and obtained approval from NARA for short retention schedules for confidential federal records?
- Maintaining a secure area for federal records?
- Marking each federal record "ADR Act Confidential"?
- Minimizing access to confidential federal records?

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- Advising internal neutrals to dispose of their rough notes which have not been circulated to anyone?

- Promptly disposing of all confidential federal records once the retention period expires?

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CHAPTER IV

EVALUATION OF ADR PROGRAMS AND PROCESSES

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality of information gathered in support of, and results of, ADR program or process evaluation efforts.

General Description

ADR program evaluation is a means by which to determine whether an ADR program or process is meeting its goals and objectives. Evaluation results are useful in determining what works and what does not, and may be a critical factor in decisions regarding whether and how to modify or expand a program or an ADR process. An ADR program administrator should understand the importance of early program evaluation in ensuring the quality of their ADR programs and/or ADR practices. This chapter addresses two types of evaluations in which information is collected by an ADR program administrator or an outside evaluator: (1) evaluation of an entire program (covering many disputes) and (2) evaluation of a particular dispute resolution proceeding.

Although the ADR Act does not protect evaluation reports or results from disclosure, there are some practical mechanisms that should be considered by an ADR program administrator to preserve the privacy of evaluation information.

Legal Analysis

The ADR Act recognizes that research and education concerning use of alternative dispute resolution techniques are important to the continued development of the field. 5 U.S.C. § 574(h) provides that the gathering of information for research or educational purposes shall not be prevented so long as the parties and the specific issues in controversy are not identifiable. However, there are no legal guarantees that such information relating to federal agency ADR processes, once collected, will not be subject to disclosure. Therefore, any evaluation program must be aware of these risks and take steps to minimize the possibility of inappropriate disclosures.

Information held by an evaluator is not protected from disclosure by the confidentiality provisions of the ADR Act. Only information held by a neutral or parties is protected from disclosure under the ADR Act (5 U.S.C. § 574(a), (b)).

It is not a violation of the ADR Act's confidentiality provisions for a party or a neutral to disclose protected dispute resolution communications to an evaluator. Section 574(h) permits parties and neutrals to answer an evaluator's questions, participate in an evaluation and disclose dispute resolution communications, so long as the evaluation is conducted in a way that the parties and specific issues in controversy are not identifiable.

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Confidentiality Issues Raised While Designing and Conducting Evaluations, and Reporting Evaluation Results

Q1: How can an ADR program administrator minimize the risk of dispute resolution communications being disclosed inappropriately or unnecessarily by the parties or neutrals when participating in an evaluation?

A1: The ADR Act permits disclosures of dispute resolution communications by a neutral or party for purposes of evaluation. Once such disclosures are made, however, the information held by the evaluator is not protected under the ADR Act. Consequently, an ADR program administrator should consider advising neutrals and parties that they:

- may participate in an evaluation;
- should request information from the evaluator to ensure that collected information will be maintained in a way that the parties and specific issues in controversy are not identifiable;
- should provide only information necessary for the evaluation; and
- should avoid providing information that reveals intimate information presented by session participants.

An ADR program administrator should consider including in the information packet given to participants in the program notice that there may be evaluations of the dispute resolution program and explain the benefits the program will derive from the feedback. An ADR program administrator should also request participants' and neutrals' consent to participate in future evaluations.

Q2: How can an ADR program administrator ensure that data obtained during an evaluation is appropriately handled and maintained, because the ADR Act does not protect information collected by the evaluator?

A2: ADR program evaluation will inevitably include some individual, case-specific information. To ensure that ADR program data is appropriately handled and maintained, an ADR program administrator should consider taking the following actions:

- collect only the data necessary;
- code intake information to ensure anonymity;
- code individual case names;
- avoid using substantive, case-specific information in reports or surveys;
- separate case-sensitive and non-case-sensitive information;

- aggregate evaluation data; and

- keep case-sensitive information in a locked file and/or create a "firewall" protection.

Q3: Do other statutes, like FOIA, protect evaluation information from disclosure?

A3: Evaluation information may be subject to disclosure in response to a FOIA request. The best practices for minimizing the inappropriate disclosure of information obtained through evaluation are therefore to follow the recommendations in A2, above. At the same time, an ADR program administrator will also need to balance the best and effective practices for evaluation of dispute resolution programs with the risks of potential required disclosures.

Q4: Will hiring an outside evaluator minimize the risk of disclosure of evaluation information under FOIA?

A4: Information collected by an outside evaluator, which is not included in an evaluation report or other document given to a federal agency, would be protected from disclosures because FOIA applies only to records held by a federal agency. However, the final products, such as evaluation reports or evaluation documents given to the federal agency, would likely be subject to disclosure unless an exemption applied. Thus, because most evaluation reports are typically going to be given to the federal agency that has contracted with the outside evaluator, use of an outside evaluator will not prevent the potential disclosure of such reports under FOIA.

Summary

As the ADR program administrator conducting evaluations, have I considered:

- Including protections for evaluation information throughout my program?

- Collecting only the data I need?

- Ensuring anonymity of participants?

- Ensuring anonymity of cases?

- Filing sensitive data separately from other files?

- Protecting sensitive data through "firewalls"?

- Reporting obtained information only in the aggregate?

- Notifying and obtaining consent of participants and neutrals to participate in evaluations?

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CHAPTER V

REQUESTS FOR DISCLOSURE OF DISPUTE RESOLUTION COMMUNICATIONS

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when requests for the release or disclosure of dispute resolution communications are received.

General Description

Requests for disclosure of protected dispute resolution communications come from two primary sources: (1) persons without specific statutory authority to obtain information, and (2) persons with statutory authority to obtain information. These requests may be directed to the neutral or a party, as well as an ADR program administrator.

Release, or disclosure, of any information or communication protected from disclosure by the ADR Act is a sensitive subject. The ADR Act recognizes the unique nature of federal ADR processes and attempts to balance the participants' need for confidentiality with the requirements of an open government. The ADR Act also distinguishes the confidentiality obligations of private neutrals and federal neutrals mediating for their own agency or as part of a sharing neutrals program. Requests for disclosure of information protected by the ADR Act are inevitable. An ADR program administrator plays a pivotal role in ensuring that requests are addressed promptly and appropriately, and that decisions to grant or deny a request are made according to the requirements of the ADR Act and agency policy and procedures.

Legal Analysis

Under the ADR Act, a neutral has a high obligation regarding confidentiality, and may not voluntarily disclose, or be compelled to disclose, information protected by the ADR Act unless authorized by a statutory exception (5 U.S.C. § 574(a)). Whenever a neutral receives a request for disclosure of a dispute resolution communication, the parties must be notified and given an opportunity to object. A court may order disclosure by a neutral only after carefully balancing the need for disclosure against the damage to the integrity of dispute resolution processes in general, using criteria stated in the ADR Act.

While parties also have an obligation of confidentiality, it is less than that of a neutral. There are a number of exceptions to the requirement that parties may not voluntarily disclose, or be compelled to disclose, information protected by the ADR Act. Unless they have agreed otherwise, via a contractual confidentiality agreement, parties may disclose what they and other parties said during a "joint session." (See the Legal Analysis section of Chapter II, Confidentiality Agreement.) They may also disclose their own statements and information. In general, they may not disclose communications generated by a neutral. A court may order a party to disclose information protected by the ADR Act, but the court must first apply a balancing test.

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The Inspector General Act of 1978 ("IG Act") does not directly address access to information concerning dispute resolution proceedings protected by the ADR Act. Rather, the IG Act sets out the general authority of Inspectors General to obtain information to carry out their responsibilities. Under the IG Act, each Inspector General is authorized "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available * * *" to the agency. (5 U.S.C. Appx. § 6(a)(1)).

The Freedom of Information Act does not directly address requests for information concerning dispute resolution proceedings protected by the ADR Act. However, FOIA provides that an agency is not required to provide requested information if the subject matter of a request is specifically exempted from disclosure by statute (5 U.S.C. § 552(b)(3)(A) and (B)). The ADR Act specifically exempts certain dispute resolution communications between a neutral and a party from disclosure under Section 552(b)(3) of FOIA (5 U.S.C. § 574(j)). Note that information obtainable through a FOIA request is limited to agency records. (See Chapter III, Agency Record-Keeping, for additional information on what constitutes "federal records.")

As the Federal ADR Council acknowledged in the 2000 ADR Guidance, there is tension between the ADR Act and other laws or regulations that authorize access to certain classes of information. The issues of statutory interpretation between these differing authorities have not yet been considered in an appropriate forum. This Guide follows the 2000 ADR Guidance's endorsement of a cooperative approach where the ADR program and Federal requesting entities establish good working relationships such that disputes over demands for disclosure of confidential communications can be minimized. The 2005 ABA Guidance discusses this topic in some detail.

Confidentiality Issues Raised When Disclosure of Protected Dispute Resolution Communications is Requested

I. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT BY PERSONS WHO DO NOT HAVE STATUTORY AUTHORITY TO OBTAIN INFORMATION

This Section addresses requests for disclosure of information regarding a dispute resolution proceeding by people who have no statutory authority to require disclosure of information. Such persons may include agency officials, representatives of other federal, state, tribal or local governmental organizations, private parties, or agency employee relations, labor relations and workplace violence staff. While there are no statistics available on the number of these informal requests for information protected by the ADR Act or who makes them, many ADR program administrators report that informal requests are common. These requests come in many forms. They include everything from a casual question (*e.g.*, "I heard there was a mediation today. How did it go?"), to more pointed requests by supervisors or other interested non-participants (*e.g.,* to be "briefed on the mediation session").

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Q1: Who is responsible for deciding how, when, and if information protected by the ADR Act should or must be disclosed?

A1: The provisions of the ADR Act focus on the neutral's responsibilities for responding to requests for disclosure. This "just say no" policy to casual requests for information applies to all neutrals – private or federal. If the request is made in writing or some other formal manner, the neutral must notify the parties and give them an opportunity to object to disclosure. When a neutral receives an informal or casual request for disclosure, the neutral must decline to disclose information protected by the ADR Act, unless the parties have waived confidentiality protection (See Chapter II, Confidentiality Agreements), or the release is authorized by a statutory exception.

The ADR Act imposes no obligation for a party to inform the neutral or other parties when the party receives a disclosure request. However, a party must consider the ADR Act's requirements when making the decision to disclose.

The role of an ADR program administrator in responding to disclosure requests is not addressed in the ADR Act. However, it is clear that while neutrals have the statutory responsibility to respond to disclosure requests, an ADR program administrator often will have a practical role. This is most likely to be the case when the neutral was obtained from a sharing neutrals program or is a federal employee in the same agency. In such cases, an ADR program administrator may need to provide the neutral with contact information to notify the parties and facilitate any decision.

Q2: What is an ADR program administrator's role when receiving a request for disclosure directed to the neutral or a party?

A2: If an ADR program administrator receives a request for information that is directed to a neutral or party, she/he should immediately forward the request to the appropriate person along with an offer to provide assistance. This assistance can include contact information for other parties and/or the neutral, a review of the program files for copies of non-confidential documents such as the Agreement to Mediate and the Settlement Agreement, and any appropriate consultation resources.

Q3: Are there any circumstances under which an ADR program administrator could or should defend a neutral that has declined a request to disclose information?

A3: Under the provisions of the ADR Act, parties are required to be notified of a request to a neutral for disclosure of information and should be given an opportunity to defend the neutral to avoid disclosure of protected information. There is nothing in the ADR Act that addresses an ADR program administrator's obligation or ability to defend a neutral. So, it would seem that an ADR program administrator could undertake a defense of the neutral on behalf of the agency in order to protect the integrity of a particular session or of the agency's program, in general.

Q4: What steps can an ADR program administrator take to ensure prompt, appropriate responses to requests for disclosure from requestors without statutory authority to obtain information?

A4: There are a number of steps an ADR program administrator can consider taking to limit the possibility that information protected by the ADR Act will be disclosed inadvertently or in violation of the ADR Act. Those steps include:

- establishing a general policy of non-disclosure;
- identifying which records maintained by the ADR program are not protected from disclosure;
- treating any information concerning a dispute resolution proceeding not protected by the ADR Act in the same manner as other communications that may be restricted as private or internal agency communications under agency policies or practices;
- establishing a review process that identifies any agreement of the parties that provides for greater or lesser confidentiality protection, in order to ensure that disclosure requests are decided appropriately as they relate to these agreements; and
- establishing policies and procedures for processing requests for disclosure and for determining when and how to disclose information protected by the ADR Act.

Q5: How does an agreement of parties for more confidentiality protection than is available under the ADR Act affect the parties' responses to requests for disclosure?

A5: Parties may agree in writing to more confidentiality protection than is available under the ADR Act. (However, see the Legal Analysis section of Chapter II, Confidentiality Agreements). Very often this additional protection relates to communications made during joint sessions, which are not protected under the ADR Act. Parties should consider and respond to disclosure requests in accordance with the requirements of the ADR Act and of their written agreement.

Q6: May any person, including a federal agency employee or management official, who is not a neutral or a party to the dispute, request and obtain disclosure of information protected by the ADR Act?

A6: In general, a person without statutory authority to obtain information ("non-statutory requestor") may not obtain information that is protected by the ADR Act. However, non-statutory requestors may request and obtain any information that does not meet the ADR Act's definition of a dispute resolution communication. These may include written agreements to enter into ADR, written settlement agreements, statements made by a party in a "joint session," where all parties are present, and documents created by a party and

made available to all parties. While some agencies restrict access to the contents of settlement agreements on a need-to-know basis, the confidentiality provisions of the ADR Act do not prevent disclosure of a final written settlement agreement that was the result of a dispute resolution proceeding.

There are a limited number of situations where non-statutory requestors may obtain disclosure of information protected by the ADR Act. These include a request by an agency decision-maker for information necessary to make a reasoned decision regarding the settlement of a mediated dispute, and a request by an agency supervisor for information necessary to successfully implement a settlement agreement. (See Chapter I, Dispute Resolution Proceedings: D. Oversight Responsibilities After the Dispute Resolution Session.)

Dilemma: *An agency employee is aware that a mediation has concluded and asks the ADR program administrator, "How did it go?" How should the program administrator respond to this personal request for information?*

Solution: *The ADR program administrator should not reveal anything about the session. The ADR program administrator would be well advised to not even acknowledge the mediation session. Rather, the ADR program administrator should simply decline to comment in any way.*

Dilemma: *The ADR program administrator's supervisor asks "to be briefed" about a particular mediation session. What may the ADR program administrator disclose?*

Solution: *The ADR program administrator may note that a proceeding occurred and, if a settlement was reached, discuss the terms of the settlement with the supervisor. (The confidentiality provisions of the ADR Act do not cover a final written settlement agreement.) If the ADR program administrator has knowledge of what was disclosed during the dispute resolution session, whether by actively participating in the session or by exercising supervisory oversight of the ADR program, the ADR program administrator may not disclose that knowledge. The ADR program administrator's supervisor is unlikely to be a neutral within the meaning of the ADR Act and cannot be given information about dispute resolution communications that may have been shared with the ADR program administrator.*

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Q7: May a party disclose a dispute resolution communication that is relevant to resolving a dispute over the existence or meaning of a settlement arrived at through a dispute resolution proceeding? May an ADR program administrator disclose the communication?

A7: Yes, there is a specific exception for disclosure of such communications by a party (5 U.S.C. § 574(b)(6)). Even if an ADR program administrator served as a neutral in the particular mediation process, she/he may not disclose the information (5 U.S.C. § 574(a)).

II. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT BY PERSONS OR FEDERAL ENTITIES WHO DO HAVE STATUTORY AUTHORITY TO OBTAIN INFORMATION

This Section addresses requests for disclosure of information regarding a dispute resolution proceeding by people with statutory authority to obtain information from a federal agency, *e.g.*, an agency Office of the Inspector General, Office of Special Counsel, and other governmental agencies. Such requests appear to be much less common than the informal requests described in the last Section. Experience – and anecdotal reports – suggests that few ADR program administrators have ever received a request for information protected by the ADR Act based on statutory authority, and it is anticipated that formal requests will continue to be rare. However, any such request is likely to involve important legal and program issues, and the results will affect all federal ADR efforts. Therefore, it is essential for program administrators to be aware of the tension that exists between the ADR Act and other statutory authorities and to prepare for potential requests. This Section addresses only issues raised by requests for disclosure of information held by an ADR program administrator, either in their role as a neutral or because the information is in files maintained by the ADR program.

Q1: A number of federal entities have statutory authority to obtain information concerning federal agency activities. Which statutes are the most likely to generate requests of information protected by the ADR Act?

A1: The following is a list of federal statutes most likely to generate requests for information protected by the ADR Act:

- Inspector General Act (5 U.S.C. Appx.);
- Whistle Blower Protection Act (5 U.S.C. § 1212(b)(2));
- Freedom of Information Act; and
- Federal Labor Relations Act (Chapter 8 CSRA).

This list is not comprehensive and an ADR program administrator may want to work with their General Counsel office to develop a more exhaustive list applicable to their program. In addition, there are other statutes that may be read to impose an affirmative obligation on federal employees to disclose certain classes of information. These include, but are not limited to, 18 U.S.C. § 4 (knowledge relating to the commission of a felony) and 28 U.S.C. § 535 (investigation of crimes involving government officers and employees).

Q2: How should an ADR program administrator handle requests from the Inspector General or from other persons or entities with statutory authority to obtain information?

A2: An ADR program administrator is in a position to be approached for disclosure of information protected by the ADR Act. Some of these requests will be from persons or entities that have statutory authority to obtain information. Some of the requestors may believe that an ADR program administrator must disclose the information despite the confidentiality provisions of the ADR Act, and despite any alternative protections that have been agreed upon by the parties. Therefore, it is important for an ADR program administrator to be prepared to decide how and when to allow disclosure of information protected by the ADR Act.

There are three basic steps an ADR program administrator can take to prepare for any disclosure request:

1. educate and inform him/herself about the persons and entities with statutory authority to make requests and their missions, duties and responsibilities;

2. develop policies and procedures for processing and responding to disclosure requests; and

3. develop a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests.

An agency's General Counsel office is a good source of information about potential requestors, their statutes, their missions and any legal questions an ADR program administrator may have as he/she develops policies and procedures.

Q3: How comprehensive should the ADR program policies and procedures be concerning responding to requests of information from persons with statutory authority?

A3: The policies and procedures should be applicable to all potential statutorily based requests for disclosure of information protected by the ADR Act. The purpose of the policies and procedures should include:

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- protecting the confidentiality of the dispute resolution proceedings;

- providing a means for protecting the competing interests of dispute resolution proceeding participants and the requestors; and

- establishing consistent, reliable processing and responses to requests.

Q4: What should be included in an ADR program's policies and procedures regarding protecting, and responding to requests for disclosure of, information protected by the ADR Act?

A4: Written policies and procedures, whether short and simple or long and complicated, provide a necessary measure of predictability and reliability to an agency's consideration and response to requests for disclosure. The following checklist is intended to help an ADR program administrator develop policies and procedures that are designed to avoid or minimize potential "access request" disputes and that are appropriate for their own agency.

1. Central processing. All requests for disclosure should be logged in and retained in a central location. This ensures that no requests are overlooked, and it provides a convenient method of tracking the request throughout the decision-making and response process.

2. Decision maker. One individual whose rank and stature within the agency allow him/her to act independently should have delegated authority to decide whether or not the agency should release information protected by the ADR Act. Note that this person cannot make decisions requiring external neutrals to disclose communications protected by the ADR Act.

3. Notice procedures. Anyone receiving a request for disclosure should immediately send the request to central processing. Central processing should notify each party, neutral, and other participants of the request.

4. Criteria for analyzing the request. These criteria should include, but not be limited to:

    - the source and identity of the requestor;

    - the statutory basis, if any, for the request;

    - the reason or purpose of the request;

    - whether some, or all, of the requested information meets the ADR Act criteria for confidentiality protection;

- whether some, or all, of the requested information can be obtained from other sources;

- whether some, or all, of the parties object to release of the information;

- whether some, or all, of the information meets the ADR Act criteria for releasing information protected by the ADR Act;

- whether some, or all, of the information is protected by a contract between the parties;

- whether some, or all, of the information is protected by a statute or rule other than the ADR Act; and

- whether some, or all, of the information is protected by agency policy or regulation.

5. Standard response. A standard format for responding to requests should include:

   - a clear statement of whether the information will, or will not, be disclosed;

   - a consent form signed by the parties and/or neutral, if information is being disclosed; and

   - an official to contact if there are questions or objections.

6. Record keeping and reporting. Each agency should keep careful records of every request and the agency's response, for accurate reporting purposes.

Q5: Does a request from an agency Inspector General raise unique confidentiality issues?

A5: Yes, there is a tension between the duties and responsibilities of an Inspector General under the IG Act (5 U.S.C. App. §§ 2 and 3), and the confidentiality provisions of the ADR Act. The ADR Act prohibits both neutrals and parties from disclosing information protected by the ADR Act unless it falls within one of the enumerated exceptions, while the IG Act authorizes the Inspector General to have access to documents relating to an agency's programs and operations. There is no easy resolution to this conflict. An ADR program administrator should educate themselves about the issue and make every attempt to establish good working relationships with their agency Inspector General to prevent, or at least minimize, any potential conflicts.

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Q6: Why would the Inspector General need to request information protected by the ADR Act?

A6: Inspectors General are charged with two general duties with respect to agency operations: (1) to audit, and (2) to investigate an agency's programs and operations (IG Act, § 2). To carry out these responsibilities, an Inspector General may do the following.

- Investigate allegations of criminal wrongdoing and administrative misconduct by agency employees. This includes allegations of criminal activity by non-agency individuals and entities that has a direct impact on the agency.

- Inform the head of the agency and Congress of problems and deficiencies in the agency's programs. This includes a semi-annual report to Congress.

- Audit and inspect agency programs and operations. This includes the activities of outside entities doing business with, or obtaining any benefit from, the agency.

Q7: Is the form, and practical effect, of a request from the Inspector General different depending upon whether the neutral or party is a federal employee?

A7: Yes, if the neutral or party is a federal employee, the Inspector General can request the information from the employee's agency but cannot subpoena it. If the neutral or party is a federal employee of another federal agency (as when the neutral was obtained from a federal sharing neutrals program), the Inspector General must request the assistance of the other agency in obtaining the information from the employee. If the neutral or party is a private person, the Inspector General can use its administrative subpoena authority to obtain any written materials in the person's possession. If the private person fails to respond or produce the information, the Inspector General can have the subpoena enforced by a federal district court.

It is important to note here that most federal agencies have policies requiring employees to report misconduct and to cooperate with the Inspector General when asked for information related to any official audit, investigation or other review.

Q8: Should an ADR program administrator consider entering into an agreement with the Inspector General and, if so, what should it contain?

A8: Yes, effectively coordinating and cooperating with the Inspector General in your agency (or others making requests pursuant to a statute) may help to prevent or de-escalate disputes concerning formal requests for information protected by the ADR Act. Therefore, in addition to developing policies and procedures for the ADR program, an ADR program administrator may wish to enter into an agreement with the Inspector General on procedures for initiating requests and the ADR program's response. These procedures should be made a part of the agency's ADR policy, and should refer to the agency's other policies for reporting to, and cooperating with, the Inspector General.

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An agreement or memorandum of understanding should address the following issues:

- description of the problem or issue, including the competing interests and statutes, the lack of legal precedents, why the Inspector General might need access to information protected by the ADR Act and the significance of confidentiality in ADR processes;

- recitation of the purpose of the agreement;

- applicable statutes (*e.g.,* ADR Act and IG Act);

- definitions of ADR and Inspector General terminology (*e.g.*, information protected by the ADR Act and special agent);

- criteria for determining when disclosure is appropriate or necessary;

- description of access needs for audit or evaluation purposes;

- description of access needs for investigative purposes;

- agreement to seek information from other sources before requesting disclosure from the neutral or parties;

- procedures for requesting information;

- procedures for processing requests and independent, fully informed decision making; and

- procedures for addressing agency refusals to disclose.

III. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT PRESENTED IN THE FORM OF A SUBPOENA OR COURT ORDER

Q1: Under what circumstances may a federal court order disclosure of communications protected by the ADR Act?

A1: A court may order disclosure of information protected by the ADR Act only when it is necessary to: (1) prevent a manifest injustice; (2) help establish a violation of law; or (3) prevent harm to the public health and safety. The court must determine that the need for the testimony or disclosure is so great in the particular case that it outweighs "the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential" (5 U.S.C. § 574(a)(4) & (b)(5)).

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Q2: Does a court order to disclose information protected by the ADR Act apply to both the neutral and a party?

A2: Yes, either the neutral and/or a party may be ordered to disclose the communication, if it meets the criteria for disclosure outlined in A1, above.

Q3: If information protected by the ADR Act has been improperly disclosed, can a court allow the improper disclosure to be admitted into testimony in a court or other legal proceeding?

A3: No, information protected by the ADR Act that is improperly disclosed is not admissible in a proceeding related to the issues in controversy. However, it may be admissible in a proceeding that does not cover the same issues.

IV. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT PRESENTED IN THE FORM OF A FOIA REQUEST

Q1: Is an ADR program administrator who receives a FOIA request for documents and oral communications created or made by parties during a particular dispute resolution proceeding required to disclose the information?

A1: No, communications during a dispute resolution proceeding that are protected by the ADR Act are specifically exempted from disclosure under Section 552(b)(3) of FOIA. An ADR program administrator should not disclose any information protected by the ADR Act.

Oral communications between and among the neutral and the parties are not covered, because FOIA only applies to federal records.

An ADR program administrator can take steps to facilitate review of documents for FOIA requests and to assist in decision-making about disclosure.

Q2: If parties have agreed to greater confidentiality protections than is available under the ADR Act, are communications protected solely by their agreement subject to FOIA?

A2: Yes, parties cannot contract for more protection from FOIA requests than the ADR Act provides (5 U.S.C. § 574(d) & (j)).

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Summary

As the ADR program administrator, have I considered:

- Establishing a general policy of non-disclosure?
- Establishing policies and procedures for processing disclosure requests?
- Establishing policies and procedures for determining if, when, and how to disclose information protected by the ADR Act?
- Educating myself about the federal statutes and federal entities most likely to generate disclosure requests?
- Developing a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests?
- Entering into an agreement with the agency Inspector General concerning disclosure requests?
- Educating myself about administrative and court orders and developing policies and procedures for responding to a subpoena or other order?
- Educating myself about FOIA and developing policies and procedures for responding to FOIA requests?

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CHAPTER VI

NON-PARTY PARTICIPANTS IN THE DISPUTE RESOLUTION SESSION: SPOUSES, FAMILY MEMBERS, FRIENDS, AND UNION REPRESENTATIVES

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when non-party participants are present at the dispute resolution session.

General Description

Typically, the persons present at the dispute resolution session are the parties, the neutral, and any personal representatives of the parties, such as an attorney. On occasion, parties may wish to bring other individuals with them to the dispute resolution session. Some may want their spouses, a friend, or co-worker to be there. Resource persons or observers may also be present at the dispute resolution session. Furthermore, agency employees who belong to the union (or collective bargaining unit) may also be present at the dispute resolution session. A person who belongs to the union may come just as a friend, or she/he may be the personal representative of the party. The union member may also be an employee of the union, part of the union's management staff, or a shop steward. In the latter capacities, the person may be present on behalf of the union as a collective bargaining unit, not on behalf of the party. Alternatively, the union member may come both on behalf of the union and on behalf of the party. An ADR program administrator should seriously consider the consequences of the presence of non-party participants in a dispute resolution proceeding.

Legal Analysis

The ADR Act defines a party to a dispute resolution proceeding as an individual who is named as a party to a federal proceeding or an individual who is significantly affected by the decision of a federal agency who participates in a proceeding without named parties. Other individuals may participate in a dispute resolution proceeding as a formal representative of a party, at the party's request, such as an attorney or union official. The ADR Act's confidentiality provisions specifically apply to parties and their formal representatives. Any other individual, who is not serving as a neutral, present in a dispute resolution proceeding is considered a "non-party participant."

Non-party participants who may be present in a dispute resolution proceeding are not subject to the ADR Act's confidentiality provisions. Persons like co-workers and friends who accompany a party to a mediation, either for moral support or other personal reasons, are not covered by the ADR Act's confidentiality provisions. However, there are options to protect confidentiality or minimize the likelihood of disclosures by non-party participants.

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Confidentiality Issues Raised for Non-Party Participants at the Dispute Resolution Session

Q1: If an employee's best friend is at the dispute resolution session for moral support, is the best friend prohibited from disclosing dispute resolution communications made by the neutral, or other parties in private caucuses?

A1: No, the best friend is free to disclose anything she learns, because the ADR Act does not cover her, unless a confidentiality agreement applies.

Q2: What categories of persons are not covered by the ADR Act's confidentiality provisions?

A2: Anyone who is not a party to the dispute or anyone who is not a party's personal representative is not covered by the ADR Act's confidentiality provisions. For example, friends, resource persons, persons representing a union, observers, co-workers, family members and spouses who attend the mediation are not covered.

Q3: What can an ADR program administrator do to protect the confidentiality of dispute resolution communications when a non-party participant is present in a dispute resolution session?

A3: An ADR program administrator should consider the following actions:

- require that non-party participants sign a confidentiality agreement (See Chapter II, Confidentiality Agreements);
- train all neutrals on the importance of having all non-party participants sign an established, separate confidentiality agreement; and
- train all neutrals on educating the participants in the session on their confidentiality obligations.

The participation of resource persons may be arranged ahead of time or may be initiated during the session. These individuals may be experts in a substantive area or they may be agency employees with expertise in an area that pertains to the dispute or to the potential resolution (*e.g.,* a pension/benefit expert, if retirement is expected to arise as an issue or option).

Under certain circumstances, non-party participants may be considered "neutrals" under the ADR Act for purposes of the confidentiality provisions. To be considered a neutral, they must:

- either be brought into the proceedings by the session neutral and acceptable to the parties or be brought into the proceedings by the parties jointly; and

- meet the other statutory requirements for "neutral." (See Chapter 1, Dispute Resolution Proceedings: A. Overview.)

If only one party brings the expert or resource person into the session, the person is not a neutral under the ADR Act.

An ADR program administrator should brief resource persons, whether they are "neutrals" or simply non-party participants, on confidentiality provisions prior to their participation in the ADR process. If they are to participate in the session, they should be encouraged to sign the confidentiality agreement. If they are brought in mid-session and are only answering questions and not hearing confidential dispute resolution communications, signing the confidentiality agreement may not be necessary.

Q4: Are union members who are present on behalf of their collective bargaining units, and not solely as a representative of the party, covered by the confidentiality provisions of the ADR Act?

A4: No, union members present on behalf of their collective bargaining units, and not solely as a representative of the party, are not covered by the ADR Act confidentiality provisions, and are free to disclose any information learned at the session, unless they signed a confidentiality agreement restricting their disclosure.

Q5: An ADR program administrator and the session neutral may, due to legal requirements, have no authority to exclude union members who are representing a bargaining unit. When this happens, what steps can an ADR program administrator take to maximize the confidentiality of dispute resolution communications while such a union member is at a dispute resolution session?

A5: In general, an ADR program administrator should be proactive with respect to the role of unions participating in dispute resolution proceedings and coordinate with the agency's labor relations office or General Counsel office on these efforts.

An ADR program administrator should consider the following actions:

- establish with each union (through mediation or negotiation) a general protocol for union participation in dispute resolution proceedings; and

- urge participating union members representing a bargaining unit to sign the standard confidentiality agreement.

If the union representative is unable to sign the standard confidentiality agreement, the session neutral should negotiate an alternative confidentiality agreement that approximates as closely as possible the ADR Act's provisions. The neutral should also make sure that the parties understand the potential consequences of the union representative's inability to sign the standard confidentiality agreement. Alternatively, if

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signing a standard or alternative confidentiality agreement is not possible, the session neutral, with the assistance of an ADR program administrator as necessary, should define on a case-by-case basis a union participation protocol.

Considerations for a protocol might include:

- If union representatives feel that, as bargaining unit representatives, they have a duty to report on certain information occurring at the dispute resolution session, the protocol could permit limited disclosure by the union representative to: (1) bargaining unit members who have a need to know such information, and (2) information that is only relevant to the union member's duties of fair representation of the bargaining unit (*e.g.*, seniority systems, *etc.*);

- The neutral, in consultation with the parties and the union representative, may consider including union representatives at joint sessions and holding private caucuses with the employee or agency without the presence of union members. If the union representatives are not present at the private caucuses, the neutral may consider giving non-confidential updates to the union representatives as the outlines of a potential settlement emerge either at a subsequent joint session or in a separate meeting; and

- The neutral should make sure parties understand the consequences of the union representatives' inability to sign a confidentiality agreement.

Summary

As the ADR program administrator, have I considered:

- Establishing a standard confidentiality agreement for non-party participants?

- Educating neutrals about the importance of requiring all non-party participants to sign such an agreement and of explaining the confidentiality provisions to them?

- Ensuring that union members, who are present on behalf of a bargaining unit, sign the standard confidentiality agreement or an alternative one with strong confidentiality protections?

- Being proactive in establishing a general protocol for union participation in dispute resolution proceedings or educating session neutrals about the importance of mediating union participation protocol on a case-by-case basis?

APPENDIX

CHAPTER SUMMARIES

Summary for Oversight Responsibilities Before the Dispute Resolution Session

As the ADR program administrator, have I considered:

- Deciding who is authorized to function as a neutral in my program?
- Appropriately identifying the individual(s) as a potential neutral?
- Identifying the neutral(s) in my program to agency staff and potential parties?
- Educating ADR program staff, including those who engage in intake, assessment and convening, about the nature of their confidentiality and record keeping obligations?
- Taking all necessary steps to ensure the program supports the neutral's confidentiality?
- Ensuring that the convening and assessment process is explicitly specified in agency documents and information as part of the ADR process for purposes of confidentiality?
- Ensuring that the parties understand the role of a neutral and their responsibilities for confidentiality?
- The benefits of having the parties sign a confidentiality agreement before substantive discussions begin?
- Educating mediators, agency personnel, and other mediation participants, including resource persons, about the nature of their confidentiality obligations?

Summary for Oversight Responsibilities During the Dispute Resolution Session

As the ADR program administrator, have I considered:

- Determining that the neutral is aware of, and will assist the parties in understanding, the scope of confidentiality protections provided by the ADR Act?
- Ensuring that the neutral specifies to the parties what aspects of agency policy incorporated into a confidentiality agreement of the parties go beyond the ADR Act's confidentiality protections or require the disclosure of information protected by the ADR Act?

- Checking to see that the session neutral has reviewed the 2000 ADR Guidance before commencing the dispute resolution session, and understands the effect of any agency policy regarding confidentiality or requiring the disclosure of certain information?

- Ensuring that the neutral will protect confidentiality through appropriate selection of session rooms, use of telephones, and the use of computers for drafting a resolution or settlement agreement or conveying other dispute resolution communications to parties?

- Ensuring that the neutral's opening statement states that he or she may need to consult with the ADR program administrator, other ADR professionals, or subject matter experts?

Summary for Oversight Responsibilities After the Dispute Resolution Session

As the ADR program administrator, have I considered:

- Ensuring that the session neutral understands she/he generally cannot disclose dispute resolution communications and communications provided to the neutral in confidence?

- Suggesting that session neutrals have the parties acknowledge either orally or in writing that the neutral may disclose information protected by the ADR Act to the extent necessary to obtain approval of the settlement agreement?

- Drafting an agency policy regarding disclosure of information protected by the ADR Act for purposes of approval of the settlement agreement?

Summary for Confidentiality Agreements

As the ADR program administrator, have I considered:

- Ensuring that the parties and neutral(s) are educated about the purpose, and benefits of signing a confidentiality agreement?

- If parties are considering using a written confidentiality agreement to increase their own confidentiality obligations, ensuring that the parties are aware of and have balanced the considerations noted in the Legal Analysis section above?

- Requiring the signing of a confidentiality agreement in all appropriate disputes?

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- Providing parties and neutrals with a model confidentiality agreement that contains the following:

    - a statement of the intent of the parties and neutral(s) that the confidentiality provisions of the ADR Act apply to their communications;

    - an explanation of the scope and limits of the protections provided by the ADR Act and the ability of parties to agree to alternative protections;

    - inclusion of additional provisions, if appropriate, intended to enhance or change the confidentiality provisions of the ADR Act; and

    - an explanation of the impacts on confidentiality of any additional incorporated provisions, including relevant agency policy or guidance and their ability to protect communications from disclosure?

- Retaining the original or a copy of the confidentiality agreement?

Summary for Agency Record-Keeping

As the ADR program administrator, have I considered:

- Identifying a records retention official?

- Maintaining electronic or written data which are likely to be deemed federal records?

- Establishing and obtained approval from NARA for short retention schedules for confidential federal records?

- Maintaining a secure area for federal records?

- Marking each federal record "ADR Act Confidential"?

- Minimizing access to confidential federal records?

- Advising internal neutrals to dispose of their rough notes which have not been circulated to anyone?

- Promptly disposing of all confidential federal records once the retention period expires?

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Summary for Evaluation of ADR Programs and Processes

As the ADR program administrator conducting evaluations, have I considered:

- Including protections for evaluation information throughout my program?
- Collecting only the data I need?
- Ensuring anonymity of participants?
- Ensuring anonymity of cases?
- Filing sensitive data separately from other files?
- Protecting sensitive data through "firewalls"?
- Reporting obtained information only in the aggregate?
- Notifying and obtaining consent of participants and neutrals to participate in evaluations?

Summary for Requests for Disclosure of Dispute Resolution Communications

As the ADR program administrator, have I considered:

- Establishing a general policy of non-disclosure?
- Establishing policies and procedures for processing disclosure requests?
- Establishing policies and procedures for determining if, when, and how to disclose information protected by the ADR Act?
- Educating myself about the federal statutes and federal entities most likely to generate disclosure requests?
- Developing a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests?
- Entering into an agreement with the agency Inspector General concerning disclosure requests?
- Educating myself about administrative and court orders and developing policies and procedures for responding to a subpoena or other order?

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- Educating myself about FOIA and developing policies and procedures for responding to FOIA requests?

Summary for Non-Party Participants in the Dispute Resolution Session

As the ADR program administrator, have I considered:

- Establishing a standard confidentiality agreement for non-party participants?

- Educating neutrals about the importance of requiring all non-party participants to sign such an agreement and of explaining the confidentiality provisions to them?

- Ensuring that union members, who are present on behalf of a bargaining unit, sign the standard confidentiality agreement or an alternative one with strong confidentiality protections?

- Being proactive in establishing a general protocol for union participation in dispute resolution proceedings or educating session neutrals about the importance of mediating union participation protocol on a case-by-case basis?

12f-000338

A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS

A SUPPLEMENT TO AND ANNOTATION OF THE
MODEL STANDARDS OF CONDUCT FOR MEDIATORS
ISSUED BY
THE AMERICAN ARBITRATION ASSOCIATION
THE AMERICAN BAR ASSOCIATION
AND
THE ASSOCIATION FOR CONFLICT RESOLUTION

FEDERAL INTERAGENCY ADR WORKING GROUP STEERING COMMITTEE

FINAL VERSION **May 9, 2006**

FOREWORD

This Guide, promulgated by the federal Interagency Alternative Dispute Resolution Working Group ("IADRWG") Steering Committee, builds upon the September 2005 Model Standards of Conduct for Mediators ("Model Standards") issued by a joint committee of three major nationwide organizations, the American Arbitration Association ("AAA"), the American Bar Association ("ABA") and the Association for Conflict Resolution ("ACR") and approved by all three organizations . The Model Standards are set forth in their entirety below. This document provides further explication through a number of Federal Guidance Notes, set out in italics following the Standards to which they apply. This Guide is intended to provide practical ethical guidance for federal employee mediators tailored to mediation practice within the federal government. Non-federal mediators involved in federal mediations may wish to agree to adhere to the Model Standards and to use of this Guide, as part of their mediation employment agreements executed for such federal mediations.

NOTE:** This Guide applies to the internal management of the federal executive branch and is intended to provide helpful advice on potentially difficult questions.* ***It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. *Questions regarding interpretations of this Guide should be brought to the Office of the General Counsel or Legal Counsel in each department or agency. In addition, federal employee mediators must look to agency rules, regulations, directives and policies to obtain guidance in conducting proceedings for their agency. Regardless of their status as mediators, as federal employees, they are responsible for being aware of and complying with a variety of statutory and regulatory requirements, including certain reporting requirements. Should they have questions regarding any of these requirements and how they may relate to their obligations as mediators, it is incumbent on them to contact appropriate personnel within their respective agencies to resolve such questions.*

The Model Standards of Conduct for Mediators
September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Federal Guidance Notes:

1. If, in a federal employee mediator's informed judgment, an agreement desired by the parties will contravene federal law or regulation, the mediator should raise the issue for the parties to consider. If the parties cannot satisfy the mediator's concerns and nevertheless insist on executing such an agreement, the mediator should withdraw from the mediation immediately.

2. Certain federal agencies have instituted workplace mediation programs that require managers and supervisors to participate initially in mediation. These programs do not violate this self-determination standard, because the agency, as one of the parties, has elected voluntarily to participate in the mediation, with the manager or supervisor attending as the agency party's representative.

3. To the extent it does not interfere with the self-determination of the parties, and so long as the parties and sponsoring agency programs authorize the mediator to do so, a mediator may offer a party his or her evaluation of that party's position as a means of assisting the party realistically to assess the strength of its positions and the risks associated with proceeding with any litigation.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

   1. A mediator should not act with partiality or prejudice based on a participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

   2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

   3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

Federal Guidance Notes:

1. If a federal employee mediator determines he/she is unable to maintain and exhibit impartiality because of agency efforts to influence inappropriately the mediator's conduct or otherwise compromise the mediator's impartiality, the mediator should withdraw from the mediation.

2. Government ethics regulations prohibit the solicitation and receipt of gifts, and this includes gifts of travel. See, for example, 5 U.S.C. § 7353, 31 U.S.C § 1353, and 5 C.F.R. 2635 Subparts B and C. Executive branch regulations are posted on the Office of Government Ethics (OGE) website which, at the time of this publication, is www.usoge.gov. The term "gifts of travel" is not intended to include the parties' reimbursement to the mediator of travel costs incurred in conjunction with rendering of mediation services.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

Federal Guidance Note: *The Administrative Dispute Resolution Act of 1996 ("ADR Act") (at 5 U.S.C. § 573(a)) requires federal employee mediators to disclose conflicts of interest in writing and this includes making sure that all parties to a mediation are aware of the precise nature of the mediator's relationship with any party. A federal employee mediator must limit his/her role to that of mediator and must never assume the role of advocate or advisor of any sort for any party's interests during the mediation process. Depending on the policies of their sponsoring program and the desires of the parties, federal employee mediators may offer evaluation of, for example, the strengths and weaknesses of positions, the value and cost of alternatives to settlement or the barriers to settlement (collectively referred to as evaluation) only if such evaluation does not interfere with the mediator's impartiality or the principle of self-determination of the parties. (See Federal Guidance Note 3 following Standard I, Self-Determination.) Under EEOC Management Directive MD-110, an EEO investigator or counselor may not serve as a mediator in an EEO case in which he/she has investigated or counseled the complainant. In addition, a mediator must not advise, counsel or represent any of the parties in any* ***future*** *proceeding concerning the subject matter of the dispute. A federal employee mediator must not serve as an advisor or approving official, for the purpose of approving a settlement agreement for statutory, regulatory or other legal compliance, when the mediator has mediated the dispute that is the subject of the settlement. Finally, mediators might also be subject to other statutes or regulations that prohibit their participation as a neutral regardless of disclosure.*

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties

may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

Federal Guidance Notes:

1. Unless a specific statute controls, the confidentiality standards of the ADR Act, found at 5 U.S.C. § 574, will govern the confidentiality obligations in federal administrative mediations, and federal employee mediators should consider this statute to be the "applicable law" referenced in standard V.A. Similarly, for matters in United States district courts, mediators need to understand the confidentiality standards established by local rules of court required by the Alternative Dispute Resolution Act of 1998, at 28 U.S.C. 652(d). Mediators need to recognize that each district court is distinct, and that the rules in one district might differ significantly from the rules in another district.

2. These statutes do not afford absolute confidentiality protection. Federal employee mediators must refrain from unauthorized disclosure of "dispute resolution communications," as defined by the ADR Act, 5 U.S.C. 574(a). Federal employee mediators should consult their agency's guidance, as well as the ADR confidentiality guidance promulgated by the U.S. Attorney General's Federal ADR Council published at 65 Federal Register 83085 (December 29, 2000) and the IADRWG website (http://www.adr.gov). A joint committee of the ABA Dispute Resolution, Administrative Law, and Public Contract Law Sections has developed additional federal ADR confidentiality guidance. The IADRWG Steering Committee's Confidentiality Subcommittee also has issued a confidentiality guidance handbook for federal workplace mediation, which is available on the IADRWG website.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Federal Guidance Notes:

1. With respect to Standard VI.A.3, certain individuals may not be excluded from a federal mediation, if their attendance and/or participation is mandated by federal law. For example, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(A)(2)(a), entitles a labor organization representing bargaining unit employees to be represented at any "formal discussion" between one or more representatives of an agency and one or more employees in the unit the union represents. This right has been interpreted by the Federal Labor Relations Authority and the U.S. Court of Appeals for the District of Columbia as applying to mediation of formal EEO complaints when the complainant is a bargaining unit employee. See, e.g., Dep't of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA, 316 F.3d 280 (D.C. Cir. 2003); Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev'd, 208 F.3d 221 (9th Cir. 1999). Federal employee mediators should consult with the agency's ADR Program official, a Labor Relations Officer, labor counsel or other appropriate official when confronted with an issue of union attendance in a federal mediation pursuant to its "formal discussion" rights.

2. Federal employee mediators should not accept federal mediation assignments unless the assignment is under the auspices of an agency program, including an established multi-agency shared neutrals program, so as to avert the possibility of being charged with abuse of official time or otherwise putting at risk their rights and benefits as federal employees. Federal employee mediators are encouraged to contact their agency's mediation program administrator or Dispute Resolution Specialist for answers to specific questions related to these Standards, including questions involving potential conflicts of interest or abuse of government positions. If applicable, they may also wish to contact their respective agency's ethics officer to resolve particular questions, and/or other appropriate official to secure authorization to serve as mediators.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

Federal Guidance Note: *For mediations subject to the ADR Act of 1996, mediators serve at the will of the parties. See 5 U.S.C. § 573(b). When federal employee mediators provide information regarding their experience and qualifications, they should provide meaningful and accurate information sufficient for the parties to make an informed decision to accept the mediator, whether that information is provided to the parties directly, via a roster, or otherwise.*

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Federal Guidance Note: *Although most federal employee mediators do not charge fees or are prohibited from charging fees, the programs for which they work sometimes charge nominal fees or seek cost reimbursement. Federal employee mediators should be prepared to answer questions regarding such arrangements for the mediations that they conduct, and conform to sections A and B above, as applicable.*

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator shall act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

A GUIDE FOR FEDERAL EMPLOYEE OMBUDS

A SUPPLEMENT TO AND ANNOTATION OF THE STANDARDS FOR THE ESTABLISHMENT AND OPERATIONS OF OMBUDS OFFICES ISSUED BY THE AMERICAN BAR ASSOCIATION

Coalition of Federal Ombudsmen (CFO)
and
Federal Interagency ADR Working Group Steering Committee

FOREWORD

This Guide, developed by the Coalition of Federal Ombudsmen (CFO) and the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG) Steering Committee, builds upon the Standards For The Establishment And Operation Of Ombuds Offices issued February 2004 by the American Bar Association (ABA) and is intended only for use by federal employee Ombuds in connection with their functions for the federal government. [Currently, the CFO, the International Ombudsman Organization (IOA), the United States Ombudsman Association (USOA), the Forum of Canadian Ombudsman, the European Union's Ombudsman and most other Ombudsman organizations continue to use the term "Ombudsman." However, the term "Ombuds" is found in the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571, et seq. ("ADRA"), as well as in the ABA Standards that serve as the basis for this Guide. Accordingly, and to maintain gender neutrality, the Steering Committee and CFO have opted to use "Ombuds" for purposes of this Guide.]

Federal agencies establishing an Ombuds function, whether by mandate or administrative action, may wish to use the ABA Standards, which are set forth below in their entirety. However, there are specific areas, unique to federal Ombuds practice, that require additional practical guidance. For these areas – in particular, confidentiality, including the provision of notice, reporting and record keeping – the CFO and IADRWG Steering Committee have developed Federal Guidance Notes, which follow each of the pertinent ABA Standards and are set out in italics.

NOTE:** This Guide applies solely to the internal management and operations of the federal executive branch.* ***It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. *Questions regarding interpretations of this Guide should be brought to the Office of the General Counsel or Legal Counsel in each department or agency. In addition, federal employee Ombuds must look to their Ombuds charters and to agency rules, regulations, directives and policies for guidance specific to their agencies.*

STANDARDS[1] FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

REVISED FEBRUARY, 2004

PREAMBLE

Ombuds[2] receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for-profit businesses, non-profit organizations, and sub-units of these entities have established Ombuds offices but with enormous variation in their duties and structures.

Ombuds offices so established may be placed in several categories: A Legislative Ombuds is a part of the legislative branch of government and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to public accountability. An Executive Ombuds may be located in either the public or private sector and receives complaints concerning actions and omissions of the entity, its officials, employees and contractors; an Executive Ombuds may work either to hold the entity or one of its programs accountable or work with entity officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector and, like the others, evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

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[1] The ABA proposed a resolution of February 2004 that supports "the greater use of 'Ombuds' to receive, review, and resolve complaints involving public and private entities" and endorsed Standards for the Establishment and Operation of Ombuds Offices. These standards modify those Standards in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the Ombud's authority; third, they provide for a new category for executive Ombuds that is described in Paragraph H; and fourth, they modify the definition of legislative Ombuds and the standards applicable to them to make them conform to the new category of executive Ombuds. The 2004 Standards, in turn, expand on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of Ombuds who serve internal constituents, Ombuds in the private sector, and Ombuds who also serve as advocates for designated populations.

[2] The term Ombuds in this report is intended to encompass all other forms of the word, such as Ombudsperson, Ombuds Officer, and Ombudsman, a Swedish word meaning agent or representative. The use of Ombuds here is not intended to discourage others from using other terms.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the Ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. The standards put forth here were developed to provide advice and guidance on the structure and operation of federal Ombuds offices so that Ombuds may fulfill their functions better and so that individuals who avail themselves of aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of a federal Ombuds are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality

Subsequent Update to ABA Standards:

On November 1, 2004, new sentencing guidelines were issued by the United States Sentencing Commission, 2004 Federal Sentencing Guidelines. These guidelines were updated in compliance with the Sarbanes-Oxley (SOX) Act. These guidelines were issued after the issuance of the ABA standards but specifically relate to the existence and establishment of an Ombuds office.

Amendment 673 of the guidelines states that determination of fines for any publicly traded organization found guilty should be based on the seriousness of the offense and the culpability of the organization. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility. One of the primary aspects of an effective compliance and ethics program is to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." While the word Ombuds was not used, the "anonymity and confidentiality without fear of retaliation" language suggests the presence of an Ombuds and some federal regulatory entities have noted the need for and encouraged the use of Ombuds. Since many of the SOX requirements are being required in Federal operations, this may be a future area of consideration when developing an Ombuds office.

ESTABLISHMENT AND OPERATIONS

A. An entity undertaking to establish an Ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the "charter"),

which clearly sets forth the role and jurisdiction of the Ombuds and which authorizes the Ombuds to:

(1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the Ombuds' jurisdiction as defined in the charter establishing the office

(2) exercise discretion to accept or decline to act on a complaint or question

(3) act on the Ombuds' own initiative to address issues within the Ombuds' prescribed jurisdiction

(4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem

(5) gather relevant information and require the full cooperation of the program over which the Ombuds has jurisdiction

(6) resolve issues at the most appropriate level of the entity

(7) function by means such as:

    (a) conducting an inquiry

    (b) investigating and reporting findings

    (c) developing, evaluating, and discussing options available to affected individuals

    (d) facilitating, negotiating, and mediating

    (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them

    (f) identifying complaint patterns and trends

    (g) educating

    (h) issuing periodic reports, and

    (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter

(8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

Federal Guidance Notes: *Although federal Ombuds offices generally are established under statutes, regulations and a variety of directives and memoranda, rather than formal charter documents, for purposes of this Supplement, we will refer to these sources of Ombuds authority as "charters." Ombuds charters should set forth the scope of the Ombuds' responsibilities and related matters dealing with how the Ombuds is to function within the federal organization.*

Many federal Ombuds are chartered specifically to deal with employment concerns. Consistent with collective bargaining obligations and agreements, Ombuds' charters also may authorize Ombuds to participate in the resolution of bargaining-unit employee disputes. In this regard, the collective bargaining agreements should address the Ombuds role in employment dispute resolution. See the Federal Guidance Note below following the ABA's Standard regarding "Limitations on the Ombuds' Authority." With respect to the above Standard, where an Ombuds serves in some capacity as a dispute resolution neutral, the Ombuds should consult two other documents prepared and being issued concurrently with this Guide by the Interagency ADR Working Group Steering Committee, namely "A Guide for Federal Employee Mediators" and "Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators".

Federal Ombuds should be aware that there are statutory provisions and there also may be regulatory provisions or internal agency guidance that may impact on the Ombuds' functions in dealing with bargaining-unit employees, in particular those under the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71. In this regard, certain individuals may not be excluded from a federal mediation, if their attendance and/or participation is mandated by federal law. For example, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(A)(2)(a), entitles a labor organization representing bargaining unit employees to be represented at any "formal discussion" between one or more representatives of an agency and one or more employees in the unit the union represents. This right has been interpreted by the Federal Labor Relations Authority and the U.S. Court of Appeals for the District of Columbia as applying to mediation of formal EEO complaints when the complainant is a bargaining unit employee. See, e.g., Dep't of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA, 316 F.3d 280 (D.C. Cir. 2003); Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev'd, 208 F.3d 221 (9th Cir. 1999). Federal employee mediators should consult with the agency's ADR Program official, a Labor Relations Officer, labor counsel or other appropriate official when confronted with an issue of union attendance in a federal mediation pursuant to its "formal discussion" rights and to assure compliance with all such statutory, regulatory or other requirements.

For those federal agencies whose Ombuds charters authorize initiation of litigation (per Standard A (8) above), the Ombuds should be mindful of their

obligations regarding the maintenance of confidentiality whenever they prosecute such litigation.

QUALIFICATIONS

B. An Ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the Ombuds with relevant education and the periodic updating of the Ombuds' qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

C. To ensure the effective operation of an Ombuds, an entity should authorize the Ombuds to operate consistently with the following essential characteristics. Entities that have established Ombuds offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any deficiency.

(1) Independence. The Ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an Ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone who may be affected by actions of the Ombuds office (a) can control or limit the Ombuds' performance of assigned duties, or (b) can (1) eliminate the office, (2) remove the Ombuds, or (3) reduce the budget or resources of the office for retaliatory purposes.

(2) Impartiality in Conducting Inquiries and Investigations. The Ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the Ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The Ombuds may become an advocate within the entity for change where the process demonstrates a need for it.

(3) Confidentiality. An Ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the Ombuds' office. An Ombuds does not reveal the identity of a complainant without that person's express consent. An Ombuds may,

however, at the Ombuds' discretion, disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An Ombuds should discuss any exceptions to the Ombuds' maintaining confidentiality with the source of the information[3].

Federal Guidance Notes: *The independence of an Ombuds Office is a fundamental prerequisite to its effective operations. To ensure this independence, the federal Ombuds should, if possible, report and have direct access to the highest agency official. If the Ombuds reports to a designee, it is critical that the reporting relationship not present a conflict that would impact adversely the integrity, independence and impartiality of the Ombuds. Thus, it would not be appropriate for an Ombuds who is called upon to resolve employment related matters to report to the agency's Director of Human Resources, even as the designee of an agency head.*

All federal employees, including federal employee Ombuds, are obligated to report incidents of fraud, waste and abuse in conjunction with the operation of federal programs and to cooperate with duly authorized federal investigative agencies and organizations. Indeed, federal Ombuds practice should be designed to facilitate reporting by federal employees raising allegations of possible fraud, waste and abuse, in part so that meaningful recommendations may be developed by the Ombuds (and forwarded to those having authority to act upon such recommendations) aimed at eradicating systemic conditions that foster fraud, waste and abuse. Also, on occasion, a federal Ombuds might have to respond to Congressional or agency management inquiries pertaining to possible fraud, waste and abuse within the agency. By the same token, the maintenance of confidentiality is of paramount importance to the effectiveness of federal Ombuds programs. To that end, Ombuds charters should expressly affirm the criticality to the Ombuds process of maintaining confidentiality. Moreover, Ombuds should be aware that, where they serve as neutrals, the Administrative Dispute Resolution Act of 1996 ("ADR Act") specifically protects against disclosure of "dispute resolution communications. A federal Ombuds thus may be presented with a conflict between (1) his/her confidentiality obligations and (2) his/her obligations to report fraud, waste or abuse. Situations may develop, for example, where employees who contact the Ombuds and describe circumstances involving fraud, waste or abuse, advise the Ombuds that they are not themselves willing to report such fraud, waste or abuse to appropriate agency officials. For all such instances where potential conflicts may arise, it is essential that federal Ombuds have access to independent or properly insulated legal counsel, in order to obtain competent advice regarding the resolution of conflicts.

[3] A Legislative Ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the Ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the Ombuds.

In terms of record keeping, federal Ombuds' records may be subject to regulations administered by the U.S. National Archives & Records Administration (NARA), an independent federal agency that determines which records and reports should be maintained in accordance with the Federal Records Act. In this regard, a distinction should be drawn among three categories of Ombuds-related documents: (1) programmatic records related to the development and administration of the Ombuds program, including documents containing the Ombuds' recommendations to higher authority for correcting systemic problems and the like; (2) statistical data reflecting conflict and issue trends – maintained by the Ombuds in a manner that respects confidentiality (by containing no information by which individuals can be identified); and (3) the Ombuds' notes that are created in the context of work on specific cases. Whereas, the first and second categories of documents would be considered as "federal records," Ombuds' case notes ordinarily would not be regarded as "federal records," pursuant to NARA regulations, so long as they are not "circulated or made available to employees, other than the creator, for official purposes, such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and . . . contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities. " 36 CFR 1222.34(c). Federal Ombuds offices should review agency record development and retention procedures and, whenever needed, should consult agency counsel and records officers for guidance as to the creation, maintenance and destruction of records. In addition, Federal Ombuds should become familiar with their obligations for complying with the Freedom of Information Act (FOIA) (including the FOIA exemption provided under the ADR Act, applicable when Ombuds are serving as neutrals) as well as the Privacy Act, and should seek counsel to resolve any questions with regard to those statutes.

LIMITATIONS ON THE OMBUDS' AUTHORITY

D. An Ombuds should not, nor should an entity expect or authorize an Ombuds to:

(1) make, change or set aside a law, policy, or administrative decision

(2) make binding decisions or determine rights

(3) directly compel an entity or any person to implement the Ombuds' recommendations

(4) conduct an investigation that substitutes for administrative or judicial proceedings

(5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent

(6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so[4], or

(7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of the Ombuds.

Federal Guidance Notes: *Notwithstanding Standard D(5), it is recognized that an Ombuds working in government may be expected to remain involved in matters pertaining to public accountability and legislative oversight, whether or not a related issue is the subject of pending litigation. Ombuds charters may explicitly state that the Ombuds has the power to investigate "without regard to the finality of the administrative act" and thus to continue involvement in an issue, regardless of its status in terms of litigation.*

Standard D(6) provides that Ombuds may not "address" issues arising under a collective bargaining agreement, or an issue involving federal, state or local labor or employment law, rule or regulation, but implies that Ombuds may do so where "there is no collective bargaining representative" and where "the employer specifically authorizes the Ombuds to do so." Charters for federal Ombuds frequently provide specific authority for the Ombuds to deal with employment related matters and, indeed, the sole focus of the federal Ombuds in many instances is in the area of employee related issues in controversy. Ombuds may also be specifically authorized to address issues "under a collective bargaining agreement or issues involving federal, state or local labor or employment law or regulation," either by language included within the collective bargaining agreements themselves, within memoranda of agreement between labor unions and federal agencies, or through some other authorizing documents. Where such authority has been conveyed to an Ombuds, the above Standard D(6) does not apply, and does not limit the Ombuds' involvement in federal employment matters. See the Federal Guidance Notes following 'Establishment and Operations' and 'Independence, Impartiality, Confidentiality' Standards.

[4] Under these Standards, the employer may authorize an Ombuds to address issues of labor or employment law only if the entity has expressly provided the Ombuds with the confidentiality specified in Paragraph C(3). An Ombuds program as envisioned by these Standards supplements and does not substitute for other procedures and remedies necessary to meet the duty of employers to protect the legal rights of both employers and employees.

REMOVAL FROM OFFICE

E. The charter that establishes the Office of the Ombuds also should provide for the discipline or removal of the Ombuds from office for good cause by means of a fair procedure.

Federal Guidance Notes: *The procedure and grounds for discipline and/or removal of a federal Ombuds are controlled by 5 U.S.C. Chapter 75.*

NOTICE

F. An Ombuds is intended to supplement, not replace, formal procedures[5]. Therefore:

(1) An Ombuds should provide the following information in a general and publicly available manner and inform people who contact the Ombuds for help or advice that –

(a) the Ombuds will not voluntarily disclose to anyone outside the Ombuds office, including the entity in which the Ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent

(b) important rights may be affected when formal action is initiated and if notice is given to the entity

(c) communications to the Ombuds may not constitute notice to the entity unless the Ombuds communicates with representatives of the entity as described in Paragraph 2

(d) working with the Ombuds may address the problem or concern effectively but may not protect the rights of either the complainant or the entity in which the Ombuds operates[6]

(e) the Ombuds is not anyone's lawyer, representative, or counselor or a substitute for any of these, and

(f) the complainant may wish to consult a lawyer or other appropriate resource with respect to those rights.

[5] An Ombuds program, as envisioned by these Standards, supplements, and does not substitute for, the need of an entity to establish formal procedures to protect legal rights and to address allegedly inappropriate or wrongful behavior or conduct.

[6] The notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

(2) If the Ombuds communicates[7] with representatives of the entity concerning an allegation of a violation, and –

(a) the communication that reveals the facts of

(i) a specific allegation and the identity of the complainant

(ii) allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful

then the communication should be regarded as providing notice to the entity of the alleged violation and the complainants should be advised that the Ombuds communicated their allegations to the entity; otherwise,

(b) whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.

(3) If an Ombuds functions in accordance with Paragraph C, "Independence, Impartiality, and Confidentiality," of these standards, then-

(a) no one, including the entity in which the Ombuds operates, should deem the Ombuds to be an agent of any person or entity, other than the Office of the Ombuds, for purposes of receiving notice of alleged violations, and

(b) communications made to the Ombuds should not be imputed to anyone else, including the entity in which the Ombuds acts unless the Ombuds communicates with representatives of the entity, as described in Paragraph 2.

Federal Guidance Notes: *Where the employee raising an issue with a federal Ombuds wishes to remain anonymous, the Ombuds, acting as a conduit for the employee and at the employee's request, may provide notice to the federal agency or other federal entity, to the extent notice is possible with an anonymous report, and should provide notice in such a way that anonymity is maintained. It is recognized that, in more instances than not, if the complainant remains anonymous, the communication by the Ombuds to the agency/entity may not have the effect of placing the agency/entity on notice.*

If the employee does not wish to remain anonymous, the Ombuds should direct the employee to the proper office within the agency/entity, in order to provide his/her own notice, and should either furnish the employee with information regarding what time limitations may apply or direct the employee to where such information may be

[7] Under these Standards, any such communication is subject to Paragraph C(3).

obtained. In other instances, the Ombuds may make recommendations for the resolution of a systemic problem to those persons who have the authority to act upon them.

LEGISLATIVE OMBUDS

G. A Legislative Ombuds is established by the legislature as part of the legislative branch who receives complaints from the general public or internally and addresses actions and omissions of a government agency, official, public employee, or contractor.

In addition to and in clarification of the standards contained in Paragraphs A-F, a Legislative Ombuds should:

(1) be appointed by the legislative body or by the executive with confirmation by the legislative body[8]

(2) be authorized to work to hold agencies within the jurisdiction of the office accountable to the public and to assist in legislative oversight of those agencies

(3) be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office

(4) have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office

(5) be authorized to issue public reports, and

(6) be authorized to advocate for change both within the entity and publicly.

EXECUTIVE OMBUDS

H. An Executive Ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and omissions of the entity, its officials, employees, and contractors. An Executive Ombuds may work either to hold the entity or specific programs accountable or work with officials to improve the performance of a program. In addition to and in clarification of the standards contained in Paragraphs A-F, an Executive Ombuds:

(1) should be authorized to conduct investigations and inquiries

[8] This restates the 1969 ABA Resolution, which remains ABA policy, that a Legislative Ombuds should be "appoint[ed] by the legislative body or…by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two-thirds."

(2) should be authorized to issue reports on the results of the investigations and inquiries, and

(3) if located in government, should not have general jurisdiction over more than one agency but may have jurisdiction over a subject matter that involves multiple agencies.

Federal Guidance Notes: *In addition to general federal executive Ombuds, some agencies have been directed by statutes and regulations to create an Ombuds position to perform specific functions. For example, Section 16.505 of the Federal Acquisition Regulation (FAR) requires federal agency heads to create "task-order" and "delivery-order" Ombuds for use in connection with multiple award indefinite quantity/indefinite delivery type acquisitions. There is great variation among federal agencies in the operations of these special purpose Ombuds. Charters for such Ombuds should be precise regarding the Ombuds' location and scope of authority.*

ORGANIZATIONAL OMBUDS

I. An Organizational Ombuds facilitates fair and equitable resolution of concerns that arise within an entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an Organizational Ombuds should:

(1) be authorized to undertake inquiries and function by informal processes as specified by the charter

(2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office

(3) be authorized to issue reports, and

(4) be authorized to advocate for change within the entity

ADVOCATE OMBUDS

J. An Advocate Ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an Advocate Ombuds should:

(1) have a basic understanding of the nature and role of advocacy

(2) provide information, advice, and assistance to members of the constituency

(3) evaluate the complainant's claim objectively and advocate for change or relief when the facts support the claim

(4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter

(5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant, and

(6) the notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

NATIONAL STRATEGY FOR

PANDEMIC INFLUENZA

IMPLEMENTATION PLAN



HOMELAND SECURITY COUNCIL

MAY 2006

12f-000367

NATIONAL STRATEGY FOR

PANDEMIC INFLUENZA

IMPLEMENTATION PLAN



HOMELAND SECURITY COUNCIL

MAY 2006

12f-000368

THE WHITE HOUSE

WASHINGTON

My fellow Americans,

On November 1, 2005, I announced the *National Strategy for Pandemic Influenza,* a comprehensive approach to addressing the threat of pandemic influenza. Our *Strategy* outlines how we are preparing for, and how we will detect and respond to, a potential pandemic.

Since then, our Nation has taken a series of historic steps to address the pandemic threat. In December, the Congress appropriated $3.8 billion. The International Partnership for Avian and Pandemic Influenza, which we launched at the United Nations in September 2005, has encouraged openness and coordinated action by the international community. Here at home, we have made major investments in vaccine and antiviral development, research into the influenza virus, surveillance for disease in animals and humans, and the local, State, and Federal infrastructure necessary to respond to a pandemic. By making these critical investments, the Federal Government has begun strengthening our ability to safeguard the American people in the event of a devastating global pandemic and helping to prepare the Nation's public health and medical infrastructure.

Building upon these efforts, the *Implementation Plan for the National Strategy for Pandemic Influenza* ensures that our efforts and resources will be brought to bear in a coordinated manner against this threat. The *Plan* describes more than 300 critical actions, many of which have already been initiated, to address the threat of pandemic influenza.

Our efforts require the participation of, and coordination by, all levels of government and segments of society. State and local governments must be prepared, and my Administration will work with them to provide the necessary guidance in order to best protect their citizens. No less important will be the actions of individual citizens, whose participation is necessary to the success of these efforts.

Our Nation will face this global threat united in purpose and united in action in order to best protect our families, our communities, our Nation, and our world from the threat of pandemic influenza.

GEORGE W. BUSH
THE WHITE HOUSE
May 2006

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Preface

In the last century, three influenza pandemics have swept the globe. In 1918, the first pandemic (sometimes referred to as the "Spanish Flu") killed over 500,000 Americans and more than 20 million people worldwide. One-third of the U.S. population was infected, and average life expectancy was reduced by 13 years. Pandemics in 1957 and 1968 killed tens of thousands of Americans and millions across the world. Scientists believe that viruses from birds played a role in each of those outbreaks.

Today, we face a new threat. A new influenza strain — influenza A (H5N1) — is spreading through bird populations across Asia, Africa, and Europe, infecting domesticated birds, including ducks and chickens, and long-range migratory birds. The first recorded appearance of H5N1 in humans occurred in Hong Kong in 1997. Since then, the virus has infected over 200 people in the Eastern Hemisphere, with a mortality rate of over 50 percent.

At this time, avian influenza is primarily an animal disease. Human infections are generally limited to individuals who come into direct contact with infected birds. If the virus develops the capacity for sustained, efficient, human-to-human transmission, however, it could spread quickly around the globe. In response to this threat, the President issued the *National Strategy for Pandemic Influenza* on November 1, 2005. The *Strategy* outlines the coordinated Federal Government effort to prepare for pandemic influenza. Of equal importance, the Strategy underscores the critical roles that State, local, and tribal authorities, the private sector, and communities must play to address the threat of a pandemic, and the concrete steps that individuals can and should take to protect themselves and their families.

This Implementation Plan for the *National Strategy for Pandemic Influenza* further clarifies the roles and responsibilities of governmental and non-governmental entities, including Federal, State, local, and tribal authorities and regional, national, and international stakeholders, and provides preparedness guidance for all segments of society. The Plan addresses the following topics:

- **Chapters 2 and 3 (U.S. Government Planning and Response)** describe the unique threat posed by a pandemic that would spread across the globe over a period of many months; the specific and coordinated actions to be taken by the Federal Government as well as its capabilities and limitations in responding to the sustained and distributed burden of a pandemic; and the central importance of comprehensive preparation at the State, local, and community levels to address medical and non-medical impacts with available resources.

- **Chapters 4 and 5 (International Efforts and Transportation and Borders)** outline steps we will take to work with our international partners to prevent, slow, or limit the spread of infection globally and in the United States, and describe proposed measures for effective management of our borders and the transportation sector during a pandemic.

- **Chapter 6 (Protecting Human Health)** details the critical actions that public health authorities, non-governmental organizations, the private sector, and individuals should take to protect human health and reduce the morbidity and mortality caused by a pandemic.

- **Chapter 7 (Protecting Animal Health)** highlights the actions necessary to prevent and contain outbreaks in animals with the aim of reducing human exposure and the opportunity for viral mutation that could result in efficient human-to-human transmission.

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- **Chapter 8** (**Law Enforcement, Public Safety, and Security**) outlines the support that State and local law enforcement and public safety agencies must provide, with appropriate Federal assistance, to public health efforts and essential public safety services, and to maintain public order.

- **Chapter 9** (**Institutional Considerations**) provides guidance for the preparation of essential pandemic plans by Federal, State, local, and tribal authorities, businesses, schools, and non-governmental organizations to ensure continuity of operations and maintenance of critical infrastructure. It also provides guidance for families and individuals to ensure appropriate personal protection. To address the threat of pandemic influenza, it is essential that such plans be put in place as soon as possible.

The Implementation Plan represents a comprehensive effort by the Federal Government to identify the critical steps that must be taken immediately and over the coming months and years to address the threat of an influenza pandemic. It assigns specific responsibilities to Departments and Agencies across the Federal Government, and includes measures of progress and timelines for implementation to ensure that we meet our preparedness objectives.

This Plan will be revised over time. The pandemic threat is constantly evolving, as is our level of preparedness. The actions, priorities, timelines and measures of progress will be reviewed on a continuous basis and revised as appropriate to reflect changes in our understanding of the threat and the state of relevant response capabilities and technologies. Additional details regarding the implementation of this Plan are included at the conclusion of Chapter 1.

The active engagement and full involvement of all levels of government and all segments of society, including at the community level, are critical for an effective response. Ultimately, however, the actions of individuals will be the key to our response.

Chapter 1 — Executive Summary

The Pandemic Threat

Influenza viruses have threatened the health of animal and human populations for centuries. Their diversity and propensity for mutation have thwarted our efforts to develop both a universal vaccine and highly effective antiviral drugs. A pandemic occurs when a novel strain of influenza virus emerges that has the ability to infect and be passed between humans. Because humans have little immunity to the new virus, a worldwide epidemic, or pandemic, can ensue. Three human influenza pandemics occurred in the 20th century, each resulting in illness in approximately 30 percent of the world population and death in 0.2 percent to 2 percent of those infected. Using this historical information and current models of disease transmission, it is projected that a modern pandemic could lead to the deaths of 200,000 to 2 million people in the United States alone.

The animal population serves as a reservoir for new influenza viruses. Scientists believe that avian, or bird, viruses played a role in the last three pandemics. The current concern for a pandemic arises from an unprecedented outbreak of H5N1 influenza in birds that began in 1997 and has spread across bird populations in Asia, Europe, and Africa. The virus has shown the ability to infect multiple species, including long-range migratory birds, pigs, cats, and humans. It is impossible to predict whether the H5N1 virus will lead to a pandemic, but history suggests that if it does not, another novel influenza virus will emerge at some point in the future and threaten an unprotected human population.

The economic and societal disruption of an influenza pandemic could be significant. Absenteeism across multiple sectors related to personal illness, illness in family members, fear of contagion, or public health measures to limit contact with others could threaten the functioning of critical infrastructure, the movement of goods and services, and operation of institutions such as schools and universities. A pandemic would thus have significant implications for the economy, national security, and the basic functioning of society.

Chapter 2 — U.S. Government Planning for a Pandemic

The President announced the *National Strategy for Pandemic Influenza (Strategy)* on November 1, 2005. The *Strategy* provides a high-level overview of the approach that the Federal Government will take to prepare for and respond to a pandemic, and articulates expectations of non-Federal entities to prepare themselves and their communities. The *Strategy* contains three pillars: (1) preparedness and communication; (2) surveillance and detection; and (3) response and containment.

Preparedness for a pandemic requires the establishment of infrastructure and capacity, a process that can take years. For this reason, significant steps must be taken now. The Strategy affirms that the Federal Government will use all instruments of national power to address the pandemic threat. The Federal Government will collaborate fully with international partners to attempt containment of a potential pandemic wherever sustained and efficient human-to-human transmission is documented, and will make every reasonable effort to delay the introduction of a pandemic virus to the United States. If these efforts fail, responding effectively to an uncontained pandemic domestically will require the full participation of all levels of government and all segments of society. The Implementation Plan (Plan) for the *Strategy* makes it clear that every segment of society must prepare for a pandemic and will be a part of the response. The Plan further recognizes that the Federal Government must provide clear criteria and

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decision tools to inform State, local, and private sector planning and response actions, and that Federal agencies must be prepared to supplement and support State and local efforts where necessary and feasible.

The *Strategy* must be translated into tangible action that fully engages the breadth of the Federal Government. This Plan provides a common frame of reference for understanding the pandemic threat and summarizes key planning considerations for all partners. It also proposes that Federal departments and agencies take specific, coordinated steps to achieve the goals of the *Strategy* and outlines expectations of non-Federal stakeholders in the United States and abroad. Joint and integrated planning across all levels of government and the private sector is essential to ensure that available national capabilities and authorities produce detailed plans and response actions that are complementary, compatible, and coordinated.

The Federal Government has already taken a historic series of actions, domestically and internationally, to address the pandemic threat. The actions include the development of a promising human vaccine against the H5N1 avian influenza virus, the submission of a $7.1 billion budget request over several years to support pandemic preparedness, the establishment of the International Partnership on Avian and Pandemic Influenza, and the first Cabinet-level exercise to assess the Federal Government response to a naturally occurring threat.

Chapter 3 — Federal Government Response to a Pandemic

The goals of the Federal Government response to a pandemic are to: (1) stop, slow, or otherwise limit the spread of a pandemic to the United States; (2) limit the domestic spread of a pandemic, and mitigate disease, suffering and death; and (3) sustain infrastructure and mitigate impact to the economy and the functioning of society (see *Stages of Federal Government Response* between Chapters 5 and 6).

Unlike geographically and temporally bounded disasters, a pandemic will spread across the globe over the course of months or over a year, possibly in waves, and will affect communities of all sizes and compositions. In terms of its scope, the impact of a severe pandemic may be more comparable to that of war or a widespread economic crisis than a hurricane, earthquake, or act of terrorism. In addition to coordinating a comprehensive and timely national response, the Federal Government will bear primary responsibility for certain critical functions, including: (1) the support of containment efforts overseas and limitation of the arrival of a pandemic to our shores; (2) guidance related to protective measures that should be taken; (3) modifications to the law and regulations to facilitate the national pandemic response; (4) modifications to monetary policy to mitigate the economic impact of a pandemic on communities and the Nation; (5) procurement and distribution of vaccine and antiviral medications; and (6) the acceleration of research and development of vaccines and therapies during the outbreak.

The center of gravity of the pandemic response, however, will be in communities. The distributed nature of a pandemic, as well as the sheer burden of disease across the Nation over a period of months or longer, means that the Federal Government's support to any particular State, Tribal Nation, or community will be limited in comparison to the aid it mobilizes for disasters such as earthquakes or hurricanes, which strike a more confined geographic area over a shorter period of time. Local communities will have to address the medical and non-medical effects of the pandemic with available resources. This means that it is essential for communities, tribes, States, and regions to have plans in place to support the full spectrum of their needs over the course of weeks or months, and for the Federal Government to provide clear guidance on the manner in which these needs can be met.

Command, Control, and Coordination of the Federal Response during a Pandemic

It is important that the Federal Government have a defined mechanism for coordination of its response. The *National Response Plan* (NRP) is the primary mechanism for coordination of the Federal Government's response to Incidents of National Significance, and will guide the Federal pandemic response. It defines Federal departmental responsibilities for sector-specific responses, and provides the structure and mechanisms for effective coordination among Federal, State, local, and tribal authorities, the private sector, and non-governmental organizations (NGOs). Pursuant to the NRP and Homeland Security Presidential Directive 5 (HSPD-5), the Secretary of Homeland Security is responsible for coordination of Federal operations and resources, establishment of reporting requirements, and conduct of ongoing communications with Federal, State, local, and tribal governments, the private sector, and NGOs.

A pandemic will present unique challenges to the coordination of the Federal response. First and foremost, the types of support that the Federal Government will provide to the Nation are of a different kind and character than those it traditionally provides to communities damaged by natural disasters. Second, although it may occur in discrete waves in any one locale, the national impact of a pandemic could last for many months. Finally, a pandemic is a sustained public health and medical emergency that will have sustained and profound consequences for the operation of critical infrastructure, the mobility of people and freight, and the global economy. Health and medical considerations will affect foreign policy, international trade and travel, domestic disease containment efforts, continuity of operations within the Federal Government, and many other aspects of the Federal response.

Pursuant to the NRP, as the primary agency and coordinator for Emergency Support Function #8 (Public Health and Medical Services), the Secretary of Health and Human Services will lead Federal health and medical response efforts and will be the principal Federal spokesperson for public health issues, coordinating closely with DHS on public messaging pertaining to the pandemic. Pursuant to HSPD-5, as the principal Federal official for domestic incident management, the Secretary of Homeland Security will provide coordination for Federal operations and resources, establish reporting requirements, and conduct ongoing communications with Federal, State, local, and tribal governments, the private sector, and NGOs. In the context of response to a pandemic, the Secretary of Homeland Security will coordinate overall non-medical support and response actions, and ensure necessary support to the Secretary of Health and Human Services' coordination of public health and medical emergency response efforts.

The NRP stipulates mechanisms for coordination of the Federal response, but sustaining these mechanisms for several months to over a year will present unique challenges. Day-to-day situational monitoring will occur through the national operations center, and strategic policy development and coordination on domestic pandemic response issues will be accomplished through an interagency body composed of senior decision-makers from across the government and chaired by the White House. These and other considerations applicable to response to a pandemic will be incorporated in the NRP review process and will inform recommendations on revisions and improvements to the NRP and associated annexes.

Pursuant to the NRP, policy issues that cannot be resolved at the department level will be addressed through the Homeland Security Council/National Security Council (HSC/NSC)-led policy coordination process.

Chapter 4 — International Efforts

Pandemic influenza is a global threat requiring an international response. Given the rapid speed of transmission and the universal susceptibility of human populations, an outbreak of pandemic influenza anywhere poses a risk to populations everywhere. Our international effort to contain and mitigate the effects of an outbreak of pandemic influenza beyond our borders is a central component of our strategy to stop, slow, or limit the spread of infection to the United States.

Substantial obstacles exist to implementing a rapid response to an incipient human pandemic in many nations. The threat of pandemic influenza may not be widely recognized or understood. Many countries do not have sufficient resources or expertise to detect and respond to outbreaks independently, and lack a robust public health and communications infrastructure, pandemic preparedness plans, and proven logistics capability. International mechanisms to support effective global surveillance and response, including coordinated provision of accurate and timely information to the public, are also inadequate.

To address the international dimension of the pandemic threat, the United States will build upon a series of recent actions. The International Partnership on Avian and Pandemic Influenza was launched by the President in September 2005 to heighten awareness of the pandemic threat among governments, to promote the development of national capacity to detect and respond to a pandemic, and to encourage transparency, scientific cooperation, and rapid reporting of outbreaks in birds and humans. We will work through the Partnership, with international health organizations and bilaterally to increase global commitment, cooperation, and capacity to address the threat of avian influenza. At the Beijing Donors Conference in January 2006, the United States committed $334 million to international efforts to prevent and counter the spread of avian and human pandemic influenza, representing approximately one-third of all international grants pledged[1]

Actions to Implement the National Strategy for Pandemic Influenza

The Federal Government will work to increase awareness of the threat by foreign governments and their citizens, and promote the development of national and international capacity to prevent, detect, and limit the spread of animal and human pandemic influenza within and beyond national borders. We will work through bilateral and multilateral channels to assist priority countries, especially those in which highly pathogenic H5N1 avian influenza is endemic or emerging, to develop and exercise plans for an effective response.

Establish Surveillance Capability in Countries at Risk

A country's ability to respond quickly to a human outbreak requires a broad surveillance network to detect cases of influenza-like illnesses in people, coupled with rapid diagnostic and response capabilities. To help address these challenges, the Federal Government and international partners will work together to assist countries at risk to build and improve infrastructure at the central, provincial, and local levels. Building this capability in countries at risk will facilitate monitoring of disease spread and rapid response to contain influenza outbreaks with pandemic potential.

[1] Does not include loans of approximately $1 billion pledged at conference

Expand Capacity for Animal Health Activities and Press for a Strong International Leadership Role

We will press for a strong leadership role for international animal health organizations, particularly the World Organization for Animal Health (OIE) and the United Nations (UN) Food and Agriculture Organization (FAO), to assess the animal health/veterinary services infrastructure of affected, high-risk, and at-risk countries, in order to determine areas of need that must be addressed. We will work to assist the FAO to establish a resident rapid response capability and a network that can be drawn upon to provide technical assistance to address the immediate needs of countries with incipient or advanced outbreaks of avian influenza.

Support a Coordinated Response by the International Community in Support of National Efforts

A series of actions will be necessary to contain an outbreak of a virus with pandemic potential, including rapid characterization of a potential outbreak, immediate and coordinated deployment of rapid reaction teams, deployment of international stocks of antiviral medications and other materiel, and institution of public health measures to limit spread. To be most effective, these measures require international preparation and coordination. The Federal Government will work with the World Health Organization (WHO), the Partnership, and through diplomatic contacts to strengthen these international mechanisms, and we will configure our own Departments and Agencies to deploy personnel and materiel in support of an international response upon the first reports of suspected outbreaks.

We will also press for the establishment of internationally agreed-upon definitions and protocols in support of a containment strategy, including:

- A global epidemiologic standard for triggering an international containment response to a potential pandemic.
- The necessary actions that should be taken by nations in response to a suspected outbreak, including prompt reporting of the outbreak to the WHO Secretariat, and sharing of viral isolates and/or tissue samples.
- The establishment of an international rapid response capability, led by the WHO but with significant contributions of personnel and equipment by the international community, to investigate and respond to the suspected beginning of a pandemic.
- The establishment of national, regional, and international stockpiles of medical and non-medical countermeasures that are pre-positioned for rapid deployment.

Coordinate Public Communication

We recognize that timely, accurate, credible, and coordinated messages will be necessary during a pandemic, and that inconsistent reporting or guidance within and between nations can lead to confusion and a loss of confidence by the public. We will work with the WHO and our international partners to share information as an outbreak proceeds, and to coordinate our response actions as well as the public messaging that accompanies these actions. We will also support the development of targeted and culturally sensitive communications in local languages to help the public in affected countries and countries at risk to understand the threat of influenza with pandemic potential in animals and of human pandemic influenza, the preventive measures that should be taken, and actions necessary in the event of a pandemic.

Assist U.S. Citizens Traveling or Living Abroad

The Federal Government will provide U.S. citizens living and traveling abroad with timely, accurate information on avian influenza, through websites, travel information, and meetings. U.S. Embassies and Consulates will identify local medical capabilities and resources that would be available to U.S. citizens in the event of a "stay in place" response to a pandemic.

Chapter 5 — Transportation and Borders

The containment of an influenza virus with pandemic potential at its origin, whether the outbreak occurs abroad or within the United States, is a critical element of pandemic response efforts. Containment is most effective when approached globally, with all countries striving to achieve common goals. While complete containment might not be successful, a series of containment efforts could slow the spread of a virus to and within the United States, thereby providing valuable time to activate the domestic response.

Our Nation's ports of entry and transportation network are critical elements in our preparation for and response to a potential influenza pandemic. Measures at our borders may provide an opportunity to slow the spread of a pandemic to and within the United States, but are unlikely to prevent it. Moreover, the sheer volume of traffic and the difficulty of developing screening protocols to detect an influenza-like illness pose significant challenges. While we will consider all options to limit the spread of a pandemic virus, we recognize complete border closure would be difficult to enforce, present foreign affairs complications, and have significant negative social and economic consequences.

Measures to limit domestic travel may delay the spread of disease. These restrictions could include a range of options, such as reductions in non-essential travel and, as a last resort, mandatory restrictions. While delaying the spread of the epidemic may provide time for communities to prepare and possibly allow the production and administration of pre-pandemic vaccine and antiviral medications, travel restrictions, per se, are unlikely to reduce the total number of people who become ill or the impact the pandemic will have on any one community. Individual regions would still experience sharp surges in the demand for medical services and the need to meet such demand with local and regional personnel, resources, and capacity. Communities, States, the private sector, and the Federal Government will need to carefully weigh the costs and benefits of transportation measures when developing their response plans, including the effectiveness of an action in slowing the spread of a pandemic, its social and economic consequences, and its operational feasibility.

Border and transportation measures will be most effective in slowing the spread of a pandemic if they are part of a larger comprehensive strategy that incorporates other interventions, such as the adherence to infection control measures (hand hygiene and cough etiquette), social distancing, isolation, vaccination, and treatment with antiviral medications.

Actions to Implement the National Strategy for Pandemic Influenza

Modeling to Inform Transportation and Border Decisions

Models are powerful tools that can be used to inform policy decisions by highlighting the impact of various interventions on the spread of disease. Models can also predict the social and economic ramifications of specific transportation and movement interventions and can inform the assessment of the operational feasibility of these interventions. We will expand our infectious disease modeling

capabilities and ensure that mechanisms are in place to share the findings of these models with State and local authorities and the private sector to inform transportation decisions. We will use these models to develop guidance for State and local authorities on interventions that are likely to limit the spread of a pandemic and on protocols for implementation.

Screening Mechanisms and Travel Restrictions

Our ability to limit the spread of a pandemic, target our public health interventions, and limit the unintended consequences of these actions will be greatly enhanced by the widespread availability of cost-effective screening tools for influenza viruses such as rapid diagnostic tests. We will expand our research and development efforts to bring such tools to market as soon as possible.

The Federal Government's plan for responding to and containing pandemic outbreaks focuses on initial source containment and the use of a layered series of actions to limit spread, including traveler screening for influenza at the point of exit from a source country, en route during air travel, and upon arrival at U.S. airports. In order to ensure that international arrivals undergo proper screening protocols and are subject to isolation and quarantine if appropriate, we are likely to limit the number of airports accepting international flights early in a pandemic. Protocols will be developed to implement these policies for air travelers.

As we have done with air travel, we will establish policies to address movement of people across our land and maritime borders and the role, if any, of domestic movement restrictions. These policies and the protocols to support them will be developed in concert with State, local, and tribal stakeholders, the private sector, and our international partners.

Quarantine and Isolation of Travelers

Current Centers for Disease Control and Prevention (CDC) recommendations for managing air passengers who may be infected with an influenza virus with pandemic potential include isolation of ill persons, quarantine of all non-ill travelers (and crew), and targeted treatment and prophylaxis with antiviral medications. The Federal Government will develop criteria and protocols for isolation and quarantine of travelers early in a pandemic, prior to significant spread of the virus in the United States.

Trade and Movement of Cargo

Excluding live animal and animal product cargo, the risk of influenza transmission by cargo is low. (Inanimate ship-borne cargo poses low risk, and routine surfaces are easily decontaminated.) With appropriate protective measures for workers in specific settings, cargo shipments could continue. The development of prevention measures/protocols that provide protection against the infection of workers in specific settings (e.g., those who handle/inspect cargo) would allow cargo traffic to and from the United States to continue, and thus mitigate the economic impact of the pandemic.

Sustaining the Transportation Infrastructure

Sustaining critical transportation services during a pandemic will be crucial to keep communities functioning and emergency supplies and resources flowing. We will make it clear to State, local, tribal, and private sector entities that planning efforts should assess systemic effects such as supply chain impact, just-in-time delivery, warehousing, and logistics, and should support the development of contingency plans to address lack of critical services and delivery of essential commodities, such as chlorine for water purification, gasoline, food, and medical supplies.

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Chapter 6 — Protecting Human Health

Protecting human health is the crux of pandemic preparedness. The components of the Strategy, the elements of this Plan, and the projected allocation of resources to preparedness, surveillance, and response activities all reflect the overarching imperative to reduce the morbidity and mortality caused by a pandemic. In order to achieve this objective, we must leverage all instruments of national power and ensure coordinated action by all segments of government and society, while maintaining the rule of law, and other basic societal functions.

The cardinal determinants of the public health response to a pandemic will be its severity, the prompt implementation of local public health interventions, and the availability and efficacy of vaccine and antiviral medications. Decisions about the prioritization and distribution of medical countermeasures; the content of risk communication campaigns; the application of community infection control and public health containment (social distancing) measures; and whether and when to make adjustments in the way care is delivered are interrelated and all fundamentally determined by the ability of the pandemic virus to cause severe morbidity and mortality and the availability and effectiveness of vaccine and antiviral medications.

While a pandemic may strain hundreds of communities simultaneously, each community will experience the pandemic as a local event. In the best of circumstances, patients and health care resources are not easily redistributed; in a pandemic, conditions would make the sharing of resources and burdens even more difficult. The Federal Government is committed to expanding national stockpiles of both vaccines and antiviral medications and will provide these medical countermeasures as well as other available resources and personnel in support of communities experiencing pandemic influenza, but communities should anticipate that in the event of multiple simultaneous outbreaks, there may be insufficient medical resources or personnel to augment local capabilities. Additionally, manufacturers and suppliers are likely to report inventory shortages and supply chains may be disrupted by the effects of a pandemic on critical personnel. State, local, and tribal entities should thus anticipate that all sources of external aid may be compromised during a pandemic.

The systematic application of disease containment measures can significantly reduce disease transmission rates with concomitant reductions in the intensity and velocity of any pandemics that do occur. The goals of disease containment after a pandemic is underway are to delay the spread of disease and the occurrence of outbreaks in U.S. communities, to decrease the clinical attack rate in affected communities, and to distribute the number of cases that do occur over a longer interval, so as to minimize social and economic disruption and to minimize, so far as possible, hospitalization and death. Decisions as to how and when to implement disease containment measures will be made on a community-by-community basis, with the Federal Government providing technical support and guidance to State and local officials on the efficacy of various social distancing measures, the manner in which they can be implemented, and strategies to mitigate unintended consequences.

Government and public health officials must communicate clearly and continuously with the public now and throughout a pandemic. To maintain public confidence and to enlist the support of individuals and families in disease containment efforts, public officials at all levels of government must provide unambiguous and consistent guidance on what individuals can do to protect themselves, how to care for family members at home, when and where to seek medical care, and how to protect others and minimize the risks of disease transmission. The public will respond favorably to messages that acknowledge its concerns, allay anxiety and uncertainty, and provide clear incentives for desirable behavior. The

information provided by public health officials should therefore be useful, addressing immediate needs, but it should also help private citizens recognize and understand the degree to which their collective actions will shape the course of a pandemic.

Ensuring access to, and timely payment for, covered services during a pandemic will be critical to maintaining a functional health care infrastructure. It may also be necessary to extend certain waivers or develop incident-specific initiatives or coverage to facilitate access to care. Pandemic influenza response activities may exceed the budgetary resources of responding Federal and State government agencies, requiring compensatory legislative action.

Actions to Implement the National Strategy for Pandemic Influenza

Achieving National Goals for Production and Stockpiling of Vaccine and Antiviral Medications

The Federal Government has established two primary vaccine goals: (1) establishment and maintenance of stockpiles of pre-pandemic vaccine adequate to immunize 20 million persons against influenza strains that present a pandemic threat; and (2) expansion of domestic influenza vaccine manufacturing surge capacity for the production of pandemic vaccines for the entire domestic population within 6 months of a pandemic declaration. The Federal Government has also established two primary goals for stockpiling existing antiviral medications: (1) establishment and maintenance of stockpiles adequate to treat 75 million persons, divided between Federal and State stockpiles; and (2) establishment and maintenance of a Federal stockpile of 6 million treatment courses reserved for domestic containment efforts.

To accomplish these goals, we will expand Federal, and create State, stockpiles of influenza countermeasures, as well as expand domestic vaccine manufacturing capacity. We will make substantial new investments in the advanced development of cell-culture-based influenza vaccine candidates, with a goal of establishing the domestic surge vaccine production capacity to meet our pre-pandemic stockpile and post-pandemic vaccine production goals.

Prioritizing and Distributing Limited Supplies of Vaccine and Antiviral Medications

The Federal Government is developing guidelines to assist State, local, and tribal governments and the private sector in defining groups that should receive priority access to existing limited supplies of vaccine and antiviral medications. Priority recommendations will reflect the pandemic response goals of limiting mortality and severe morbidity; maintaining critical infrastructure and societal function; diminishing economic impacts; and maintaining national security. Priorities for vaccine and antiviral drug use will vary based on pandemic severity as well as the vaccine and drug supply.

The establishment of credible distribution plans for our countermeasures is equally important. We will work with State and tribal entities to develop and exercise influenza countermeasure distribution plans, to include the necessary logistical support of such plans, including security provisions.

Deploying Limited Federal Assets and Resources to Support Local Medical Surge

Given that local and regional surge capacity will be the foundation of a community's medical response, we will expand and enhance our guidance to State, local, and tribal entities on the most effective ways to develop and utilize surge assets. Recognizing that the availability of health and medical personnel represents the most significant barrier to the care of large numbers of patients, we will establish a joint strategy for the deployment of Federal medical providers from across the U.S. Government, and will

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expand and enhance programs such as the Medical Reserve Corps and the Commissioned Corps of the Public Health Service. We will also ensure that credible plans are in place to rapidly credential, organize, and incorporate volunteer health and medical providers as part of the medical response in areas that are facing workforce shortages.

Establishing Real-Time Clinical Surveillance

In order to manage an outbreak most effectively, it is necessary to establish mechanisms for "real-time" clinical surveillance in domestic acute care settings such as emergency departments, intensive care units, and laboratories to provide local, State, and Federal public health officials with continuous awareness of the profile of illness in communities. We will support local and national efforts to establish this capability by linking hospital and acute care health information systems with local public health departments, and advancing the development of the analytical tools necessary to interpret and act upon these data streams in real time.

Modeling to Inform Decision Making and Public Health Interventions

Given the power of models to inform decision making, we will establish a single interagency hub for infectious disease modeling efforts, and ensure that this effort integrates related modeling efforts (e.g., transportation decisions, border interventions, economic impact). We will also work to ensure that this modeling can be used in real time as information about the characteristics of a pandemic virus and its impact become available. Finally, we will use this capability to inform the development of more advanced guidance for State, local, and tribal entities on social distancing measures that can be employed to limit disease spread through a community.

Chapter 7 — Protecting Animal Health

Influenza viruses that cause severe disease outbreaks in animals, especially birds, are believed to be a likely source for the emergence of a human pandemic influenza virus. The avian influenza type A "H5N1" virus currently found in parts of Asia, Europe, and Africa is of particular concern due to its demonstrated ability to infect both birds and mammals, including humans. Emergence of a pandemic strain could happen outside the United States or within our borders. Once a pandemic strain emerges, infections will predominantly reflect human-to-human transmission, and birds or other animals are unlikely to be a continuing source of significant virus spread in humans.

Irrespective of whether H5N1 leads to a human pandemic, these viruses have the potential to impact the U.S. poultry industry. Some avian influenza viruses cause high mortality in chickens and are referred to as highly pathogenic avian influenza (HPAI) viruses. The economic consequences of an HPAI outbreak in the United States would depend on the size, location, type, and time necessary to eradicate the outbreak. Although such eradication efforts may help to protect human health, they can result in significant costs due to poultry production losses from bird depopulation activities and from quarantine or other movement restrictions placed on birds. But eradication of these viruses also protects the production of U.S. poultry, worth about $29 billion in 2004.

An extensive amount of influenza surveillance is currently conducted in poultry and wild birds in the United States. Commercial poultry operations are monitored for avian influenza through the National Poultry Improvement Plan, and birds moving through the U.S. live bird marketing system are also tested for avian influenza. Wild birds are examined for avian influenza viruses through efforts involving the Federal Government, State wildlife authorities, and universities.

Actions to Implement the National Strategy for Pandemic Influenza

Bolstering Domestic Surveillance

Although substantial surveillance activities are already in place in the United States to detect avian influenza viruses with human pandemic potential in domestic poultry, enhancing surveillance in domestic animals and wildlife will help ensure that reporting of these events will occur as early as possible. Animal populations that are most critical for additional surveillance activities are poultry and wild birds, not only in terms of increased numbers tested but also in the geographic distribution of testing to increase the probability of detection. To fully utilize data collected as part of the national surveillance for influenza viruses with pandemic potential in animal populations, we will establish capabilities for capturing, analyzing, and sharing data.

Expanding the National Veterinary Stockpile

A National Veterinary Stockpile, already established, contains a variety of materiel that would be necessary for a response to an influenza outbreak, including personal protection equipment (PPE), disinfectant, diagnostic reagents, and antiviral medication (for responders). In addition, there are currently 40 million doses of avian influenza vaccine for use in poultry, should an outbreak occur. We will expand this vaccine stockpile to 110 million doses.

Educating Bird Owners

We will expand our multilevel outreach and education campaign called "Biosecurity for the Birds" to provide disease and biosecurity information to poultry producers, especially those with "backyard" production. The program provides guidance to bird owners and producers on preventing introduction of disease and mitigating spread of disease should it be introduced, and encourages producers to report sick birds, thereby increasing surveillance opportunities for avian influenza.

Advancing Our Domestic Outbreak Response Plans

Regardless of where the risk for emergence exists, the Federal Government will be prepared to respond appropriately. The Federal Government has a history of success in working with the poultry industry to eradicate HPAI viruses that have been introduced into U.S. poultry. If an influenza virus with human pandemic potential is introduced into domestic birds or other animals in the United States, despite all international efforts to prevent it, action must be directed to detecting and eradicating the virus as quickly as possible. If it is found in wild birds, we will act to prevent introduction into domestic birds or other susceptible animals.

Enhancing Infrastructure for Animal Health Research and Development

Enhancement of our knowledge of the ecology of influenza viruses, viral evolution, novel influenza strains that emerge in animals, and the determinants of virulence of influenza viruses in animal populations is essential. We will expand our avian influenza research programs to accelerate the development of the tools necessary to detect influenza viruses in the environment, provide immunity to avian populations, and validate disease response strategies.

Chapter 8 — Law Enforcement, Public Safety, and Security

Due to stresses placed upon the health care system and other critical functions, civil disturbances and breakdowns in public order may occur. Likewise, emergency call centers may be overwhelmed with calls for assistance, including requests to transport influenza victims. Local law enforcement agencies may be called upon to enforce movement restrictions or quarantines, thereby diverting resources from traditional law enforcement duties. To add to these challenges, law enforcement and emergency response agencies can also expect to have their uniform and support ranks reduced significantly as a result of the pandemic. Private sector entities responsible for securing critical infrastructure will face similar challenges.

While significant progress has been made since the terrorist attacks of September 11, 2001, in establishing joint investigative protocols and linkages among the key components of public health, emergency management, and law enforcement/emergency response communities, an influenza pandemic will present new challenges, and it is important that all concerned understand their respective roles and the governing legal authorities so that they can coordinate their efforts under a complex set of Federal, State, tribal, and local laws. Joint training and exercises will help prepare for an effective response to a pandemic influenza outbreak.

State and local law enforcement will normally provide the first response pursuant to State and local law. Consistent with State law, the Governor may deploy National Guard as needed to prevent or respond to civil disturbances. When State and local resources prove incapable of an effective response, the Federal Government can assist by providing Federal law enforcement personnel, and by directing the Armed Forces to assist in law enforcement and maintain order when legal prerequisites are met. Logistical and other support assistance can also be provided.

The response to an influenza pandemic could require, if necessary and appropriate, measures such as isolation or quarantine. Isolation is a standard public health practice applied to persons who have a communicable disease. Isolation of pandemic influenza patients prevents transmission of pandemic influenza by separating ill persons from those who have not yet been exposed. Quarantine is a contact management strategy that separates individuals who have been exposed to infection but are not yet ill from others who have not been exposed to the transmissible infection; quarantine may be voluntary or mandatory. The States, which enact quarantine statutes pursuant to their police powers, are primarily responsible for quarantine within their borders. The Federal Government also has statutory authority to order a quarantine to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or from one State or possession into any other State or possession. Influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic is on the list of specified communicable diseases for which Federal quarantine is available.

Actions to Implement the National Strategy for Pandemic Influenza

Providing Guidance to State and Local Law Enforcement Entities

We will provide State and local law enforcement with the guidance, training, and exercises needed to prepare them to respond during a pandemic influenza outbreak, including how to assist and facilitate containment measures. Similarly, we will provide Governors with specific information concerning the processes for obtaining Federal law enforcement and military assistance.

Supporting Local Law Enforcement Activities

While we rely upon local and State entities to maintain civil order, it is essential that we be prepared to respond in the event of a breakdown of order that cannot be handled at the local or State level. We will ensure that Federal law enforcement agencies and the military have the necessary plans to assist States with law enforcement and related activities in the event that the need arises.

Chapter 9 -— Institutions: Protecting Personnel and Ensuring Continuity of Operations

Unlike many other catastrophic events, an influenza pandemic will not directly affect the physical infrastructure of an organization. While a pandemic will not damage power lines, banks, or computer networks, it has the potential ultimately to threaten all critical infrastructure by its impact on an organization's human resources by removing essential personnel from the workplace for weeks or months. Therefore, it is critical that organizations anticipate the potential impact of an influenza pandemic on personnel and, consequently, the organization's ability to continue essential functions. As part of that planning, organizations will need to ensure that reasonable measures are in place to protect the health of personnel during a pandemic.

The Federal Government recommends that government entities and the private sector plan with the assumption that up to 40 percent of their staff may be absent for periods of about 2 weeks at the height of a pandemic wave, with lower levels of staff absent for a few weeks on either side of the peak. Absenteeism will increase not only because of personal illness or incapacitation but also because employees may be caring for ill family members, under voluntary home quarantine due to an ill household member, minding children dismissed from school, following public health guidance, or simply staying at home out of safety concerns.

Public and private sector entities depend on certain critical infrastructure for their continued operations. Critical infrastructure encompasses those systems and assets that are so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, and national public health or safety. Critical infrastructure protection entails all the activities directed at safeguarding indispensable people, systems (especially communications), and physical infrastructure associated with the operations of those critical infrastructure sectors. Over 85 percent of critical infrastructure is owned and operated by the private sector. Therefore, sustaining the operations of critical infrastructure under conditions of pandemic influenza will depend largely on each individual organization's development and implementation of plans for business continuity under conditions of staffing shortages and to protect the health of their workforces.

Infection control measures are critically important for the protection of personnel. The primary strategies for preventing pandemic influenza are the same as those for seasonal influenza: (1) vaccination; (2) early detection and treatment; and (3) the use of infection control measures to prevent transmission. However, when a pandemic begins, a vaccine may not be widely available, and the supply of antiviral drugs may be limited. The ability to limit transmission and delay the spread of the pandemic will therefore rely primarily on the appropriate and thorough application of infection control measures in health care facilities, the workplace, the community, and for individuals at home.

Simple infection control measures may be effective in reducing the transmission of infection. There are two basic categories of intervention: (1) *transmission interventions,* such as the use of facemasks in health care settings and careful attention to cough etiquette and hand hygiene, which might reduce the

likelihood that contacts with other people lead to disease transmission; and (2) *contact interventions,* such as substituting teleconferences for face-to-face meetings, the use of other social distancing techniques, and the implementation of liberal leave policies for persons with sick family members, all of which eliminate or reduce the likelihood of contact with infected individuals. Interventions will have different costs and benefits, and be more or less appropriate or feasible, in different settings and for different individuals.

General Provisions

This Plan provides initial guidance for Federal and non-Federal entities, including State, local, and tribal entities, businesses, schools and universities, communities, and NGOs, on the development of their institutional plans and provides initial guidance for individuals and families on ways that they can prepare for a pandemic. This guidance will be expanded and refined over time, in consultation with the above stakeholders.

As part of their planning, organizations will need to ensure that reasonable measures are in place to protect the health of Americans during a pandemic, sustain critical infrastructure, and mitigate impact to the economy and the functioning of society. The collective response of all Americans will be crucial in mitigating the health, social, and economic effects of a pandemic (see *Individual, Family, and Community Response to Pandemic Influenza* between Chapters 5 and 6).

The actions directed in this Plan will be implemented in a manner consistent with applicable law and subject to availability of appropriations. Nothing in this Plan alters, or impedes the ability to carry out, existing authorities or responsibilities of Federal department and agency heads to perform their responsibilities under law and consistent with applicable legal authorities and Presidential guidance.

The actions directed in this plan are intended only to improve the internal management of the executive branch of the Federal Government, and they are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Chapter 2 — U.S. Government Planning for a Pandemic

The Pandemic Threat

Influenza viruses have threatened the health of animal and human populations for centuries. Their diversity and propensity for mutation have thwarted our efforts to develop both a universal vaccine and highly effective antiviral drugs. As a result, and despite annual vaccination programs and modern medical technology, influenza in the United States results in approximately 36,000 deaths and 226,000 hospitalizations each year.

A pandemic occurs when a wholly new strain of influenza virus emerges that has the ability to infect and be passed between humans. Because humans have little immunity to the new virus, a worldwide epidemic, or pandemic, can ensue. Three human influenza pandemics occurred in the 20th century, each resulting in illness in approximately 30 percent of the world population and death in 0.2 percent to 2 percent of those infected. Using this historical information and current models of disease transmission, it is projected that a modern pandemic could lead to the deaths of 200,000 to 2 million U.S. citizens.[2]

The animal population serves as a reservoir for new influenza viruses. Scientists believe that avian, or bird, viruses played a role in the last three pandemics. The current concern for a pandemic arises from an unprecedented outbreak of H5N1 influenza in birds. In 1997, the H5N1 influenza virus emerged in poultry in Hong Kong and infected 18 people, 6 of whom died. Since then, the virus has spread across bird populations in Asia, Europe, and Africa resulting in the deaths, through illness and culling, of over 200 million birds. In addition, the virus has shown the ability to infect multiple species, including long-range migratory birds, pigs, cats, and humans. To date, the virus is known to have infected over 200 persons in the Eastern Hemisphere, and resulted in the deaths of more than half of those known to be infected. This mortality rate is due in part to the fact that H5 influenza viruses have not previously circulated in humans, so the population has no background immunity to these viruses. It is impossible to predict whether the H5N1 virus will lead to a pandemic, but history suggests that if it does not, another novel influenza virus will emerge at some point in the future and threaten an unprotected human population.

While a pandemic will lead to a significant toll that is measured in human illness and death, its impact will extend far beyond hospitals, infirmaries, and doctors' offices. Because influenza viruses do not respect geography, age, race, or gender, the impact of a pandemic will be pervasive, removing essential personnel from the workplace for weeks, due to their own illness, illness in a family member, or as a result of public health guidance to limit contact with others. Absenteeism across multiple sectors will threaten the functioning of critical infrastructure providers, the movement of goods and services, and operation of anchor institutions such as schools and universities. This has significant ramifications for the economy, national security, and the basic functioning of society.

The economic repercussions of a pandemic could be significant. The Congressional Budget Office has estimated that a pandemic on the scale of the 1918 outbreak could result in a loss of 5 percent of gross

[2] A Potential Influenza Pandemic: Possible Macroeconomic Effects and Policy Issues. Congressional Budget Office, December 8, 2005

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domestic product, or a loss of national income of about $600 billion. These effects will occur through two main channels. A pandemic will affect the economy directly through illness and mortality caused by the disease, and the associated lost output. A pandemic will also generate indirect costs, from actions taken to prevent and control the spread of the virus. Some of these actions will be taken by the government. Others will be taken by institutional leaders and employers, while still others will be the result of uncoordinated individual responses to avoid infection. These latter reactions will reflect public perceptions and fears.

Preparedness for a pandemic requires the establishment of infrastructure and capacity, a process that can take years. For this reason, significant steps must be taken now. This Implementation Plan (Plan) for the *National Strategy for Pandemic Influenza (Strategy)* acknowledges this reality, and makes it clear that every segment of society must prepare for a pandemic and will be a part of the response. The Plan further recognizes that the Federal Government must provide clear criteria and decision tools to inform State, local, tribal, and private sector planning and response actions, and that Federal agencies must be prepared to supplement and support State, local, and tribal efforts where necessary and feasible.

The National Strategy for Pandemic Influenza

Pandemics represent a unique threat to the health and well being of human populations and ultimately to the functioning of society. As products of a complex ecosystem, their timing cannot be predicted and their emergence cannot be controlled. Because novel influenza viruses meet little immunological resistance in the population, their impact is widespread and can be severe, threatening the functioning of all elements of society. The recognition of this potential impact has led governments around the globe to accelerate their planning efforts to combat and prepare for a pandemic. It has also led governments and international health organizations around the globe to call for transparency in reporting of cases of pandemic influenza, scientific cooperation to characterize the virus and develop effective vaccines, and coordinated international plans to stop, slow, or limit the spread of a pandemic virus after it emerges.

In response to this threat, the President announced the *National Strategy for Pandemic Influenza* on November 1, 2005. The *Strategy* provides a high-level overview of the approach that the Federal Government will take to prepare for and respond to a pandemic, and articulates expectations of non-Federal entities to prepare themselves and their communities.

The *Strategy* contains three pillars: (1) preparedness and communication, (2) surveillance and detection, and (3) response and containment. Each pillar describes domestic and international efforts, animal and human health efforts, and efforts that will be undertaken at all levels of government and in communities to prepare for and respond to a pandemic. It describes the manner in which the Federal Government will support preparedness efforts domestically and internationally in regions affected by avian influenza outbreaks, including the establishment of vaccine and antiviral production capacity and stockpiles; mechanisms to ensure timely coordinated messages to the public, whether from Federal, State, local, or tribal entities, or international authorities; establishment of early warning systems that allow us to activate our response mechanisms and the production and administration of vaccine before the arrival of a pandemic to our shores; and coordinated responses domestically and internationally to limit the spread of disease and mitigate disease, suffering and death.

The *Strategy* makes it clear that the Federal Government will use all instruments of national power to address the pandemic threat. However, if efforts to contain the outbreak at its source fail, the resources of the Federal Government will not be sufficient to prevent the spread of a pandemic across the Nation and

its resulting impact on communities, workplaces, families, and individuals. An effective response will require the full participation of all levels of government and all segments of society.

Implementation of the *National Strategy*

While the *Strategy* provides an important framework for Federal Government planning for an influenza pandemic, it must be translated to tangible action that fully engages the breadth of the Federal enterprise. This Plan proposes that Federal departments and agencies take specific, coordinated steps to achieve the goals of the *Strategy*. Because preparedness and response activities depend upon entities outside of the Federal Government, it also outlines expectations with respect to non-Federal stakeholders in the United States and abroad. Joint and integrated planning across all levels of government and the private sector is essential to ensure that available national capabilities and authorities produce detailed plans and response actions that are complementary, compatible, and coordinated.

This Plan supports Homeland Security Presidential Directive 8 (HSPD-8) by identifying coordinated preparedness and response actions to combat pandemic influenza. All actions in this Plan emphasize jointness and coordination of effort between and among Federal, State, tribal, and local entities. The purpose of HSPD-8 is to establish "policies to strengthen the preparedness of the United States to prevent and respond to threatened or actual domestic terrorist attacks, major disasters, and other emergencies by requiring a national domestic all-hazards preparedness goal, establishing mechanisms for improved delivery of Federal preparedness assistance to State and local governments, and outlining actions to strengthen preparedness capabilities of Federal, State, and local entities."

Because it is essential for all institutions to develop their own pandemic plans, this Plan provides guidance for non-Federal entities on the development of their institutional plans, including State, local, and tribal entities, businesses, schools and universities, and non-governmental organizations (NGOs). It also provides guidance for individuals and families on ways that they can prepare for a pandemic. Additional resources to support this planning are available at **www.pandemicflu.gov**. Federal agencies are expected to further supplement this Plan with guidance on pandemic planning for their respective stakeholders.

Finally, this Plan describes the series of actions that the Federal Government will take when an influenza virus with pandemic potential is identified in the human population anywhere in the world, recognizing that while we are devoting significant resources to early warning and containment overseas, a pandemic strain of influenza virus could also originate in the United States.

This Plan is divided into chapters that address the breadth of major considerations raised by a pandemic: protecting human health, protecting animal health, international considerations, transportation and borders, security considerations and institutional considerations. The chapters include the following:

- Narrative descriptions of the scope of the challenges and key considerations, followed by the rationales underlying the Federal Government approach;
- The roles and responsibilities of Federal departments and agencies, State, local, and tribal entities, the private sector, and individuals and families;
- A comprehensive set of over 300 actions for Federal departments and agencies to address the pandemic threat, each accompanied by lead and supporting agencies, outcome measures, and timelines for action; and

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• Clearly defined expectations for non-Federal stakeholders.

An appendix at the end of this Plan provides a brief description of relevant legal authorities in each chapter, as well as the manner in which the Federal Government will implement the Plan.

While this Plan proposes that departments and agencies to undertake a series of actions in support of the *Strategy*, it does not describe the operational details of how departments will accomplish these objectives. Departmental pandemic plans will provide those details, and will address additional considerations raised during a pandemic, including (1) protection of employees, (2) maintenance of essential functions and services, and (3) the manner in which departments and agencies will communicate messages about pandemic planning and response to their stakeholders. Specific guidance on the development of department plans is included in Chapter 9 and Appendix A.

The proposals contained within this Plan build upon a historic and comprehensive set of actions taken by the Federal Government in 2005 to address the pandemic threat. The actions include the development of a promising human vaccine against the H5N1 avian influenza virus, the submission of a $7.1 billion budget request to support pandemic preparedness, the establishment of the International Partnership on Avian and Pandemic Influenza, and the first Cabinet-level exercise to assess the Federal Government response to a naturally occurring threat.

Necessary Enablers of Pandemic Preparedness

View Pandemic Preparedness as a National Security Issue

A complex balance exists between humans and the microbial world. We are forced to take notice when this balance is disrupted, but antimicrobials and medical therapies usually allow us to restore the steady state to which we have become accustomed, limiting the impact of infectious disease to an individual or a community. Because our public health and medical system is well equipped to deal with the routine challenges presented by the microbes around us, the impact of infectious diseases and the policies and procedures that guide our actions remain largely within the purview of these communities.

The pandemic threat is different. In the event of a pandemic, the transmissibility of influenza viruses, the universal susceptibility of the world's population to viruses that have not previously circulated, and the mobility of human populations mean that every corner of the globe and every element of society are likely to be touched. This has ramifications not only for the health and well being of populations, but for the national and economic security of nations, and the functioning of society. Once this fundamental premise is recognized, the scope and scale of the measures necessary to prepare for a pandemic become apparent.

Promote Connectivity

One of our greatest vulnerabilities is the lack of connectivity between communities responsible for pandemic preparedness. This applies to the coordination of efforts between nations, between the health and non-health communities, between the public health and medical communities, and between the animal and human health communities.

Public Health and Medical Communities

In the United States, the public health community has responsibility for community-wide health promotion and disease prevention and mitigation efforts, and the medical community is largely focused

on action at the individual level. Insufficient communication and coordination between these communities represents a vulnerability in our preparedness for an influenza outbreak. During a pandemic, the medical community must have awareness of the ongoing epidemiological analysis and community-wide interventions being recommended by public health leaders, and the public health community must have situational awareness of the evolution of disease that can only come from connectivity to the emergency departments and other acute care settings where patients with influenza are presenting. The inter-pandemic period presents an opportunity to establish and test these relationships.

International Community

Given that viruses do not respect borders, and that one country's actions will have ramifications for the rest of the globe, we should work to align pandemic preparedness and response efforts across nations. The international community should conform to pre-specified standards for disease reporting, scientific cooperation, public health measures to limit disease spread, and the range of related measures that support our objectives of early warning and rapid response. Early adoption of the International Health Regulations by nations represents an important step in this direction, as does the commitment by nations to the principles of the International Partnership on Avian and Pandemic Influenza. The international community must build upon these agreements to establish coordinated national policies, protocols, and procedures to ensure that we have a consistent response across nations upon the emergence of a pandemic virus.

Health and Non-Health Communities

Because the impact of a pandemic will be felt across society, it is essential that all institutions prepare for what would normally be left to the purview of the health and medical communities. This requires a shift in thinking for most governmental and non-governmental entities, particularly businesses, which may not be accustomed to planning around health considerations. While these organizations have a responsibility to plan on behalf of their employees, customers, students, and other stakeholders, it is incumbent upon the health and medical communities to provide guidance on how to accomplish this planning. This can only be accomplished through the establishment of relationships between the health community and agencies across the government and entities across the community.

Animal and Human Health Communities

Animals serve as a limitless reservoir for new human pathogens. While influenza viruses have demonstrated this over centuries, we have also learned this lesson from HIV and the virus responsible for SARS. We must address the barriers between the animal and human health communities that exist at all levels of government, between NGOs, within academia, and in the community. These barriers have impeded international preparedness and response efforts to the ongoing pandemic in birds, have delayed our recognition of threats to human health, and ultimately have contributed to the overall risk of an avian virus adapting itself to the human host. While cooperation is improving between these sectors domestically, we must encourage the same between ministries of agriculture and health in other nations, and require this of the multilateral organizations that represent these communities.

Communicate Risk and Responsibility

Uncertainty during a pandemic will drive many of the outcomes we fear, including panic among the public, unpredictable, and unilateral actions by governments, instability in markets, and potentially

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devastating impacts on the economy. The need for timely, accurate, credible, and consistent information that is tailored to specific audiences cannot be overstated. This requires coordinated messaging by spokespersons across government, at the local, State, tribal, and Federal levels, and by our international partners. It also requires the designation and training of a cadre of spokespersons within relevant organizations, the ability to provide guidance in the setting of incomplete information, and the acknowledgement that this guidance may change as more information becomes available. Such a capability should be developed before a pandemic, as should the key messages that we know we will have to communicate upon the emergence of a pandemic virus.

As important as it will be to provide clear guidance during a pandemic, it is equally important to communicate expectations and responsibilities of all relevant stakeholders before a pandemic begins. Disease transmission occurs on an individual basis, and the outbreak of an infectious disease represents the summation of innumerable individual actions. Actions taken at the individual level do matter, as do actions by all organizations, irrespective of their size.

The need for individual and organizational participation in pandemic planning is amplified by the fact that governments and the Federal Government in particular, have limited ability to impact the spread of disease at the community level. Moreover, we can predict that the Federal Government will have limited capacity to augment the health and other infrastructure needs of specific communities when the entire Nation is overwhelmed. This reality, and the concomitant requirement for local self-sufficiency, must be communicated to States, communities, organizations, commercial enterprises, and even individuals before a pandemic begins.

Support Multilateral Organizations

A pandemic is a global threat that has the potential to impact every nation. Because an outbreak in any location in the world threatens all nations, it is critically important that the international community coordinate its preparedness and response activities. Nowhere is this more apparent than in our containment planning efforts. This requires international standards for surveillance, transparency, sample sharing, and swift coordinated action upon the recognition of an outbreak. It also requires the presence of credible and independent arbiters of scientific and epidemiologic information as it becomes available.

The World Health Organization (WHO) represents the linchpin of international preparedness and response activities. It is bolstered by other multilateral and bilateral organizations, but during a pandemic we will rely upon it to be a highly visible and credible coordinator of the international response. Given the critical role that it plays, it is essential that the international community support its efforts with resources and personnel, and expand plans to provide emergency increases in capacity when the emergence of a pandemic virus is suspected or confirmed.

As we take action to support the efforts of the WHO, we must draw attention to the need to expand and enhance coordination of international animal health efforts. Given the near certainty that the next pandemic will emerge from an animal reservoir, it is critically important that the multilateral organizations responsible for animal health, particularly the United Nations (UN) Food and Agriculture Organization (FAO), be prepared to assist nations that are in the midst of or threatened by an outbreak of avian influenza.

Merge Preparedness for Natural and Deliberate Threats

While the initial events leading to a deliberate or natural outbreak of infectious disease are dramatically different, the actions necessary to prepare, provide early warning, and respond are nearly identical. We

should make this principle explicit in our planning for outbreaks and ensure, to the extent possible, that the mechanisms that we put in place are mutually supportive. This has clear implications for the manner in which the Federal Government directs its biodefense resources, but it similarly places a responsibility upon the public health community to ensure that the infrastructure established at the State, local, and tribal levels to support traditional public health priorities is configured to meet our biodefense requirements.

Advancing Pandemic Preparedness

The U.S. Government has already taken a historic series of actions, domestically and internationally, to address the pandemic threat:

- **The *National Strategy for Pandemic Influenza*** was announced on November 1, 2005, and provides strategic direction for all Federal departments and agencies, and clearly articulates expectations of non-Federal stakeholders, in pandemic preparedness, surveillance, and response. It also outlines a strategy for establishing domestic vaccine and antiviral medication production and stockpile capacity to protect the population and limit the spread of a pandemic virus in the United States and to provide treatment to those who become ill. The *Strategy* is supported by this Plan and department and agency-specific pandemic plans.

- **An Emergency Budget Request of $7.1 billion to support activities over several years** was submitted to Congress to support the objectives of the *Strategy*. An initial appropriation in FY06 of $3.8 billion has been made to support the budget requirements of the first year of the initiative. While much of the funding is directed toward domestic preparedness and the establishment of countermeasure stockpile and production capacity, over $400 million is directed to bilateral and multilateral international efforts and builds upon the $25 million appropriation of funds in the emergency Tsunami Appropriation Act Supplemental of 2005. Key programs that will be supported by the funds appropriated to date:

    - Expansion of domestic vaccine production capacity to provide greater quantities of this critical medical countermeasure than now is possible. The primary objective, depending upon availability of future appropriations and the responsiveness of the vaccine industry, is for domestic manufacturers to be able to produce enough vaccine for the entire U.S. population within 6 months of the recognition of a human influenza virus with pandemic potential. A supporting objective is to develop and maintain a standing stockpile of vaccine to protect 20 million U.S. citizens against each currently circulating influenza virus (currently avian H5N1 virus) that could become a virus with human pandemic potential.

    - Expansion of stockpiles of antiviral medications to treat more U.S. citizens than current stockpiles will allow. The primary objective, depending upon the availability of future appropriations and global production capacity, is to acquire sufficient drugs to treat 75 million U.S. citizens, or 25 percent of the U.S. population, during an influenza pandemic plus 6 million courses to be directed to containment of initial outbreaks in the United States.

    - Expansion of surveillance capabilities domestically and internationally, in humans and animals, to provide early warning of a pandemic and its arrival to our shores, and to target public health interventions during a pandemic.

    - Investments in the development of risk communication strategies, to ensure that timely, credible, and consistent messages are being provided to the public by all authorities before and during a pandemic.

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- Investments in multilateral organizations and on a bilateral basis to expand scientific, public health, surveillance, and response capacity in countries currently affected by the H5N1 avian outbreak.

Enhancing Domestic Preparedness

- **Over $6 billion has been invested in State and local public health and medical preparedness since 2002 for activities that directly support pandemic preparedness.** The development of pandemic plans by States has been a requirement of the Centers for Disease Control and Prevention Cooperative Agreements and the Health Resources and Services Administration Hospital Bioterrorism Preparedness Grants since 2004.

- **Real-time surveillance of disease in communities is being established by the BioSense Real-Time Clinical Connections Program,** in order to provide real-time "situational awareness" to public health officials in communities across the country during a pandemic and to facilitate the targeting of public health interventions. Ten cities were chosen to initiate the program, with a goal of including all 31 BioWatch communities by the end of 2006.

- **The Department of Homeland Security (DHS) has established a National Biosurveillance Integration System** to collect, integrate, and analyze domestic and international all-source information. The system will integrate human disease, agriculture, food, and environmental surveillance systems.

- **A Cabinet-level tabletop exercise of the Federal Government response to a pandemic** was held in December 2005 to identify and address gaps in capabilities and coordination. The exercise was the first of its kind to test the Federal response to any event, natural or deliberate, and highlighted key policy issues that are currently being addressed and resolved. The exercise will lay the foundation for ongoing assessments of Federal preparedness for a pandemic.

- **The Department of Health and Human Services' (HHS) pandemic influenza plan** and guidance for State, local, and tribal preparedness was released on November 2, 2005. It provides comprehensive guidance for States, communities, tribal entities, hospitals, health care providers, and individuals on actions that they should take to prepare for a pandemic.

- **An HHS National meeting of States** was held in Washington, D.C., in December 2005 to provide guidance on the development of State and local pandemic preparedness and response plans. A series of more than 60 local summits on pandemic preparedness, encompassing all 50 States, will be completed in the first half of 2006.

- **The proposed Federal quarantine regulations,** which have been published for public comment, contain enhanced reporting mechanisms and procedures for conducting epidemiologic investigations, and influenza viruses with pandemic potential have been added to the list of quarantinable diseases.

- **A Memorandum of Understanding has been signed by HHS and DHS** to ensure coordination of border screening activities and information sharing for contact tracing during an outbreak of a communicable disease and references operating guidelines specific to H5N1.

Developing, Producing, and Stockpiling Vaccines and Antiviral Medications

- **Human vaccines against the H5N1 avian influenza virus have been developed** in conjunction with manufacturers and are undergoing testing by HHS. Vaccine will be stockpiled to provide an

immediately available supply of "pre-pandemic" H5N1 vaccine while a new vaccine tailored to the specific virus that emerges is developed after a pandemic begins.

- **Investments have been made since 2004 to advance cell culture technology for the production of influenza vaccine.**

- **Over 4 million treatment courses of antiviral medications are held in the Strategic National Stockpile (SNS),** with plans to expand to 50 million courses in the SNS, and another 31 million courses in State-based stockpiles, the procurement of which will be subsidized by the Federal Government.

- **Added procedures for comprehensive liability protection for pandemic and epidemic countermeasure manufacturers, distributors, program planners, persons who prescribe, administer, and dispense countermeasures, officials, agents, and employees of each of these entities, and a compensation program** have been put in place through legislation that was introduced and passed in 2005, thereby removing a major impediment to the establishment of a domestic vaccine production base, while ensuring that those who are harmed by a pandemic vaccine receive compensation.

Enhancing International Cooperation, Capacity, and Preparedness

- **The International Partnership on Avian and Pandemic Influenza** was launched by the United States on September 14, 2005, to ensure transparency, scientific cooperation, rapid reporting of cases, donor coordination, and a series of other actions to support global preparedness and response. The Partnership will increase cooperation among participating countries and international organizations including WHO, FAO, and the World Organization for Animal Health to develop global capacity to address an incipient pandemic. The Partnership agreed at its first meeting in Washington, D.C., in October 2005 to elevate pandemic influenza on national agendas, coordinate efforts among donor and affected nations, mobilize and leverage resources globally, and increase transparency in disease reporting and surveillance and building capacity.

- **The United States is working on a bilateral basis to support local, national, and regional efforts to build capacity, increase reporting, ensure scientific cooperation, and enhance overall preparedness.** The United States, Indonesia, and Singapore also agreed to create a model avian influenza-free zone in Indonesia to develop and demonstrate best practices to prevent infection and spread of a pandemic virus in both animals and humans. The Regional Emerging Disease Intervention Center in Singapore, jointly staffed by Singapore and the United States, is conducting training on avian influenza in Southeast Asia and developing the model for the Joint Avian Influenza Demonstration Project. The United States also is working with China to strengthen vaccine development, disease surveillance and rapid response, and pandemic planning through the U.S.-China Joint Initiative on Avian Influenza. Given the challenge of containing an outbreak of a pandemic virus on the North American continent, the United States has also begun discussions with Canada and Mexico to develop an agreed doctrine to respond to and contain a pandemic.

- **Working through existing multilateral frameworks to advance the goals of the Partnership.**

    - WHO: The United States is assisting WHO in the development of a response and containment protocol for consideration and adoption by the World Health Assembly. In addition, the United States is supporting other WHO efforts at improving the detection and response capabilities of other countries and ensuring that all actions are consistent with the International Health Regulations.

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- APEC: At the November 2005 Asia Pacific Economic Cooperation (APEC) Summit, the United States supported APEC's Initiative to Prepare For and Mitigate an Influenza Pandemic to strengthen response and preparedness in the region, including through an inventory of regional disaster management capabilities, exercise of regional communications, and an Emerging Infectious Diseases Symposium in Beijing.

- GHSAG: Health Ministers from Canada, France, Germany, Italy, Japan, Mexico, United Kingdom, and the United States cooperate in the Global Health Security Action Group (GHSAG) to refine national pandemic influenza plans, support development of WHO protocols for early containment of influenza, and coordinate on capacity building in developing countries.

- G-8: The United States is encouraging the G-8 to support the development of an avian influenza plan and information packages for affected countries to use in the event of an outbreak, to agree on deployment of WHO stockpiles of antiviral medications and to adhere early to WHO's revised International Health Regulations.

- The United States is engaged with the private sector, including business groups like the APEC Business Advisory Council, the U.S.-Association of Southeast Asian Nations (ASEAN) Council, the American Chamber of Commerce, and the non-governmental community, on the role the private sector can play in preparing for and responding to a pandemic outbreak.

Planning Assumptions

Planning Assumptions for the Implementation Plan

Pandemics are unpredictable. While history offers useful benchmarks, there is no way to know the characteristics of a pandemic virus before it emerges. Nevertheless, we must make assumptions to facilitate planning efforts. Federal planning efforts assume the following:

1. Susceptibility to the pandemic influenza virus will be universal.

2. Efficient and sustained person-to-person transmission signals an imminent pandemic.

3. The clinical disease attack rate will be 30 percent in the overall population during the pandemic. Illness rates will be highest among school-aged children (about 40 percent) and decline with age. Among working adults, an average of 20 percent will become ill during a community outbreak.

4. Some persons will become infected but not develop clinically significant symptoms. Asymptomatic or minimally symptomatic individuals can transmit infection and develop immunity to subsequent infection.

5. While the number of patients seeking medical care cannot be predicted with certainty, in previous pandemics about half of those who became ill sought care. With the availability of effective antiviral medications for treatment, this proportion may be higher in the next pandemic.

6. Rates of serious illness, hospitalization, and deaths will depend on the virulence of the pandemic virus and differ by an order of magnitude between more and less severe scenarios. Risk groups for severe and fatal infection cannot be predicted with certainty but are likely to include infants, the elderly, pregnant women, and persons with chronic or immunosuppressive medical conditions.

7. Rates of absenteeism will depend on the severity of the pandemic. In a severe pandemic, absenteeism attributable to illness, the need to care for ill family members, and fear of infection may reach 40 percent during the peak weeks of a community outbreak, with lower rates of absenteeism during the weeks before and after the peak. Certain public health measures (closing schools, quarantining household contacts of infected individuals, "snow days") are likely to increase rates of absenteeism.

8. The typical incubation period (interval between infection and onset of symptoms) for influenza is approximately 2 days.

9. Persons who become ill may shed virus and can transmit infection for one-half to one day before the onset of illness. Viral shedding and the risk of transmission will be greatest during the first 2 days of illness. Children will play a major role in transmission of infection as their illness rates are likely to be higher, they shed more virus over a longer period of time, and they control their secretions less well.

10. On average, infected persons will transmit infection to approximately two other people.

11. Epidemics will last 6 to 8 weeks in affected communities.

12. Multiple waves (periods during which community outbreaks occur across the country) of illness are likely to occur with each wave lasting 2 to 3 months. Historically, the largest waves have occurred in the fall and winter, but the seasonality of a pandemic cannot be predicted with certainty.

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Chapter 3 — Federal Government Response to a Pandemic

While the Implementation Plan (Plan) directs Federal departments and agencies to take action to prepare for a pandemic, it is important for the Federal Government to coordinate closely its efforts to gather relevant data and overall situational awareness in a timely manner from the initial phases of a pandemic until recovery is complete, and to communicate its approach to its international partners, State, local, and tribal entities, critical infrastructure owners and operators, and the public. This section describes the manner in which the Federal Government will coordinate its actions, the specific roles and responsibilities of the various Federal departments and agencies, and the specific actions to be taken at stages before, during, and after the occurrence of the first wave of a pandemic in the United States.

Command, Control, and Coordination of the Federal Response

A pandemic will differ from most natural or manmade disasters in nearly every respect. Unlike events that are discretely bounded in space or time, a pandemic will spread across the globe over the course of months or over a year, possibly in waves, and will affect communities of all sizes and compositions. The impact of a severe pandemic may be more comparable to that of a widespread economic crisis than to a hurricane, earthquake, or act of terrorism. It may present as a particularly severe influenza season, or it may overwhelm the health and medical infrastructure of cities and have secondary and tertiary impacts on the stability of institutions and the economy. These consequences are impossible to predict before a pandemic emerges because the biological characteristics of the virus and the impact of our interventions cannot be known in advance.

Similarly, the role of the Federal Government in a pandemic response will differ in many respects from its role in most other natural or manmade events. The distributed nature of a pandemic, as well as the sheer burden of disease across the Nation, means that the physical and material support States, localities, and tribal entities can expect from the Federal Government will be limited in comparison to the aid it mobilizes for geographically and temporally bounded disasters like earthquakes or hurricanes. Nevertheless, the Federal Government must maintain complete situational awareness and be ready and able to take decisive action to ensure a comprehensive and timely national response to a pandemic. The Federal Government will also bear primary responsibility for certain critical functions, including the support of containment efforts overseas and limitation of the arrival of a pandemic to our shores; provision of clear guidance to State, local, and tribal entities, the private sector and the public on protective measures and responses that should be taken; modifications to the law and regulations to facilitate the national pandemic response; modifications to monetary policy to mitigate the economic impact of a pandemic on communities and the Nation; and many others. The Federal Government will also work to ensure the production and distribution of vaccine and antiviral medications to State, local, and tribal entities, and the acceleration of research, development, testing, and evaluation of vaccines and therapies during the outbreak.

To ensure an effective response, single points of contact within each State and Tribal Nation for the key functional areas of pandemic response will be identified. The Department of Homeland Security (DHS) will solicit from Governors and Tribal Chief Executive Officers a single point of contact within each State and Tribal Nation for overall incident management of pandemic influenza response efforts. The Department of Health and Human Services (HHS) will solicit lead points of contact for public health

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and medical emergency response activities, and the Department of Agriculture (USDA) will solicit lead points of contact for veterinary response activities. DHS will coordinate the consolidation of these points of contact.

States, localities, and tribal entities across the Nation will each have to address the medical and non-medical impacts of the pandemic with available resources. This means that it is essential for State, local, and tribal entities to have plans in place to support the full spectrum of societal needs over the course of weeks or months, and for the Federal Government to provide clear guidance on the manner in which these needs can be met.

It is important that the Federal Government have a defined mechanism for coordination of its response. *The National Response Plan* (NRP) is the primary mechanism for coordination of the Federal Government response to terrorist attacks, major disasters, and other emergencies, and will form the basis of the Federal pandemic response. It defines Federal departmental responsibilities for sector-specific responses, and provides the structure and mechanisms for effective coordination among Federal, State, local, and tribal entities, the private sector, and non-governmental organizations (NGOs). Pursuant to the NRP and Homeland Security Presidential Directive 5 (HSPD-5), the Secretary of Homeland Security is responsible for coordination of Federal operations and resources, establishment of reporting requirements, and conduct of ongoing communications with Federal, State, local, and tribal governments, the private sector, and NGOs.

A pandemic will present unique challenges to the coordination of the U.S. Government response. First and foremost, the types of support that the Federal Government will provide to the Nation are of a different kind and character than those it traditionally provides to communities damaged by natural disasters. Second, although it may occur in discrete waves in any one locale, the national impact of a pandemic could last for many months. Finally, a pandemic is a sustained public health and medical emergency that will have sustained and profound consequences for the operation of critical infrastructure, the mobility of people and freight, and the global economy. Health and medical considerations will affect foreign policy, international trade and travel, domestic disease containment efforts, continuity of operations (COOP) within the Federal Government, and many other aspects of the Federal response.

Pursuant to the NRP, as the primary agency for, and coordinator for, Emergency Support Function #8 (Public Health and Medical Services), the Secretary of Health and Human Services will lead Federal health and medical response efforts and will be the principal Federal spokesperson for public health issues, coordinating closely with DHS on public messaging pertaining to the pandemic. Pursuant to HSPD-5, as the principal Federal official for domestic incident management, the Secretary of Homeland Security will provide coordination for Federal operations and resources, establish reporting requirements, and conduct ongoing communications with Federal, State, local, and tribal governments, the private sector, and NGOs. In the context of response to a pandemic, the Secretary of Homeland Security will coordinate overall non-medical support and response actions, and ensure necessary support to the Secretary of Health and Human Services' coordination of public health and medical emergency response efforts.

The NRP stipulates mechanisms for coordination of the Federal response, but sustaining these mechanisms for several months to over a year will present unique challenges. Day-to-day situational monitoring will occur through the national operations center, and strategic policy development and coordination on domestic pandemic response issues will be accomplished through an interagency body composed of senior decision makers from across the government and chaired by the White House. These and other considera-

tions applicable to response to a pandemic will be incorporated in the NRP review process and inform recommendations on revisions and improvements to the NRP and associated annexes.

Pursuant to the NRP, policy issues that cannot be resolved at the department level will be addressed through the Homeland Security Council/National Security Council (HSC/NSC)-led policy coordination process.

Roles and Responsibilities

The Federal Government

The *National Response Plan* is the primary mechanism for coordination of the Federal Government response to terrorist attacks, major disasters, and other emergencies, and will form the basis of the Federal pandemic response. While the Secretary of Homeland Security is responsible for overall coordination of Federal response actions for a pandemic, nothing in the NRP alters or impedes the ability of Federal, State, local, or tribal departments and agencies to carry out their specific authorities or perform their responsibilities under all applicable laws, Executive orders, and directives. Individual departments and agencies have responsibilities within the NRP for a pandemic, consistent with what is described below:

The Secretary of Health and Human Services will be responsible for the overall coordination of the public health and medical emergency response during a pandemic, to include coordination of all Federal medical support to communities; provision of guidance on infection control and treatment strategies to State, local, and tribal entities, and the public; maintenance, prioritization, and distribution of countermeasures in the Strategic National Stockpile; ongoing epidemiologic assessment, modeling of the outbreak, and research into the influenza virus, novel countermeasures, and rapid diagnostics.

The Secretary of Homeland Security, will be responsible for coordination of the Federal response as provided by the *National Strategy for Pandemic Influenza (Strategy)*, the Homeland Security Act of 2002, and HSPD-5, and will support the Secretary of Health and Human Services' coordination of overall public health and medical emergency response efforts. The Secretary will be responsible for coordination of the overall response to the pandemic, implementation of policies that facilitate compliance with recommended social distancing measures, the provision of a common operating picture for all departments and agencies of the Federal Government, and ensuring the integrity of the Nation's infrastructure, domestic security, and entry and exit screening for influenza at the borders.

The Secretary of State will be responsible for the coordination of the international response, including ensuring that other nations join us in our efforts to contain or slow the spread of a pandemic virus, helping to limit the adverse impacts on trade and commerce, and coordinating our efforts to assist other nations that are impacted by the pandemic.

The Secretary of Defense will be responsible for protecting American interests at home and abroad. The Secretary of Defense may assist in the support of domestic infrastructure and essential government services or, at the direction of the President and in coordination with the Attorney General, the maintenance of civil order or law enforcement, in accordance with applicable law. The Secretary of Defense will retain command of military forces providing support.

The Secretary of Transportation will be responsible for coordination of the transportation sector and will work to ensure that appropriate coordinated actions are taken by the sector to limit spread of infection while preserving the movement of essential goods and services and limiting the impact of the pandemic on the economy.

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The Secretary of Agriculture will be responsible for overall coordination of veterinary response to a domestic animal outbreak of a pandemic virus or virus with pandemic potential and ongoing surveillance for influenza in domestic animals and animal products. The Secretary of Agriculture will also be responsible for ensuring that the Nation's commercial supply of meat, poultry, and egg products are wholesome, not adulterated, and properly labeled and packaged.

The Secretary of the Treasury will be responsible for monitoring and evaluating the economic impacts of the pandemic and will help formulate the economic policy response and advise on the likely economic impacts of containment efforts. The Secretary of the Treasury will also be responsible for preparing policy responses to pandemic-related international economic developments, for example, leading the Federal Government's engagement with the multilateral development banks (MDB) and international financial institutions (IFI), including encouraging MDB and IFI efforts to assist countries to address the impact of pandemic influenza.

The Secretary of Labor will be responsible for promoting the health, safety, and welfare of employees and tracking changes in employment, prices, and other economic measurements.

Other Cabinet heads will retain responsibility for their respective sectors. All departments and agencies will be responsible for developing pandemic plans that (1) provide for the health and safety of their employees; (2) ensure that the department or agency will be able to maintain its essential functions and services in the face of significant and sustained absenteeism; (3) provide clear direction on the manner in which the department will execute its responsibilities in support of the Federal response to a pandemic as described in this Plan; and (4) communicate pandemic preparedness and response guidance to all stakeholders of the department or agency.

Non-Federal Entities

The *Strategy* and this Plan clearly articulate expectations for all stakeholders for pandemic preparedness and response, including international partners, State, local, and tribal entities, the private sector and infrastructure providers, and individuals and families. These expectations can be found under "Roles and Responsibilities" in the subsequent chapters and the "Actions and Expectations" contained at the end of each chapter.

Federal Government Actions during a Pandemic

While the majority of this Plan describes specific actions that will be taken to improve our preparedness, it is important to show how this preparedness will translate to action in the period of time immediately before, during, and after the emergence of a pandemic. The unpredictable nature of a pandemic, the character of the pandemic virus, and the state of our preparedness efforts when a pandemic begins make it difficult to accurately predict all actions that the Federal Government will take during a pandemic. Nevertheless, it is possible to describe what action would be taken if a pandemic begins tomorrow, recognizing that our preparedness and ability to respond will improve with each passing month.

For containment to be effective, the United States and the international community must develop a comprehensive containment strategy that involves commitments of funding, supplies, equipment, training, expertise, personnel, countermeasures (e.g., antiviral medications, vaccine, and personal protective equipment (PPE)), and animal and public health measures in a coordinated, global approach. The success of such an effort, however, will be highly dependent on early notification of influenza cases, in

both humans and animals, caused by strains that have pandemic potential. Countries must immediately notify the World Health Organization (WHO) of such infections in humans, and the World Organization for Animal Health (OIE) for infections in animals, and provide timely sharing of samples to allow for an international response to be initiated.

World Health Organization Phases of a Pandemic

It is most appropriate to link our actions to the phases of a pandemic. The WHO has defined six phases, before and during a pandemic, that are linked to the characteristics of a new influenza virus and its spread through the population. This characterization represents a useful starting point for discussion about Federal Government actions.

Inter-Pandemic Period (period of time between pandemics)

Phase 1: No new influenza virus subtypes have been detected in humans. An influenza virus subtype that has caused human infection may be present in animals. If present in animals, the risk of human disease is considered to be low.

Phase 2: No new influenza virus subtypes have been detected in humans. However, a circulating animal influenza virus subtype poses a substantial risk of human disease.

Pandemic Alert Period

Phase 3: Human infection(s) with a new subtype, but no human-to-human spread, or at most rare instances of spread to a close contact.

Phase 4: Small cluster(s) with limited human-to-human transmission but spread is highly localized, suggesting that the virus is not well adapted to humans.

Phase 5: Larger cluster(s) but human-to-human spread still localized, suggesting that the virus is becoming increasingly better adapted to humans, but may not yet be fully transmissible (substantial pandemic risk).

Pandemic Period

Phase 6: Pandemic phase: increased and sustained transmission in general population.

We are currently in WHO Phase 3 of the Pandemic Alert Period. As previously described, significant action is underway to prepare for a pandemic. It is the policy of the Federal Government to accelerate these preparedness efforts prior to WHO Phase 4, then initiate pandemic response actions at Phase 4, when epidemiological evidence of two generations of human-to-human transmission of a new influenza virus is documented anywhere in the world.

Stages of the Federal Government Response

The WHO phases provide succinct statements about the global risk for a pandemic and provide benchmarks against which to measure global response capabilities. In order to describe the Federal Government approach to the pandemic response, however, it is more useful to characterize the stages of an outbreak in terms of the immediate and specific threat a pandemic virus poses to the U.S. population

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(See *WHO Global Pandemic Phases and the Stages for Federal Government Response* between Chapters 5 and 6). The following stages provide a framework for Federal Government actions:

Stage 0: New Domestic Animal Outbreak in At-Risk Country

Stage 1: Suspected Human Outbreak Overseas

Stage 2: Confirmed Human Outbreak Overseas

Stage 3: Widespread Human Outbreaks in Multiple Locations Overseas

Stage 4: First Human Case in North America

Stage 5: Spread throughout United States

Stage 6: Recovery and Preparation for Subsequent Waves

The following description of the Federal Government response at each of these stages is divided into objectives, actions, policy decisions, and messaging considerations (see *Stages of Federal Government Response* between Chapters 5 and 6). "Immediate Actions" reflect those agreed-upon measures that would be triggered as each landmark for increasing risk to the U.S. population was passed. "Policy Decisions" reflect issues that would have to be considered by the Federal Government at the time, in the context of the available information about the pandemic and the status of our response. Finally, "Communications and Outreach" describes the high-level objectives of the guidance that is provided to the public; institutions; State, local, and tribal authorities; and our international partners.

This Plan will be updated on a regular basis to reflect ongoing policy decisions, as well as improvements in domestic preparedness (e.g., increases in the size of our domestic stockpile or vaccine production capacity).

The list of decisions and actions is not exhaustive—it is intended to provide a high-level overview of the Federal Government approach to a pandemic response. It should also be recognized that during a pandemic a number of actions and decisions will proceed in the face of incomplete information, or in the setting of a rapidly evolving epidemiologic or societal picture. It will be important to maintain a flexible and nimble response posture throughout the response, and adjust our approach as additional situational information becomes available. Finally, there are a series of crosscutting actions that will occur throughout the response. We will continuously review, reassess, and adjust our strategy as new information or response capabilities become available, in areas such as risk communication to the public, our allocation scheme for countermeasures, and the support provided to different sectors of critical infrastructure and the economy.

While this set of actions and decisions represents the Federal Government approach to the pandemic response, this approach will not be taken in a vacuum. We will ensure that our response is closely coordinated with our international partners, multilateral organizations, and State, local, and tribal entities, and that we provide clear, accurate, credible, and timely information about our response to the public and all other stakeholders on an ongoing basis.

Summary of Federal Government Actions during a Pandemic

Stage 0: New Domestic Animal Outbreak in At-Risk Country (WHO Phase 1, 2, or 3)

A human pandemic influenza virus could emerge outside the United States or within our borders. Because of the potential for an HPAI virus, including the current HPAI H5N1, to become a pandemic strain, many international animal health initiatives are being implemented to assist affected countries with their response to disease outbreaks in poultry. Control of threatening viruses among animals is a critical element of the strategy to reduce the level of human exposure, a key risk factor for infection and, therefore, emergence of a pandemic strain.

Regardless of where the risk exists for emergence of a pandemic strain, we must be prepared to respond appropriately. A robust surveillance system in domestic animals and wildlife is required to ensure detection and identify new outbreaks in previously unaffected countries. Of the two, outbreaks in domestic animals present a relatively higher likelihood of human exposure to influenza virus than do outbreaks in wildlife. Domestic animal infections may also present more opportunity than do wildlife infections for an influenza virus to undergo genetic reassortment and become a human pandemic strain. This means that when an influenza virus with human pandemic potential is introduced into domestic birds or other domestic animals in a previously unaffected country, the infection must be detected and eradicated as quickly as possible. If such a virus is found in wild birds or other wildlife, efforts should be directed at preventing it from being introduced into domestic birds or other susceptible animals.

Perhaps most importantly, surveillance of animals needs to be integrated with human influenza surveillance activities at a national level. It is important for results of animal surveillance to serve as an input that may help target human surveillance efforts, relative to temporal, geographic, or other risk factors, especially when an influenza virus with human pandemic potential is detected in birds or other animals.

A confirmed outbreak in domestic animals of an influenza virus with pandemic potential, especially one that has already shown the ability to cause illness in humans, signals an important opportunity to decrease the risk of a human pandemic. When such an outbreak occurs in a country that is not currently experiencing other outbreaks caused by that strain of influenza virus, there will be a variety of actions that need to be taken to address the situation. It is incumbent upon the international community to take rapid action to ascertain the facts on the ground and provide appropriate assistance to the affected country. The steps taken in this stage will be closely coordinated with our international partners and multilateral organizations such as the United Nations Food and Agriculture Organization (FAO) and the OIE.

Should such an outbreak occur within the United States, appropriate response and coordination activities will be initiated as presented in Chapter 7 — Protecting Animal Health.

Objectives

- Track outbreaks until control/resolution.
- Provide coordination mechanisms, logistical support, and technical guidance.
- Monitor for reoccurrence of disease.

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Immediate Actions

- Initiate dialogue with FAO, other relevant international health organizations, and other international partners to ensure complete coordinated support (Department of State (DOS) and USDA).

- Initiate dialogue with affected nation through diplomatic, animal health, and human health channels to ascertain situation, offer scientific, technical, and, potentially, economic and trade assistance, and encourage full and open sharing of information (DOS, HHS, and USDA).

- Prepare to deploy rapid response team including influenza epidemiology, diagnostics, public-health management, and communications, as part of bilateral and multilateral teams to assess situation and requirements for successful animal disease eradication and human disease prevention effort (DOS, USDA, U.S. Agency for International Development (USAID), Department of Defense (DOD), and HHS).

- Prepare to supply testing protocols and deploy reagents and equipment to support diagnostic requirements for both animal and human testing (USDA, HHS, DOD, and DHS).

- Prepare to deploy animal disease response materiel, including PPE (USDA and USAID).

Policy Decisions

- Deployment of countermeasures to affected country as part of the U.S. contribution to an animal disease control and eradication effort.

Communications and Outreach

- All: Advise that the Federal Government, along with international partners, is working to ascertain situation as quickly as possible, and that information will be communicated as it becomes available.

- International: Encourage nations and international animal and public health organizations to engage in rapid, coordinated assessments and coordinated communication of findings.

- Public: Reassure public that disease containment measures have been implemented and indicate that measures are targeted at preventing animal-to-animal and animal-to-human transmission.

Stage 1: Suspected Human Outbreak Overseas (WHO Phase 3)

There are many ways in which suspicious clusters of illness may come to our attention, including through reporting to the WHO, news reporting, clinical results in regional laboratories, or through word of mouth or other informal channels. It is incumbent upon the international community to take rapid action to ascertain the facts on the ground, irrespective of the manner in which the reporting occurs. The steps taken here and at subsequent stages will be closely coordinated with our international partners and multilateral organizations such as the WHO.

With the WHO Secretariat and other partners, countries should agree ahead of time on the core content of basic information packages that will be necessary to give to the public in the event of a pandemic, and, to the greatest extent possible, develop an agreed "script" of common, harmonized messages to broadcast

to the public immediately and continuing for at least 36 to 48 hours after a pandemic has potentially begun.

Objectives

- Rapidly investigate and confirm or refute reports of human-to-human transmission.
- Initiate coordination mechanisms and logistical support that will be necessary if outbreak confirmed.

Immediate Actions

- Initiate dialogue with WHO and other relevant international health organizations to ensure complete coordinated support (DOS and HHS).
- Deploy rapid response team including influenza epidemiology, microbiology, public health management, infection control, and communications, as part of bilateral and multilateral teams to assess situation and identify situation-specific requirements for successful containment effort if human-to-human transmission strongly suspected or confirmed (HHS).
- Ensure rapid genetic sequencing of viral isolates is performed, providing U.S. facilities and resources to support sequencing and comparison with existing influenza gene libraries as needed (HHS).
- Activate logistical capability to transport samples to the United States or other key locations (HHS and DOD).
- Prepare to deploy reagents to support surge diagnostic requirements (HHS).
- Amplify laboratory-based and clinical surveillance in region (DOD and HHS).
- Prepare to provide logistical support for deployment of stockpile materiel to region, including identification of necessary equipment, supplies, and personnel (DOD and HHS).
- Activate Assistant Secretary-level task force to track developments in region, coordinate and communicate information flow across interagency, and coordinate response efforts and decisions (DOS, HHS, and DHS).
- Initiate dialogue with potentially affected nations through diplomatic and health channels to ascertain situation, offer scientific, technical, and potentially economic and trade assistance, and encourage full and open sharing of information; initiate dialogue with international partners to ensure complete coordinated support (DOS and HHS).
- Review domestic plans to increase layered protective measures at borders and prepare to implement travel restrictions from affected areas, as appropriate (DHS, HHS, and Department of Transportation (DOT).

Policy Decisions

- Pre-positioning of U.S. contribution to international stockpile assets in region of suspected outbreak.

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- Vaccination of selected populations with pre-pandemic vaccine.

Communications and Outreach

- All: Advise that the Federal Government, along with international partners, is working to ascertain situation as quickly as possible, and that information will be communicated as it becomes available.

- International: Encourage nations and international organizations to engage in rapid, coordinated assessments and coordinated communication of findings.

- State/local/tribal entities and Institutions: Review pandemic plans and direct to trusted information sources such as **www.pandemicflu.gov.**

- Public: Reassure public, explain confirmed facts, and direct to trusted information sources such as **www.pandemicflu.gov.**

Stage 2: Confirmed Human Outbreak Overseas (WHO Phase 4 or 5)

We will rely upon the WHO to confirm sustained human-to-human transmission of a novel influenza virus, but it is possible that confirmation will come directly from an affected nation or through our own scientists in the affected region.

Objectives

- Contain the outbreak to the affected region(s) and limit potential for spread to the United States.

- Activate the domestic public health and medical response.

Immediate Actions

- Deploy non-countermeasure components of international stockpile and diagnostic reagents to support outbreak investigation, as well as technical and medical assistance (DOS, HHS, and DOD).

- Rapidly assess conditions and likelihood of international containment or slowing of pandemic spread (HHS, DHS, DOD, and DOS).

- Support international deployment of countermeasures to affected region(s) (see below).

- Work with other countries to implement host country pre-departure screening and initiate U.S. en route and arrival screening at U.S. ports of entry (DOS, DOT, DHS, HHS, and DOD).

- Consider travel or routing restrictions from the affected area and for countries that do not have adequate pre-departure screening (DHS, DOT, DOS, and DOD).

- Implement protocols for cargo handling that allow trade to continue, when possible (DHS, DOD, DOS, and DOT).

- Implement protocols to manage or divert inbound international flights with suspected cases of pandemic influenza and prepare to limit domestic ports of entry to manage increased demand for screening, as needed (DOT, DOS, DHS, HHS, and DOD).

- Activate domestic quarantine stations and ensure coordination at State, local, and tribal level, especially with health care resources (HHS and DHS).

- Declare Incident of National Significance (DHS in coordination with other Federal departments).

- Amplify hospital-based surveillance in all communities (HHS).

- Develop seed for vaccine and prepare to produce monovalent vaccine (HHS).

- Meet with vaccine and pharmaceutical manufacturers to discuss maximal exploitation of production capacity and regulatory modifications to facilitate countermeasure production (HHS).

- Develop, produce, and deploy diagnostic reagents for pandemic virus to Laboratory Response Network (LRN) laboratories (HHS).

- Prepare to provide military bases and installation support to Federal, State, local, and tribal agencies (DOD).

- Evaluate ability of pandemic virus to infect and replicate efficiently in poultry or other animals and take appropriate actions based on the results of the evaluation (USDA).

- Determine whether pre-pandemic vaccine is effective against pandemic strain (HHS).

- Review domestic pandemic plans and prepare for response, placing critical staff on recall and pre-deploying assets where appropriate (All).

Policy Decisions

- Deployment of countermeasures to affected region(s) as part of the U.S. contribution to a containment effort.

- Entry/exit screening criteria, nations/regions involved, protocol for isolation and quarantine of passengers and employees.

- Diversion of annual trivalent vaccine production to monovalent pandemic vaccine when seed virus available.

- Pre-vaccination with or administration of a primer dose of pre-pandemic (unmatched) vaccine for emergency response teams (to be followed by pandemic strain vaccine, when available).

- Revision of prioritization and allocation scheme for pandemic vaccine and antiviral medications, based upon real-time situational analysis of characteristics of the pandemic virus, epidemiological analyses, and the most recent data regarding available stockpiles of countermeasures.

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- Deployment of pre-pandemic vaccine to State/tribal entities and to Federal departments and agencies, and initiation of vaccination.

Communications and Outreach

- All: Place all on alert that a high likelihood of a pandemic exists, educate all stakeholders on Federal Government response and containment strategies and expectations for all entities below.

- International: Encourage rapid, coordinated containment effort and coordinated actions to limit from region and to screen passengers.

- State/local/tribal: Place on alert for spread of outbreak to the United States; activate preparedness/response plans and surveillance systems; initiate regular calls with Governors and State/tribal public health and emergency preparedness leaders to provide guidance on preparedness actions necessary and to coordinate messaging.

- Institutions: Make organizations aware of continuity plans and measures to limit infection transmission in workplace; reassure that efforts will be made to limit adverse impact on movement of goods, services and people.

- Public: Prepare public for possibility of a pandemic while providing information about containment efforts, reassure that we have not yet seen cases domestically; review actions that reduce likelihood of influenza exposure and limit influenza transmission.

Stage 3: Widespread Human Outbreaks in Multiple Locations Overseas (WHO Phase 6)

The occurrence of widespread outbreaks suggests that efforts are unlikely to be successful in containing the emerging pandemic. We will focus our efforts on our domestic preparedness posture and response actions and on delaying the onset of epidemics within the United States.

Objectives

- Delay the emergence of pandemic influenza in the U.S. and North American populations.

- Ensure the earliest warning possible of the first case(s) in North America.

- Prepare our domestic containment and response mechanisms.

Immediate Actions

- Re-examine limitation on international travel from affected regions (or regions that do not institute pre-departure screening) and maintain layered screening measures for host country pre-departure, en route, and arrival of U.S.-bound travelers (DOS, DHS, and HHS).

- Prepare "containment stockpile" for deployment to quarantine stations and other locations as appropriate (HHS).

- Maintain heightened hospital-based surveillance in all communities (HHS).

- If not previously available, develop and deploy diagnostic reagents for pandemic virus to all LRN laboratories (HHS).
- Perform real-time modeling and epidemiological analyses to characterize the virus, its speed of spread, and impact on the population to inform recommendations concerning public health interventions and countermeasure prioritization (HHS).
- Deploy antiviral stockpile with appropriate security to State/tribal entities and to Federal departments and agencies, with prioritization and treatment recommendations (HHS).
- Prepare to implement surge plans at Federal medical facilities (HHS, DOD and Department of Veterans Affairs (VA).
- Activate domestic emergency medical personnel plans (HHS and VA).
- If not previously done, divert annual trivalent vaccine production to monovalent pandemic vaccine (HHS).
- Deploy pre-pandemic vaccine to State/tribal entities and to Federal agencies, and initiation of vaccination.

Policy Decisions

- Prioritize efforts for domestic preparedness and response.

Communications and Outreach

- International: Reinforce importance of limiting travel in affected areas and continuing entry/exit screening.
- State/local/tribal: Advise governments to activate pandemic response plans; review influenza case definition and testing protocols used by public health and medical community; announce preliminary conclusions of epidemiologic assessments and modeling; request that State, local, and tribal leadership reach out to critical infrastructure providers to ensure that continuity plans are in place.
- Institutions: Review COOP guidance.
- Public: Review preparedness and countermeasure distribution guidance; advise public to prepare to reduce non-essential domestic travel once epidemic reaches United States.

Stage 4: First Human Case in North America (WHO Phase 6)

We recognize that the development of the first case anywhere in North America represents a significant threat to the entire continent, as for practical purposes it will be impossible to prevent completely the migration of disease across land borders. We also recognize that a pandemic could originate in North America, rather than overseas, in which case our response would begin with the steps below. We will work with Canada and Mexico to delay the spread of the pandemic across North America through aggressive attempts to contain the initial North American outbreaks, recognizing the challenges associated with such an effort.

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Objectives

- Contain the first cases on the continent with slowing of first and subsequent pandemic waves of spread.
- Antiviral treatment and prophylaxis.
- Implement the national response.

Immediate Actions

- Deploy "containment stockpile," if available, to any domestic region with confirmed or suspected cases of pandemic influenza, if an epidemiologic link to an affected region exists (HHS).
- Limit non-essential passenger travel in affected areas and institute protective measures/social distancing, and support continued delivery of essential goods and services (DHS, DOT, and HHS).
- Ensure that pandemic plans are activated across all levels of government and in all institutions (HHS and DHS).
- Continue with development of pandemic vaccine (HHS).
- Activate surge plans within Federal health care systems and request that State, local, and tribal entities do the same (HHS and DHS).
- Continue to develop and deploy diagnostic reagents for pandemic virus to all LRN laboratories and other laboratories with capability and expertise in pandemic influenza diagnostic testing (HHS).
- Antiviral treatment and targeted antiviral prophylaxis (HHS).

Policy Decisions

- Revision of prioritization and allocation scheme for pandemic vaccine as appropriate, based upon characteristics of the pandemic virus and available quantities of vaccine.

Communications and Outreach

- All: Communicate up-to-date information on epidemiologic characteristics of virus and outbreak modeling.
- International: Reinforce importance of travel restrictions and entry/exit screening.
- State/local/tribal: Advise State, local, and tribal leadership to implement pandemic response plans; provide guidance on public communication.
- Institutions: Advise institutions to implement continuity plans.
- Public: Review actions that reduce likelihood of influenza exposure and limit influenza transmission; assure public of ability to maintain domestic safety and security; advise public to

curtail non-essential travel and prepare for implementation of community disease containment measures as epidemic spreads (See *Individual, Family, and Community Response to Pandemic Influenza* between chapters 5 and 6).

Stage 5: Spread throughout United States (WHO Phase 6)

The emergence of human cases in multiple locations around the country will portend a progressive increase in case load on communities and a resulting impact on all institutions, including those supporting critical infrastructure.

Objectives

- Support community responses to the extent possible to mitigate illness, suffering, and death.
- Preserve the functioning of critical infrastructure and mitigate impact to the economy and functioning of society.

Immediate Actions

- Maintain continuous situational awareness of community needs, triage, and direct Federal support of health and medical systems, infrastructure, and maintenance of civil order as feasible (All).
- Deploy pandemic vaccine, if available, with continuously updated guidance on prioritization and use (HHS).
- Continuously evaluate the epidemiology of the pandemic virus and update recommendations on treatment of patients and protective actions for all sectors on an ongoing basis (HHS and DHS).
- Provide guidance on judicious use of key commodities to reduce the likelihood of shortages (DHS).

Policy Decisions

- Determination of whether (and if so, the form of) Federal intervention is required to support critical infrastructure and the availability of key goods and services (such as food, utilities, and medical supplies and services).
- Determination of when travel restrictions previously enacted can be lifted.

Communications and Outreach

- International: Advise that the United States is executing its plans to assure continuity of society and national defense.
- State/local/tribal entities and Institutions: Advise that Federal Government will continue to provide support, as possible; advise continued implementation of continuity plans, update guidance on epidemiology and successful COOP plans.

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- Public: Review actions that reduce likelihood of influenza exposure and limit influenza transmission; provide candid messages about the epidemiology of the virus, the likelihood of contracting influenza and likelihood of severe illness.

Stage 6: Recovery and Preparation for Subsequent Waves (WHO Phase 6 or 5)

While a pandemic may impact the Nation for several months or over a year, a given community can expect to be affected by a pandemic over the course of 6 to 8 weeks. While subsequent waves have been the norm in previous pandemics, it will be important for communities to begin reconstituting themselves as soon as possible in order to mitigate persistent secondary and tertiary impacts of the outbreak, including the adverse economic consequences that are anticipated.

Objectives

- Return all sectors to a pre-pandemic level of functioning as soon as possible.
- Prepare for subsequent waves of pandemic.

Immediate Actions

- Work with private sector, State, local, and tribal entities to prioritize and begin restoring essential services and reviewing plans to maintain continuity of operations in subsequent waves with support of employees that are immunized or have developed immunity (DHS and HHS).
- Redeploy and refit Federal response assets (All).
- Resume essential Federal functions and ensure continuity of operation through subsequent waves (DHS and All).
- Maintain continuous situational awareness of disease in communities, in order to forecast the reduction in illness and reduction in strain on critical infrastructure (HHS and DHS).
- Provide continuously updated information about the epidemiology of the virus, effective treatments, and lessons learned from the first wave, so as to enhance preparedness for subsequent waves (HHS).
- Continue deployment of pandemic vaccine in preparation for subsequent waves (HHS).
- Review lessons learned to develop strategies for subsequent waves (All).

Policy Decisions

- Determination as to whether Federal support is needed for any sector(s) unable to function effectively after the pandemic.

Communications and Outreach

- All: Advise that additional waves of the pandemic may occur and emphasize need to prepare accordingly; communicate key lessons learned to all sectors, and recommend actions to enhance preparedness for subsequent waves.

Chapter 4 — International Efforts

Introduction

Pandemic influenza is a global threat. Given the rapid speed of transmission, the universal susceptibility of human populations, and even a modest degree of lethality, an outbreak of pandemic influenza anywhere poses a risk to populations everywhere. Our international effort to contain and mitigate the effects of an outbreak of pandemic influenza beyond our borders is a central component of our strategy to stop, slow, or limit the spread of infection to the United States.

To meet this important international challenge, all nations and the broader international community must be able to detect and respond rapidly to outbreaks of animal or human influenza with pandemic potential to contain the infection and delay its spread. Many countries, however, do not have sufficient resources or expertise to detect and respond to outbreaks independently. International mechanisms to support effective global surveillance and response, including coordinated provision of accurate and timely information to the public, are also inadequate.

For these reasons, through the International Partnership on Avian and Pandemic Influenza (the Partnership), established by President George W. Bush in September 2005, and other bilateral and multilateral international engagement, the Federal Government is heightening awareness of the threat on the part of foreign governments and publics, and promoting development of national and international capacity and commitment to prevent, detect, and limit the spread of animal and human pandemic influenza within and beyond national borders. We are elevating pandemic influenza on national agendas, coordinating efforts among donor and affected nations, mobilizing and leveraging global resources, increasing transparency in global disease reporting and surveillance, and building global public health capacity. The United States is also offering bilateral assistance to strengthen capacity to fight pandemic influenza in the countries at highest risk.

Key Considerations

With the ever-present threat that a newly emerging strain of animal influenza could spark a human pandemic, it is essential that highly pathogenic viruses in animals, wherever they appear, be carefully monitored for changes that could indicate an elevated threat to humans. An outbreak of a novel strain or subtype of influenza capable of sustained and efficient human-to-human transmission, which could occur in the United States or abroad, would spread quickly within an affected community, doubling in size approximately every 3 days. Thorough preparedness, robust surveillance, and strong response on the part of all countries are critically important, as the probability of containing an outbreak of a pandemic virus at its site of origin depends on how quickly a country detects and reports it, shares and tests viral samples, distributes effective countermeasures, and implements public health measures to limit spread.

There are significant challenges to a rapid response to an incipient human pandemic in many countries at risk. The threat of pandemic influenza may not be widely recognized or understood. Many countries at risk lack robust public health and communications infrastructure, pandemic preparedness plans, and proven logistics capability. In many developing countries the livelihood of families is linked to the animals they own, and reporting an outbreak of animal influenza can result in the destruction of a family's animals and, therefore, a threat to their livelihood. Lack of infrastructure and expertise to detect

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an outbreak in a remote location and quickly transport a sample to a laboratory with appropriate diagnostic capability can impede timely and effective application of countermeasures. Many countries at risk also do not have the veterinary, medical, and non-medical countermeasures, including antiviral medications, to contain a confirmed outbreak.

To promote an effective global response to a pandemic outbreak, donor countries and relevant international health organizations should assist countries that have less capacity and expertise as well as fewer of the necessary resources.

Limited International Capacity

In many of the countries in which the risk of emergence of pandemic influenza is considered to be high, the animal and human health sectors lack the expertise, resources, and infrastructure necessary to effectively detect and contain animal cases and prevent human cases. Recent outbreaks of avian influenza in Asia, Europe, and Africa highlight critical shortcomings in national human and animal disease surveillance and reporting. Early warning and clinical surveillance systems are insufficient to detect changes in an influenza virus that could lead to emergence of a pandemic strain. Key gaps include lack of understanding of the nature of the threat and ways to prevent it, scarcity of well-trained laboratory, epidemiologic, medical, and veterinary staff to provide effective in-country surveillance, and the need for greater commitment and capacity to share data, specimens, and viral isolates rapidly and transparently with national and international animal and human health authorities. International animal and human health mechanisms and resources also need to be strengthened.

Because the risk to public health from an animal influenza virus with human pandemic potential is directly related to the ability to detect and control such viruses in animal populations, the effectiveness of national veterinary services of affected, high-risk, and at-risk countries is critical to minimize human exposure to threatening animal viruses. The objective of controlling or eliminating an animal influenza virus with pandemic potential can only be attained, and then maintained, through concurrent strengthening of national veterinary services. This will require international support for the development of sustainable veterinary services in affected, high-risk, and at-risk countries, and the domestic will of those countries to make such development a priority. Support for development should be based on a unified assessment approach that can be applied in a consistent manner to individual countries to help determine what must be done to create an adequate and sustainable animal health infrastructure.

Likewise, in many countries, limited capacity to detect and control outbreaks of respiratory diseases among humans also adversely impacts on international ability to detect and control the emergence of an influenza pandemic. Countries must give priority to strengthening their public health and respiratory disease case management capacities. The international community must support this prioritization in a consistent and coordinated manner.

As a key part of the U.S.Government's international efforts in support of the *National Strategy for Pandemic Influenza (Strategy)*, under the coordination of the Department of State (DOS) and the U.S. Agency for International Development (USAID), the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), the Department of Homeland Security (DHS), the Department of Transportation (DOT), and the Department of Defense (DOD) are working in cooperation, through complementary strategies, to build capacity in countries at risk to address aspects of avian influenza related to human and animal health.

Preparedness and Planning

Comprehensive preparation including the development and exercise of national and regional plans to respond to a pandemic will facilitate containment efforts and should help mitigate social impacts when containment fails. HHS, DOS, USAID, and USDA are working together to assist priority countries, especially those in which highly pathogenic H5N1 avian influenza is endemic or emerging, to develop, and exercise plans for effective response to a possible extended human pandemic outbreak. We also are supporting public education and risk communication on best practices to prevent and contain animal and human infection.

Surveillance and Response

A country's ability to respond to a human outbreak quickly, requires a broad surveillance network to detect cases of influenza-like illnesses in people, coupled with rapid diagnostic and response capabilities. To help address these challenges, HHS and USAID, in collaboration with DOS, DOD, and international partners, will work together and with the WHO Influenza Network to assist countries at risk, including those that are experiencing outbreaks of H5N1 highly pathogenic avian influenza, to build and improve infrastructure at the central, provincial, and local levels to provide timely notification of suspected human cases of influenza with pandemic potential. Building this capability in countries at risk will facilitate monitoring of disease spread and rapid response to contain influenza outbreaks with pandemic potential. HHS, USAID, DHS, and DOS will support development of rapid response teams, coordinated logistics capability, and new modeling efforts to support containment; increase involvement of the private sector in prevention and control of animal influenza, pandemic planning, and risk management; and improve the ability of the health care sector to control infection and manage cases.

Donor Coordination

To fully address the needs of countries at risk, increased assistance from other countries and international organizations is necessary. In addition, donors must coordinate international assistance resources and activities to avoid duplication of effort and maximize results. DOS, with relevant U.S. Government agencies, is working through the Partnership and other multilateral and bilateral diplomatic contacts to encourage increased, coordinated, international assistance. The United States also will intensify efforts to engage the private sector on the role it can play in preparing for and responding to a pandemic outbreak.

In our bilateral assistance efforts, the United States takes into account assistance pledged by other donors. We target bilateral assistance and expertise to build global veterinary and public health capacity in the countries we believe to be at highest risk, taking into account existing country capacities and needs, and the likelihood that U.S. Government funding will have an impact in a particular country or region given the disease situation, population size, and existing capacities and needs, which vary from country to country. U.S. assistance abroad is intended to protect the health of the American people abroad.

Strengthening International Animal Health Infrastructure

To address needs related to developing sustainable animal health infrastructures in affected, high-risk, or at-risk countries, we will work with the World Organization for Animal Health (OIE), the United Nations (UN) Food and Agriculture Organization (FAO), and other members of the Partnership to develop a unified and consistent approach for such infrastructure development in all countries. The approach will include an assessment of needs for the reduction of animal influenza with human pandemic potential in countries where it exists, and of needs that individual countries may have in making the building of their

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national veterinary services capacity a domestic priority. Potential options for funding to meet those needs will also be identified. The ultimate goal will be to implement a program through the OIE and FAO and other partners to develop stronger international coordination and support for the animal health response to the current H5N1 avian influenza outbreak in Asia, Europe, and Africa, and for prevention and containment of any future animal disease outbreaks of international concern or consequence.

Key Elements of Effective International Response and Containment

To contain an outbreak of influenza with pandemic potential or delay its spread, a coordinated response by the international community in support of national efforts is key. Many affected countries or regions will require international assistance to detect cases early and respond quickly and effectively to prevent spread. Instituting countermeasures to prevent or slow the spread of infection, including exit and entry screening, restrictions on movement across borders, and rapid deployment of international stocks of antiviral medications, requires international preparation and coordination to be most effective. The U.S. Government is working with WHO, the Partnership, and through diplomatic contacts to strengthen international mechanisms to respond to an outbreak of influenza with pandemic potential, including finalization of WHO's doctrine of international response and containment which lays out the responsibilities of the international community and countries with human outbreaks, and includes provisions to develop and deploy critical resources needed to contain the virus. The U.S. Government considers the following to be key elements of an international response effort.

Agreed Epidemiological "Trigger" for International Response and Containment

While WHO has stated that the first potential signal of early pandemic activity cannot be known in advance and precise "triggering" activity cannot be fully developed ahead of time, WHO also has stated that containment will be strongly considered in the following circumstances:

- Moderate-to-severe respiratory illness (or deaths) in three or more health care workers who have no known exposure other than contact with ill patients, and laboratory confirmation of infection (novel influenza virus) in at least one of these workers.
- Moderate-to-severe respiratory illness (or deaths) in 5 to 10 persons with evidence of human-to-human transmission in at least some, and laboratory confirmation of infection (novel influenza virus) in more than two of these persons.
- Compelling evidence that more than one generation of human-to-human transmission of the virus has occurred.
- Isolation of a novel (influenza) virus combining avian and human genetic material or a virus with an increased number of mutations not seen in avian isolates from one or more persons with moderate-to-severe respiratory illness (acute onset), supported by epidemiological evidence that transmission patterns have changed.

The WHO also has stated that containment will not be attempted in any of the following circumstances:

- Laboratory studies fail to confirm infection caused by a novel influenza virus.
- The number or geographical distribution of affected persons is so large at time of detection that it renders containment impracticable for logistic reasons (i.e., the number of persons requiring prophylactic administration of antiviral drugs exceeds available supplies, or the size of the

affected community makes it impossible to ensure adequate supplies of food and shelter, and the provision of medical care and emergency services during a containment operation).

- More than 4 to 6 weeks have passed since detection of the initial cluster, thus decreasing the likelihood that containment would be successful.

The feasibility of rapid containment will further depend on the number of contacts of the initial cases and the ability of the government authorities and international teams to ensure basic infrastructure and essential services to the affected population. Such services include shelter, power, water, sanitation, food, security, and communications with the outside world.

With disease confirmation, the WHO Director-General would announce a human outbreak of an influenza virus with pandemic potential, after consultation with experts from HHS and scientists from other governments. As outlined above, the basis for announcing a human outbreak of pandemic potential would consider a number of factors, including the number of individuals affected, the rapidity of spread, and the virulence of the disease. An outbreak of an influenza virus with pandemic potential is considered a Public Health Emergency of International Concern under the revised International Health Regulations, adopted by the World Health Assembly in May 2005.

Rapid, Transparent Reporting and Sharing of Samples

Countries should immediately take certain actions in response to a suspected outbreak, including prompt reporting of the outbreak to the WHO Secretariat, sharing of viral isolates and/or tissue samples with WHO-designated laboratories for confirmation and vaccine development, activation of national response plans in an effort to contain the outbreak, implementation of public health measures including prophylaxis, vaccination, and social distancing measures (e.g., school closures, snow days, quarantines) in the affected area, epidemiological investigation to identify additional cases and pinpoint the source of the infection, and implementation of screening of passengers. The United States will work with the international community to develop capacity and resources to encourage these actions by countries and regions affected by human outbreaks.

Rapid Response Teams

The international community should develop international Rapid Response Teams to investigate and respond to the suspected beginning of a pandemic. The United States is identifying experts to commit to the teams and encouraging other countries with significant veterinary and public health capacity to do the same. The international community should encourage and assist the WHO Secretariat, the FAO, and the OIE to organize, train, equip, exercise, and deploy these teams.

Stockpiles of Countermeasures

Medical and non-medical countermeasures should be stockpiled and pre-positioned for rapid deployment to help ensure that countries affected by an outbreak of pandemic influenza can launch an effective effort to contain the incipient pandemic. The WHO Secretariat has called for the establishment of an international stockpile of medical countermeasures and the development of an agreed international plan to allocate and deploy them in the event of a pandemic outbreak. WHO is now working with health experts to determine the size, composition, and locations of stockpiles needed for a rapid and effective response and to develop a doctrine of deployment. The U.S. Government has identified medical countermeasures it is prepared to commit for deployment to the international stockpile when needed, and is

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urging other countries to do the same. We also are supporting international efforts to stockpile non-medical countermeasures, both goods and services, to support containment of animal or human influenza outbreaks with pandemic potential, including transportation of personnel and materiel, personal protective equipment, screening and isolation equipment, disinfectants, temporary shelters, and technical and logistical resources needed to implement an effective containment response.

Logistical Support for an International Response

The international community needs to develop a plan and to identify resources to rapidly transport personnel, supplies and other materiel to support an international containment response, including in geographically remote or underdeveloped locations. The U.S. Government is determining its capabilities in this regard, and will encourage the international community to explore the logistical needs for a coordinated international response and how to address them.

Surveillance to Limit Spread

Early outbreak detection with continued surveillance of travelers and institution of appropriate measures, including social distancing, isolation of infected individuals, quarantine of suspected cases, or treatment with antiviral medications can help delay or limit the spread of a virus once a case occurs. Well-coordinated international implementation of entry and exit restrictions is an important component of an effective global response to contain cases and prevent a pandemic. All countries should prepare to implement steps to limit spread, including local, regional, and national entry and exit restrictions based on veterinary and health monitoring, screening and surveillance for humans, animals, and animal products, and information sharing and cooperation to manage borders. Recognizing the significant costs to implementing border restrictions and the need for international coordination to achieve maximum efficacy, the U.S. Government is examining which surveillance steps will be most effective in limiting spread, including pre-departure exit screening for travelers from affected areas, a reduction of the number of entry and exit points to the United States for international travelers, disease surveillance and entry screening at U.S. borders, and exit screening for travelers leaving the United States in the event of a case occurring here. The international community should provide technical assistance and support personnel to countries that need it to implement screening quickly and effectively. We will endeavor to establish agreements and arrangements with our international partners to ensure the international community takes coordinated action on screening, that such measures are tailored as narrowly as possible to be consistent with efficacy, and that they are lifted quickly when their utility has ended.

Development of Vaccines and Rapid Diagnostics

Vaccines when they become available will be a major means of controlling the spread of a pandemic and reducing associated mortality and morbidity. The vaccine industry, however, faces many risks and uncertainties, including unpredictable market demand and pricing, liability and intellectual property considerations, and regulatory and tax issues. As a result, global and domestic vaccine research and manufacturing capacity is limited. Strong public/private partnerships are needed among government, academia, and industry globally as well as nationally to build vaccine production capacity to levels necessary to address a pandemic and establish a reliable vaccine supply. In addition to its efforts to increase domestic vaccine production capacity, the United States is working through several programs to provide direct and indirect support to multinational vaccine manufacturers, foreign academic institutions, and foreign governments to increase global vaccine production capacity. HHS is supporting advanced development of cell-based influenza vaccines, the evaluation of new H5N1 vaccine candidates, and

development of global capacity to produce large quantities of pre-pandemic vaccine (i.e., a vaccine against human infection with the strain of influenza A (H5N1) that is currently circulating among poultry) on a commercial scale through the award of contracts to U.S. and international companies. HHS also is supporting development of H5N1 vaccines in Vietnam and other countries at risk, and beginning discussions with health officials in Southeast Asia concerning possible joint clinical evaluation of avian influenza vaccines in human subjects. HHS also will continue to support development of pandemic influenza vaccines at eligible international as well as domestic research institutions. HHS, USDA, and the Department of the Interior (DOI) are supporting additional efforts to sequence influenza viruses from wild birds, live bird markets, and pigs in Asia and North America, with plans to expand surveillance and collection sites in the future.

The development of rapid diagnostic tests and the distribution of diagnostic reagents and tests are also critical components of pandemic influenza preparedness. USDA has developed and applied a real-time diagnostic protocol to analyze influenza in animal specimens and is assisting countries to adopt and apply this protocol in support of surveillance and response programs for avian influenza among animals. The HHS Centers for Disease Control and Prevention (CDC) and the private sector have developed high-throughput rapid diagnostic kits that can provide results in 4 hours and will undergo field testing by U.S. and Southeast Asian scientists and public health officials to ascertain the utility and robustness of these products in real-time scenarios for detection and reporting of influenza and other viruses in humans and animals.

Effective Public Communication

Public audiences in affected countries and countries at risk will require targeted communications in local languages to understand the threat of influenza with pandemic potential in animals and of human pandemic influenza, the preventive measures that should be taken now, and what actions must be taken if a pandemic occurs. The WHO Secretariat requires the resources to develop and implement international media and risk communications strategies. The Federal Government is pursuing a two-track approach. HHS, USAID, USDA, DOD, and DOS are implementing coordinated, complementary communication plans to reach their respective constituencies with focused and consistent messages. In addition, the Federal Government is working with the WHO Secretariat to coordinate U.S. Government messages with those of other countries so the public receives the same message from their governments, WHO, and U.S. public health authorities. In addition to executing a comprehensive risk communication strategy in the United States, HHS also is working with health officials overseas to develop effective local language health-based messages for the foreign audiences. USAID and USDA are targeting behavior change communications to poultry farmers and the general public in affected regions and DOS is implementing broad-based domestic and international communications plans that inform U.S. and foreign audiences about international initiatives and plans to address the threat of avian and pandemic influenza.

Assistance to United States Citizens Traveling or Living Abroad

The Federal Government will provide U.S. citizens living and traveling abroad with timely, accurate information on avian influenza, through websites, travel information, and meetings. U.S. Embassies and Consulates in countries in which a virus with pandemic potential has been found in wild and/or domestic birds, or where human cases have occurred, will use town hall meetings and their local warden system information networks to disseminate information and enable U.S. citizens to make informed decisions. U.S. Embassies and Consulates are also working to identify local medical capabilities and resources that would be available to Americans in the event of a "stay in place" response to a pandemic,

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noting WHO and HHS advice that the close physical proximity entailed by air travel poses a particular risk of human-to-human transmission. The Federal Government's ability to provide consular assistance to U.S. citizens who are living and traveling abroad in the event of a pandemic may be limited because travel into, out of, or within a country may not be possible, safe, or medically advisable.

Assistance to the United States

We will develop policies to request, accept, and utilize foreign aid, both material and personnel, quickly in the event that a pandemic outbreak first occurs in the United States, or elsewhere in North America or the Western Hemisphere.

Roles and Responsibilities

The responsibility for preparing for, detecting, and responding to an outbreak of influenza with pandemic potential is global. An outbreak anywhere is a threat to populations everywhere. All nations and relevant international organizations have a responsibility to prepare to respond immediately and leverage all resources, domestic and international, to contain human or animal cases, wherever they may occur. In the event of an outbreak, the government of the affected nation has an obligation to report it immediately to appropriate international organizations (e.g., WHO, OIE) and share epidemiological data and samples with relevant international organizations. In addition, the Federal Government, States, tribal entities, and localities, private sector entities with activities overseas, and international health organizations all have key roles to play in fighting pandemic influenza.

The Federal Government

The Federal Government will encourage engagement by other governments, relevant international organizations, and the private sector to strengthen international capacity and commitment to prepare for, detect, and respond to animal or human outbreaks of influenza with pandemic potential.

Department of State: DOS leads the Federal Government's international engagement, bilateral and multilateral, to promote development of global capacity to address an influenza pandemic. With technical support from HHS and USDA, DOS also leads coordination of the Federal Government's international efforts to prepare for and respond to a pandemic, including the interagency process to identify countries requiring U.S. assistance, identify priority activities, and ensure Federal Government assistance reflects those priorities. DOS is also the coordinating agency for the International Coordination Support Annex to the *National Response Plan* (NRP), with assistance provided by other Federal agencies. DOS is responsible for providing consular services to American citizens who are traveling or residing abroad, including endeavoring to inform American citizens abroad where they can obtain up-to-date information and pandemic risk level assessments to enable them to make informed decisions and take appropriate personal protective measures. DOS sets policies for Federal employees who are working abroad under Chief of Mission authority, including in the event of a pandemic.

In carrying out these responsibilities, DOS works closely with other Federal departments and agencies that bring critical expertise to bear and play a key role in our international prevention and containment efforts, including through engagement with their counterparts in foreign governments and with relevant international organizations. Overseas, in particular, Federal Government departments and agencies cooperate under the authority of the Chief of Mission to bring their respective expertise and resources to bear in a coordinated Federal Government effort.

U.S. Agency for International Development: USAID leads on international disaster response, the development of health capacity abroad, including public health capacity, the training of non-health professionals, and operational coordination for the provision of U.S. international health and development assistance. USAID plays a critical role in bridging between the human and animal health sectors to ensure a comprehensive and cross-sectoral international response to the threat of avian influenza. With technical guidance from HHS and USDA respectively, USAID will work closely with WHO and FAO to ensure strong coordination and standardization of efforts to prepare for, identify, and respond to outbreaks of influenza with pandemic potential in either animal or human populations. In addition, working through non-governmental organizations (NGOs) and the private sector, USAID will expand capacities for the early detection of outbreaks, and support behavior change communications and public efforts in affected countries. A key part of these efforts will be to provide direct financial and commodity support to country-level rapid response teams to ensure timely and effective containment of influenza outbreaks in humans and animals.

Department of Health and Human Services: HHS's primary international responsibilities are those actions required to protect the health of all Americans, in cooperation with the Secretariat of the WHO and other technical partners, including leading Federal Government efforts in the surveillance and detection of influenza outbreaks overseas; supporting rapid containment of localized outbreaks of novel human influenza viruses where and when containment is feasible; leading Federal Government participation in international collaboration on research into human influenza, including zoonotic varieties; providing training to foreign health professionals in how to recognize and treat influenza; providing training and guidance to national and local public health authorities in foreign nations on the use, timing, and sequencing of community infection control measures; and implementing any necessary travel restrictions. HHS's international roles and responsibilities are further defined in the International Coordination Support Annex to the NRP. HHS also will work with USAID in developing local-language campaigns overseas to communicate information related to pandemic influenza, and in supporting the U.S. Government's participation in international efforts to stockpile countermeasures against possible influenza pandemics, and offer our international partners recommendations related to the use, distribution, and allocation of such countermeasures. HHS is the lead Federal Government technical agency for interactions within the Global Health Security Action Initiative, manages the development of a North American Pandemic Influenza Plan under the Security and Prosperity Partnership of North America, and supports DOS in diplomatic and scientific efforts undertaken under the umbrella of the International Partnership on Avian and Pandemic Influenza.

Department of Agriculture: USDA leads the Federal Government's participation in international collaboration on animal health research, risk analyses, transboundary movement of animals and animal products, governance of international agricultural organizations (e.g., FAO, OIE), and delivery of veterinary and agricultural expertise to other countries. USDA personnel at U.S. missions throughout the world collect information, facilitate policy dialogue, and encourage host countries' cooperation with the United States and compliance with international standards on matters concerning animal health. USDA conducts agricultural research and technical and policy outreach with its established public (e.g., land-grant universities) and private stakeholders, strategically coordinating with international, domestic, and other Federal Government participants. USDA analyzes the short- and long-term economic impact of influenza outbreaks among animals, as well as the impact of a potential pandemic on the agricultural sector, while pursuing prevention and control strategies to support international agricultural systems and commerce.

Department of Homeland Security: DHS coordinates overall Federal domestic incident management in accordance with the NRP and supports implementation of the International Coordination Support

Annex to the NRP. With respect to the U.S. Government's international efforts to fight pandemic influenza, DHS supports DOS as the coordinating agency for the international component of an incident under the NRP. DHS, in coordination with DOT, will engage the international transportation industry via the various industry associations and groups. DHS, in collaboration with DOS and HHS, leads the effort to engage foreign entities in sharing passenger manifest information on travelers exposed to pandemic influenza. DHS supports DOS, DOT, and HHS efforts with foreign governments to screen and limit travel to the United States of travelers exposed to pandemic influenza.

Department of Transportation: DOT will support DOS efforts to coordinate with other Federal Government participants on international pandemic response. DOT will collaborate with DHS to implement transportation and border measures, conduct outreach with its public and private stakeholders, and provide emergency management and guidance for civil transportation resources and systems. In its role in the global transportation network, DOT will support international efforts by marshaling transportation planning and emergency support activities.

Department of Defense: DOD supports DOS in international engagement to promote global capacity to address an influenza pandemic consistent with its national security mission. DOD is responsible for the protection of its forces, including providing up-to-date information and pandemic risk-level assessments to enable DOD forces abroad to make informed decisions and take appropriate personal protective measures. The first priority of DOD support, in the event of a pandemic, will be to provide sufficient personnel, equipment, facilities, materials, and pharmaceuticals to care for DOD forces, civilian personnel, dependents, and beneficiaries to protect and preserve the operational effectiveness of our forces throughout the globe. DOD sets policies for deployed military forces working abroad in the Geographic Combatant Commander's area of responsibility and under the commander's command authority, consistent with the responsibilities outlined in the Unified Command Plan. DOD, in conjunction with DOS and HHS, will utilize its existing research centers to strengthen recipient nation capability for surveillance, early detection, and rapid response to animal and human avian influenza.

Department of the Treasury: Treasury assists in analyzing potential economic impacts and monitoring and preparing policy responses to pandemic-related international economic developments. Treasury also leads the U.S. Government's engagement with the multilateral development banks (MDB) and international financial institutions (IFI), including encouraging MDB and IFI efforts to assist countries to address the impact of pandemic influenza.

Department of Commerce: DOC facilitates the expedited interagency review for any export licenses needed for items necessary for overseas shipment in response to an avian influenza pandemic. DOC coordinates, as needed, with HHS/CDC to expedite export licenses of strains, test kits/equipment, and technology to specified destinations in order to allow rapid identification of strains, and provide on ground support to contain/mitigate a pandemic to support development of scientific and epidemiological expertise in affected regions to ensure early recognition of changes in pattern of outbreak.

State, Local, and Tribal Entities

State, local, and tribal authorities ensure that foreign diplomatic and consular personnel in the United States are kept informed of developments relevant to their rights and responsibilities under international and domestic law and that they can perform their authorized functions, including functions of consular protection and assistance. In the event of a pandemic, personal inviolability and other privileges and immunities need to be taken into account when protective measures such as quarantine are being consid-

ered, and it will be important that States, localities, and tribal entities afford consular communication and access to non-official foreign nationals who may be quarantined. State, local, and tribal entities, especially those along a U.S. border, should work with DOS on these matters and more generally in pandemic preparedness planning, including engaging with foreign countries and the broader international community on measures to prevent and contain pandemic influenza. The interaction between U.S. States/Tribal Nations and their Canadian and Mexican counterparts, under DOS coordination, will be crucial during implementation of the North American Pandemic Influenza Plan under the Security and Prosperity Partnership.

The Private Sector and Critical Infrastructure Entities

The U.S. Government works with the private sector to leverage its presence and resources overseas to prepare for, detect, and respond to a pandemic.

Individuals and Families

Private Americans who are living or traveling abroad should make personal plans relating to their medical care, ability to address a "stay-in-place" response, and the possibility that international movement will be restricted for public health reasons.

International Partners

Three international organizations play key roles with respect to preparing for, detecting, and containing an outbreak of animal or pandemic influenza. The WHO Secretariat and its Regional Offices and the WHO Influenza Network help build international public health capacity, encourage and assist countries to develop and exercise pandemic preparedness plans, and set international public health standards. The WHO leadership coordinates the international response to an outbreak of pandemic influenza, including through its Global Outbreak Alert and Response Network (GOARN), consistent with the revised International Health Regulations (IHRs) as adopted by the World Health Assembly in May 2005 for entry into force in June 2007, which will govern the obligations of WHO member states to report public health emergencies of international concern to the WHO Secretariat and describe steps countries may take to limit international movement of travelers, conveyances, or cargo to prevent the spread of disease. The OIE and the FAO share the lead on animal health and work with the United States and other nations to detect, respond to, and contain outbreaks of influenza with pandemic potential in animals. The Senior UN System Coordinator for Avian and Human Influenza, appointed by the UN Secretary General in September 2005, will coordinate the efforts of WHO and the full range of UN organizations that may be tapped in the fight against pandemic influenza.

MDBs are preparing to provide loans and technical assistance to help borrowing member countries assess the potential economic impact of and develop action plans to respond to an influenza pandemic. The Asian Development Bank has approved a line of credit and approved grants to fight infectious diseases in Asia, including avian influenza, and has conducted initial economic analysis on the impact that a wider avian influenza outbreak could have on the regional economy. The World Bank has opened a line of credit to fight an influenza pandemic and is establishing a unit to track donor financial commitments and spending.

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Actions and Expectations

4.1. Pillar One: Preparedness and Communication

Preparedness is key to an effective effort to contain an outbreak of influenza with pandemic potential at home or abroad. The United States will work to improve the international community's capacity and the commitment to take coordinated, effective action to contain an outbreak at its site of origin if possible and if not, to slow or limit its spread; to provide and coordinate assistance to nations that lack the capacity to detect independently and respond to an outbreak of animal or human influenza with pandemic potential; to develop and exercise pandemic response plans; to increase medical, veterinary, and scientific capacity and national and international supplies of countermeasures; and to communicate clearly and effectively with all stakeholders before and during a pandemic. These international activities will benefit or advance the health of the American people.

a. Planning for a Pandemic

4.1.1. Support the development and exercising of avian and pandemic response plans.

4.1.1.1. DOS, in coordination with HHS, USAID, DOD, and DOT, shall work with the Partnership, the Senior UN System Coordinator for Avian and Human Influenza, other international organizations (e.g., WHO, World Bank, OIE, FAO) and through bilateral and multilateral initiatives to encourage countries, particularly those at highest risk, to develop and exercise national and regional avian and pandemic response plans within 12 months. Measure of performance: 90 percent of high-risk countries have response plans and plans to test them.

4.1.1.2. USDA, USAID, and HHS shall use epidemiological data to expand support for animal disease and pandemic prevention and preparedness efforts, including provision of technical assistance to veterinarians and other agricultural scientists and policymakers, in high-risk countries within 12 months. Measure of performance: all high-risk and affected countries have in place (1) national task forces meeting regularly with representation from both human and animal health sectors, government ministries, businesses, and NGOs; (2) national plans, based on scientifically valid information, developed, tested, and implemented for containing influenza in animals with human pandemic potential and for responding to a human pandemic.

4.1.1.3. DOD, in coordination with DOS and other appropriate Federal agencies, host nations and regional alliance military partners, shall, within 18 months: (1) conduct bilateral and multilateral assessments of the avian and pandemic preparedness and response plans of the militaries in partner nations or regional alliances such as NATO focused on preparing for and mitigating the effects of an outbreak on assigned mission accomplishment; (2) develop solutions for identified national and regional military gaps; and (3) develop and execute bilateral and multilateral military-to-military influenza exercises to validate preparedness and response plans. Measure of performance: all countries with endemic avian influenza engaged by U.S. efforts; initial assessment and identification of exercise timeline for the military of each key partner nation completed.

4.1.2. Expand in-country and abroad, medical, veterinary, and scientific capacity to respond to an outbreak.

4.1.2.1. DOS shall ensure strong U.S. Government engagement in and follow-up on bilateral and multilateral initiatives to build cooperation and capacity to fight pandemic influenza internationally, including the Asia-Pacific Economic Cooperation (APEC) initiatives (inventory of resources and regional expertise to fight pandemic influenza, a region-wide tabletop exercise, a Symposium on Emerging Infectious Diseases to be held in Beijing in April 2006 and the Regional Emerging Disease Intervention (REDI) Center in Singapore), the U.S.-China Joint Initiative on Avian Influenza, and the U.S.-Indonesia-Singapore Joint Avian Influenza Demonstration Project; and shall develop a strategy to expand the number of countries fully cooperating with U.S. and/or international technical agencies in the fight against pandemic influenza, within 6 months. Measure of performance: finalized action plans that outline goals to be achieved and timeframes in which they will be achieved.

4.1.2.2. HHS shall staff the REDI Center in Singapore within 3 months. Measure of performance: U.S. Government staff provided to REDI Center.

4.1.2.3. USDA, working with USAID and the Partnership, shall support the FAO and OIE to implement an instrument to assess priority countries' veterinary infrastructure for prevention, surveillance, and control of animal influenza and increase veterinary rapid response capacity by supporting national capacities for animal surveillance, diagnostics, training, and containment in at-risk countries, within 9 months. Measure of performance: per the OIE's Performance, Vision and Strategy Instrument, assessment tools exercised and results communicated to the Partnership, and priority countries are developing, or have in place, an infrastructure capable of supporting their national prevention and response plans for avian or other animal influenza.

4.1.2.4. USDA, in coordination with DOS, USAID, the OIE, and other members of the Partnership, shall support FAO to enhance the rapid detection and reporting of, response to, and control or eradication of outbreaks of avian influenza, within 12 months. Measure of performance: an international program is established and providing functional support to priority countries with rapid detection and reporting of, response to, and control or eradication of outbreaks of avian influenza, as appropriate to the country's specific situation.

4.1.2.5. HHS, in coordination with USAID, shall increase rapid response capacity within those countries at highest risk of human exposure to animal influenza by supporting national and local government capacities for human surveillance, diagnostics, and medical care, and by supporting training and equipping of rapid response and case investigation teams for human outbreaks., within 9 months. Measure of performance: trained, deployable rapid response teams exist in countries with the highest risk of human exposure.

4.1.2.6. DOD, in coordination with DOS, host nations, and regional alliance military partners, shall assist in developing priority country military infection control

and case management capability through training programs, within 18 months. Measure of performance: training programs carried out in all priority countries with increased military infection control and case management capability.

4.1.2.7. Treasury shall encourage and support MDB programs to improve health surveillance systems, strengthen priority countries' response to outbreaks, and boost health systems' readiness, consistent with legislative voting requirements, within 12 months. Measure of performance: projects that fit relevant MDB criteria approved in at least 50 percent of priority countries.

4.1.3. Educate people in priority countries about high-risk practices that increase the likelihood of virus transmission from animals and between humans.

4.1.3.1. USAID, HHS, and USDA shall conduct educational programs focused on communications and social marketing campaigns in local languages to increase public awareness of risks of transmission of influenza between animals and humans, within 12 months. Measure of performance: clear and consistent messages tested in affected countries, with information communicated via a variety of media have reached broad audiences, including health care providers, veterinarians, and animal health workers, primary and secondary level educators, villagers in high-risk and affected areas, poultry industry workers, and vendors in open air markets.

4.1.3.2. HHS and USAID shall work with the WHO Secretariat and other multilateral organizations, existing bilateral programs and private sector partners to develop community- and hospital-based health prevention, promotion, and education activities in priority countries countries within 12 months. Measure of performance: 75 percent of priority countries are reached with mass media and community outreach programs that promote AI awareness and behavior change.

b. Communicating Expectations and Responsibilities

4.1.4. Work to ensure clear, effective, and coordinated risk communication, domestically and internationally, before and during a pandemic. This includes identifying credible spokespersons at all levels of government to effectively coordinate and communicate helpful, informative, and consistent messages in a timely manner.

4.1.4.1. DOS and HHS, in coordination with other agencies, shall ensure that the top political leadership of all affected countries understands the need for clear, effective coordinated public information strategies before and during an outbreak of avian or pandemic influenza within 12 months. Measure of performance: 50 percent of priority countries that developed outbreak communication strategies consistent with the WHO September 2004 Report detailing best practices for communicating with the public during an outbreak.

4.1.4.2. DOS and HHS, in coordination with other agencies, shall implement programs within 3 months to inform U.S. citizens, including businesses, NGO personnel, DOD personnel, and military family members residing and traveling abroad, where they may obtain accurate, timely information, including risk level assess-

ments, to enable them to make informed decisions and take appropriate personal measures. Measure of performance: majority of registered U.S. citizens abroad have access to accurate and current information on influenza.

4.1.4.3. DOS and HHS shall ensure that adequate guidance is provided to Federal, State, tribal, and local authorities regarding the inviolability of diplomatic personnel and facilities and shall work with such authorities to develop methods of obtaining voluntary cooperation from the foreign diplomatic community within the United States consistent with U.S. Government treaty obligations within 6 months. Measure of performance: briefing materials and an action plan in place for engaging with relevant Federal, State, tribal, and local authorities.

4.1.4.4. USAID, USDA, and HHS shall work with the WHO Secretariat, FAO, OIE, and other donor countries within 12 months to implement a communications program to support government authorities and private and multilateral organizations in at-risk countries in improving their national communications systems with the goal of promoting behaviors that will minimize human exposure and prevent further spread of influenza in animal populations. Measure of performance: 50 percent of priority countries have improved national avian influenza communications.

4.1.4.5. USAID, in coordination with DOS, HHS, and USDA, shall develop and disseminate influenza information to priority countries through international broadcasting channels, including international U.S. Government mechanisms such as Voice of America and Radio Free Asia (radio, television, shortwave, Internet), and share lessons learned and key messages from communications campaigns, within 12 months. Measure of performance: local language briefing materials and training programs developed and distributed via WHO and FAO channels.

c. Producing and Stockpiling Vaccines, Antiviral Medications, and Medical Material

4.1.5. Encourage nations to develop production capacity and stockpiles to support their response needs, to include pooling of efforts to create regional capacity.

4.1.5.1. DOS, in coordination with other agencies, shall use the Partnership and bilateral and multilateral diplomatic contacts on a continuing basis to encourage nations to increase international production capacity and stockpiles of safe and effective human vaccines, antiviral medications, and medical material within 12 months. Measure of performance: increase by 50 percent the number of priority countries that have plans to increase production capacity and/or stockpiles.

4.1.5.2. HHS and USAID shall work to coordinate and set up emergency stockpiles of protective equipment and essential commodities other than vaccine and antiviral medications for responding to animal or human outbreaks within 9 months. Measure of performance: essential commodities procured and available for deployment within 24 hours.

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4.1.5.3. HHS shall provide technical expertise, information, and guidelines for stockpiling and use of pandemic influenza vaccines within 6 months. Measure of performance: all priority countries and partner organizations have received relevant information on influenza vaccines and application strategies.

4.1.5.4. USDA and USAID, in cooperation with FAO and OIE, shall provide technical expertise, information and guidelines for stockpiling and use of animal vaccines, especially to avian influenza affected countries and those countries at highest risk, within 6 months. Measure of performance: all priority countries and relevant international organizations have received information on animal vaccines' efficacy and application strategies to guide country-specific decisions about preparedness options

4.1.6. Facilitate appropriate coordination of efforts across the vaccine manufacturing sector.

4.1.6.1. DOS, in coordination with HHS and other agencies, shall continue to work through the Partnership and other bilateral and multilateral venues to build international cooperation and encourage countries and regional organizations to develop diagnostic, research and vaccine manufacturing capacity within 24 months. Measure of performance: global diagnostic and research capacity increased significantly compared to 24 months earlier; significant investments made to expand international vaccine manufacturing capacity.

4.1.6.2. HHS, in coordination with the WHO Secretariat, shall establish at least six new sites for Collaborative Clinical Research on Emerging Infectious Diseases to conduct collaborative clinical research on the diagnostics, therapeutics, and natural history of avian influenza and other human emerging infectious diseases. In addition, within 18 months it will provide in-country support for one or more partner countries for human avian influenza clinical trials. Measure of performance: cooperative programs established in six new sites, to include the initiation of research protocols and design of clinical trials.

4.1.6.3. USDA shall generate new information on avian vaccine efficacy and production technologies and disseminate to international organizations, animal vaccine manufacturers, and countries at highest risk within 6 months. Measure of performance: information disseminated to priority entities.

d. Establishing Distribution Plans for Vaccines and Antiviral Medications

4.1.7. Develop credible countermeasure distribution mechanisms for vaccine and antiviral agents prior to and during a pandemic.

4.1.7.1. DOS shall work with HHS and USAID, in collaboration with the WHO Secretariat, to coordinate the U.S. Government contribution to an international stockpile of antiviral medications and other medical countermeasures, including international countermeasure distribution plans and mechanisms and agreed prioritization of allocation, within 6 months. Measure of performance: release of proposed doctrine of deployment and concept of operations for an international stockpile.

4.1.7.2. The Department of Justice (DOJ) and DOS, in coordination with HHS, shall consider whether the U.S. Government, in order to benefit from the protections of the Defense Appropriations Act, should seek to negotiate liability-limiting treaties or arrangements covering U.S. contributions to an international stockpile of vaccine and other medical countermeasures, within 6 months. Measure of performance: review initiated and decision rendered.

4.1.7.3. USDA, in collaboration with FAO and OIE, shall develop and provide best-practice guidelines and technical expertise to countries that express interest in obtaining aid in the implementation of a national animal vaccination program, within 4 months. Measure of performance: interested countries receive guidelines and other assistance within 3 months of their request.

e. Advancing Scientific Knowledge and Accelerating Development

4.1.8. Ensure that there is maximal sharing of scientific information about influenza viruses between governments, scientific entities, and the private sector.

4.1.8.1. HHS shall support the Los Alamos H5 Sequence Database and the Institute for Genomic Research (TIGR), for the purpose of sharing avian H5N1 influenza sequences with the scientific community within 24 months. Measure of performance: completed H5 sequences entered into both the Los Alamos database and GenBank and annotated.

4.1.8.2. HHS shall enhance a regional influenza genome reference laboratory in Singapore within 9 months. Measure of performance: capacity to sequence complete influenza virus genome established in Singapore; all reported novel animal influenza samples sequenced and made available on public databases.

4.1.8.3. USDA and USAID shall work with international organizations, governments, and scientific entities to disseminate and exchange information to bolster and apply avian influenza prevention and response plans in priority countries, within 12 months. Measure of performance: 50 percent of priority countries have national epizootic prevention and response plans based upon pragmatic, comprehensive, and scientifically valid information.

4.1.8.4. HHS and DOD, in coordination with DOS, shall enhance open source information sharing efforts with international organizations and agencies to facilitate the characterization of genetic sequences of circulating strains of novel influenza viruses within 12 months. Measure of performance: publication of all reported novel influenza viruses which are sequenced.

4.2. Pillar Two: Surveillance and Detection

To increase the probability of containing a virus with pandemic potential that originates outside the United States or delaying its spread as long as possible as we activate protective measures at home, we will need early recognition of the problem. We will work to ensure effective surveillance, rapid detection, and transparent reporting of outbreaks internationally by strengthening scientific and epidemiological expertise abroad; enhancing laboratory capacity and diagnostic

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capabilities; and establishing international mechanisms and commitment to ensure transparent and rapid reporting. We will develop, enhance, and encourage early implementation of international screening and monitoring mechanisms to limit the spread of viruses with pandemic potential.

a. Ensuring Rapid Reporting of Outbreaks

4.2.1. Work through the International Partnership on Avian and Pandemic Influenza, as well as through other political and diplomatic channels such as the United Nations and the Asia-Pacific Economic Cooperation forum, to ensure transparency, scientific cooperation, and rapid reporting of avian and human influenza cases.

4.2.1.1. DOS, in coordination with other agencies, shall work on a continuing basis through the Partnership and through bilateral and multilateral diplomatic contacts to promote transparency, scientific cooperation, and rapid reporting of avian and human influenza cases by other nations within 12 months. Measure of performance: all high-risk countries actively cooperating in improving capacity for transparent, rapid reporting of outbreaks.

4.2.1.2. HHS, in coordination with DOS, shall pursue bilateral agreements with key affected countries on health cooperation including transparency, sample and data sharing, and development of rapid response protocols; and develop and train in-country rapid response teams to quickly assess and report on possible outbreaks of avian and human influenza, within 12 months. Measure of performance: agreements established with Vietnam, Cambodia, and Laos, 100 teams throughout Asia, including China, Thailand, and Indonesia, trained and available to respond to outbreaks.

4.2.1.3. HHS shall place long-term staff at key WHO offices and in select affected and high-risk countries to provide coordination of HHS-sponsored activities and to serve as liaisons with HHS within 9 months. Measure of performance: placement of staff and increased coordination with the WHO Secretariat and Regional Offices.

4.2.1.4. HHS shall, to the extent feasible, negotiate agreements with established networks of laboratories around the world to enhance its ability to perform laboratory analysis of human and animal virus isolates and to train in-country government staff on influenza-related surveillance and laboratory diagnostics, within 6 months. Measure of performance: completed, negotiated agreement, and financing mechanism with at least one laboratory network outside the United States.

4.2.1.5. HHS shall support the WHO Secretariat to enhance the early detection, identification and reporting of infectious disease outbreaks through the WHO's Influenza Network and Global Outbreak and Alert Response Network (GOARN) within 12 months. Measure of performance: expansion of the network to regions not currently part of the network.

4.2.1.6. USAID, in coordination with USDA, shall initiate a pilot program to evaluate strategies for farmer compensation and shall engage and leverage the private sector and other donors to increase the availability of key commodities, compensation, financing and technical support for the control of avian influenza, within 6 months. Measure of performance: a model compensation program measured in value of goods and services available for compensation is developed.

4.2.1.7. USAID, HHS, USDA, and DOS shall support NGOs, FAO, OIE, WHO, the Office of the Senior UN System Coordinator for Avian and Human Influenza, and host governments to expand the scope, accuracy, and transparency of human and animal surveillance systems and to streamline and strengthen official protocols for reporting avian influenza cases, within 6 months. Measure of performance: 75 percent of priority countries have established early warning networks, international case definitions, and standards for laboratory diagnostics of human and animal samples.

4.2.2. Support the development of the proper scientific and epidemiologic expertise in affected regions to ensure early recognition of changes in the pattern of avian or human outbreaks.

4.2.2.1. HHS and USDA, in collaboration with one or more established networks of laboratories around the world, including the WHO Influenza Network, shall train staff from priority countries' Ministries of Health and Agriculture, to conduct surveillance and perform epidemiologic analyses on influenza-susceptible species and manage and report results of findings, within 12 months. Measure of performance: 75 percent of priority countries have access to multi-year epidemiology and surveillance training programs.

4.2.2.2. HHS and USDA shall increase support of scientists tracking potential emergent influenza strains through disease and virologic surveillance in susceptible animal species in priority countries within 9 months. Measure of performance: surveillance for emergent influenza strains expanded in priority countries.

4.2.2.3. HHS, in coordination with DOD, shall provide support to Naval Medical Research Unit (NAMRU) 2 in Jakarta, Indonesia and Phnom Penh, Cambodia, the Armed Forces Research Institute of Medical Sciences in Bangkok, Thailand, and NAMRU-3 in Cairo, Egypt to expand and expedite geographic surveillance of human populations at-risk for H5N1 infections in those and neighboring countries through training, enhanced surveillance, and enhancement of the Early Warning Outbreak Recognition System, within 12 months. Measure of performance: reagents and technical assistance provided to countries in the network to improve and expand surveillance of H5N1 and number of specimens tested by real-time processing.

4.2.2.4. HHS shall enhance surveillance and response to high priority infectious disease, including influenza with pandemic potential, by training physicians and public health workers in disease surveillance, applied epidemiology and outbreak response at its GDD Response Centers in Thailand and China and at the U.S.-China Collaborative Program on Emerging and Re-Emerging Infectious

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Diseases, within 12 months. Measure of performance: 50 physicians and public health workers living in priority countries receive training in disease surveillance applied epidemiology and outbreak response.

4.2.2.5. DOD shall develop active and passive systems for inpatient and outpatient disease surveillance at its institutions worldwide, with an emphasis on index case and cluster identification, and develop mechanisms for utilizing DOD epidemiological investigation experts in international support efforts, to include validation of systems/tools and improved outpatient/inpatient surveillance capabilities, within 18 months. Measure of performance: monitoring system and program to utilize epidemiological investigation experts internationally are in place.

4.2.2.6. DOD shall monitor the health of military forces worldwide (CONUS and OCONUS bases, deployed operational forces, exercises, units, etc.), and in coordination with DOS, coordinate with allied, coalition, and host nation public health communities to investigate and respond to confirmed infectious disease outbreaks on DOD installations, within 18 months. Measure of performance: medical surveillance "watchboard" reports show results of routine monitoring, number of validated outbreaks, and results of interventions.

4.2.2.7. DOD, in coordination with DOS and with the cooperation of the host nation, shall assist with influenza surveillance of host nation populations in accordance with existing treaties and international agreements, within 24 months. Measure of performance: medical surveillance "watchboard" expanded to include host nations.

4.2.3. Support the development and sustainment of sufficient U.S. and host nation laboratory capacity and diagnostic reagents in affected regions and domestically, to provide rapid confirmation of cases in animals or humans.

4.2.3.1. HHS shall develop and implement laboratory diagnostics training programs in basic laboratory techniques related to influenza sample preparation and diagnostics in priority countries within 9 months. Measure of performance: 25 laboratory scientists trained in influenza sample preparation and diagnostics.

4.2.3.2. HHS in collaboration with one or more established networks of laboratories, including the WHO Influenza Network, shall train staff from priority countries on influenza-related laboratory diagnostics, within 12 months. Measure of performance: 100 percent of priority countries have training programs established.

4.2.3.3. HHS, in cooperation with the WHO Secretariat and other donor countries, shall expand an existing specimen transport fund that enables developing countries to transport influenza samples to WHO regional reference laboratories and collaborating centers, within 6 months. Measure of performance: 100 percent of priority countries funded for sending influenza samples to WHO regional reference laboratories.

4.2.3.4. HHS shall invest in the development and evaluation of more accurate rapid diagnostics for influenza to enhance the ability of the global healthcare community to rapidly diagnose influenza, within 18 months. Measure of performance: new grants and contracts issued to researchers to develop and evaluate new diagnostics.

4.2.3.5. HHS and USAID shall work with the WHO Secretariat and private sector partners, through existing bilateral agreements, to provide support for human health diagnostic laboratories by developing and giving assistance in implementing rapid international laboratory diagnostics protocols and standards in priority countries, within 12 months. Measure of performance: 75 percent of priority countries have improved human diagnostic laboratory capacity.

4.2.3.6. USDA and USAID shall work with FAO and OIE to provide technical support for animal health diagnostic laboratories by developing and implementing international laboratory diagnostic protocols, standards, and infrastructure in priority countries that can rapidly screen avian influenza specimens from susceptible animal populations, within 12 months. Measure of performance: 75 percent of priority countries have improved animal diagnostic laboratory capacity.

4.2.3.7. USDA and USAID shall provide technical expertise to help priority countries develop their cadre of veterinary diagnostic technicians to screen avian influenza specimens from wild and domestic bird populations, and other susceptible animals, rapidly and in a manner that adheres to international standards for proficiency and safety, within 12 months. Measure of performance: all priority countries have access to laboratories that are able to screen avian influenza specimens and confirm diagnoses in a manner that supports effective control of cases of avian influenza.

4.2.3.8. DOD, in coordination with HHS, shall develop and refine its overseas virologic and bacteriologic surveillance infrastructure through Global Emerging Infections Surveillance and Response System (GEIS) and the DOD network of overseas labs, including fully developing and implementing seasonal influenza laboratory surveillance and an animal/vector surveillance plan linked with WHO pandemic phases, within 18 months. Measure of performance: animal/vector surveillance plan and DOD overseas virologic surveillance network developed and functional.

4.2.3.9. DOD, in coordination with HHS, shall prioritize international DOD laboratory research efforts to develop, refine, and validate diagnostic methods to rapidly identify pathogens, within 18 months. Measure of performance: completion of prioritized research plan, resources identified, and tasks assigned across DOD medical research facilities.

4.2.3.10. DOD shall work with priority nations' military forces to assess existing laboratory capacity, rapid response teams, and portable field assay testing equipment, and fund essential commodities and training necessary to achieve an effective national military diagnostic capability, within 18 months. Measure of perform-

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ance: assessments completed, proposals accepted, and funding made available to priority countries.

b. Using Surveillance to Limit Spread

4.2.4. Develop mechanisms to rapidly share information on travelers who may be carrying or may have been exposed to a pandemic strain of influenza, for the purposes of contact tracing and outbreak investigation.

4.2.4.1. HHS and USAID shall, in coordination with regional and international multilateral organizations, develop village-based alert and response surveillance systems for human cases of influenza in priority countries, within 18 months. Measure of performance: 75 percent of all priority countries have established a village alert and response system for human influenza.

4.2.4.2. DOD shall incorporate international public health reporting requirements for exposed or ill military international travelers into the Geographic Combatant Commanders' pandemic influenza plans within 18 months. Measure of performance: reporting requirements incorporated into Geographic Combatant Commanders' pandemic influenza plans.

4.2.5. Develop and exercise mechanisms to provide active and passive surveillance during an outbreak, both within and beyond our borders.

4.2.5.1. HHS and USAID shall develop, in coordination with the WHO Secretariat and other donor countries, rapid response protocols for use in responding quickly to credible reports of human-to-human transmission that may indicate the beginnings of an influenza pandemic, within 12 months. Measure of performance: adoption of protocols by WHO and other stakeholders.

4.2.5.2. HHS, in coordination with DOS and other agencies participating in the Security and Prosperity Partnership, shall pursue cooperative agreements on pandemic influenza with Canada and Mexico to create and implement a North American early warning surveillance and response system in order to prevent the spread of infectious disease across the borders, within 9 months. Measure of performance: implementation of early warning surveillance and response system.

4.2.5.3. USDA and USAID shall provide technical expertise to priority countries in order to expand the scope and accuracy of systematic surveillance of avian influenza cases, within 12 months. Measure of performance: 75 percent of priority countries have expanded animal surveillance capabilities.

4.2.6. Expand and enhance mechanisms for screening and monitoring animals that may harbor viruses with pandemic potential.

4.2.6.1. DHS, USDA, DOI, and USAID, in collaboration with priority countries, NGOs, WHO, FAO, OIE, and the private sector shall support priority country animal health activities, including development of regulations and enforcement capacities that conform to OIE standards for transboundary movement of animals,

development of effective biosecurity measures for commercial and domestic animal operations and markets, and identification and confirmation of infected animals, within 12 months. Measure of performance: 50 percent of priority countries have implemented animal health activities as defined above.

4.2.7. Develop screening and monitoring mechanisms and agreements to appropriately control the movement and shipping of potentially contaminated products to and from affected regions if necessary, and to protect unaffected populations.

4.2.7.1. DOS, in coordination with DOT, DHS, HHS, and U.S. Trade Representative (USTR), shall collaborate with WHO, the International Civil Aviation Organization (ICAO), and the International Maritime Organization (IMO) to assess and revise, as necessary and feasible, existing international agreements and regulations governing the movement and shipping of potentially infectious products, in order to ensure that international agreements are both adequate and legally sufficient to prevent the spread of infectious disease, within 12 months. Measure of performance: international regulations reviewed and revised.

4.2.7.2. USDA shall provide technical assistance to priority countries to increase safety of animal products by identifying potentially contaminated animal products, developing screening protocols, regulations, and enforcement capacities that conform to OIE avian influenza standards for transboundary movement of animal products, within 36 months. Measure of performance: all priority countries have protocols and regulations in place or in process.

4.2.8. Share guidance with international partners on best practices to prevent the spread of influenza, including within hospitals and clinical settings.

4.2.8.1. HHS and USAID shall develop community- and hospital-based infection control and prevention, health promotion, and education activities in local languages in priority countries within 9 months. Measure of performance: local language health promotion campaigns and improved hospital-based infection control activities established in all Southeast Asian priority countries.

4.3. Pillar Three: Response and Containment

The United States is working now with other nations and relevant international organizations to detect and contain outbreaks of animal influenza with pandemic potential with the aim of preventing its spread to humans. We will work to ensure nations and relevant international organizations agree as soon as possible on a doctrine of international response and containment to implement in the event of a human outbreak. Once health authorities signal sustained, efficient human transmission of a virus with pandemic potential overseas, we will encourage rigorous implementation of the agreed doctrine for international containment and response and offer technical expertise and assistance as needed. Critical to this effort will be the timely implementation of a coordinated and accurate international public awareness campaign to define the facts and establish realistic expectations. We will monitor economic and social effects of a pandemic and employ appropriate measures to limit their impact on global stability and security.

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a. Containing Outbreaks

4.3.1. Work to develop a coalition of strong partners to coordinate actions to limit the spread of a virus with pandemic potential beyond the location where it is first recognized abroad in order to protect U.S. interests.

4.3.1.1. DOS, in coordination with HHS, USDA, USAID, and DOD, shall coordinate the development and implementation of U.S. capability to respond rapidly to assess and contain outbreaks of avian influenza with pandemic potential abroad, including coordination of the development, training and exercise of U.S. rapid response teams; and coordination of U.S. support for development, training and exercise of, and U.S. participation in, international support teams. Measure of performance: agreed operating procedures and operational support for U.S. rapid response, and for U.S. participation in international rapid response efforts, are developed and function effectively.

4.3.1.2. DOS, in coordination with HHS, shall work with WHO and the international community to secure agreement (e.g., through a resolution at the World Health Assembly in May 2006) on an international containment strategy to be activated in the event of a human outbreak, including an accepted definition of a "triggering event" and an agreed doctrine for coordinated international action, responsibilities of nations, and steps they will take, within 4 months. Measure of performance: international agreement on a response and containment strategy.

4.3.1.3. HHS, in coordination with DOS, and the WHO Secretariat, and USDA, USAID, DOD, as appropriate, shall rapidly deploy disease surveillance and control teams to investigate possible human outbreaks through WHO's GOARN network, as required. Measure of performance: teams deployed to suspected outbreaks within 48 hours of investigation request.

4.3.1.4. DOS, in coordination with HHS, and the WHO Secretariat, and USDA, USAID, DOD, as appropriate, shall coordinate United States participation in the implementation of the international response and containment strategy (e.g., assigning experts to the WHO outbreak teams and providing assistance and advice to ministries of health on local public health interventions, ongoing disease surveillance, and use of antiviral medications and vaccines if they are available). Measure of performance: teams deployed to suspected outbreaks within 48 hours of investigation request.

4.3.1.5. USDA and USAID, in coordination with DOS, HHS, and DOD, and in collaboration with relevant international organizations, shall support operational deployment of rapid response teams and provide technical expertise and technology to support avian influenza assessment and response teams in priority countries as required. Measure of performance: all priority countries have rapid access to avian influenza assessment and response teams; deployment assistance provided in each instance and documented in a log of technical assistance rendered.

4.3.1.6. DOS shall lead U.S. Government engagement with the international community's effort to develop a coordinated plan for avian influenza assistance (funds, materiel, and personnel) to streamline national assistance efforts within 12 months. Measure of performance: commitments from countries on funds, personnel, and materiel they will contribute to an integrated and prioritized international prevention, preparedness, and response effort.

4.3.1.7. DOS, in coordination with and drawing on the expertise of USAID, HHS, and DOD, shall work with the international community to develop, within 12 months, a coordinated, integrated, and prioritized distribution plan for pandemic influenza assistance that details a strategy for (1) strategic lift of WHO stockpiles and response teams; (2) theater distribution to high-risk countries; (3) in-country coordination to key distribution areas; and (4) establishment of internal mechanisms within each country for distribution to urban, rural, and remote populations. Measure of performance: commitments by countries that specify their ability to support distribution, and specify the personnel and material for such support.

4.3.1.8. DOS, in coordination with HHS, USDA, USAID, and DHS, and in collaboration with WHO, FAO, OIE, the World Bank and regional institutions such as APEC, the Association of Southeast Asian Nations and the European Community, shall work to improve public affairs coordination and establish a set of agreed upon operating principles among these international organizations and the United States that describe the actions and expectations of the public affairs strategies of these entities that would be implemented in the event of a pandemic, within 6 months. Measure of performance: list of key public affairs contacts developed, planning documents shared, and coordinated public affairs strategy developed.

4.3.1.9. DOS and DOC, in collaboration with NGOs and private sector groups representing business with activities abroad, shall develop and disseminate checklists of key activities to prepare for and respond to a pandemic, within 6 months. Measure of performance: checklists developed and disseminated.

4.3.2. Where appropriate, use governmental authorities to limit movement of people, goods, and services into and out of areas where an outbreak occurs.

4.3.2.1. DOS, in coordination with DHS, HHS, DOD, and DOT, and in collaboration with foreign counterparts, shall support the implementation of pre-existing passenger screening protocols in the event of an outbreak of pandemic influenza. Measure of performance: protocols implemented within 48 hours of notification of an outbreak of pandemic influenza.

4.3.2.2. DOD, in coordination with DOS, HHS, DOT, and DHS, shall limit official DOD military travel between affected areas and the United States. Measure of performance: DOD identifies military facilities in the United States and OCONUS that will serve as the points of entry for all official travelers from affected areas, within 6 months.

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b. Leveraging International Medical and Health Surge Capacity

4.3.3. Activate plans to distribute medical countermeasures, including non-medical equipment and other material, internationally.

4.3.3.1. DOS, in coordination with HHS, USAID, USDA, and DOD, shall work with the Partnership to assist in the prompt and effective delivery of countermeasures to affected countries consistent with U.S. law and regulation and the agreed upon doctrine for international action to respond to and contain an outbreak of influenza with pandemic potential. Measure of performance: necessary countermeasures delivered to an affected area within 48 hours of agreement to meet request.

4.3.4. Address barriers to the flow of public health, medical, and veterinary personnel across international borders to meet local shortfalls in public health, medical, and veterinary capacity.

4.3.4.1. DOS in collaboration with the Partnership and WHO shall negotiate international instruments and/or arrangements to facilitate the flow of rapid response teams and other public health, medical, and veterinary personnel across international borders, within 12 months. Measure of performance: negotiated agreements for facilitating deployment of rapid response teams deployed across international borders using instruments and/or arrangements as detailed above, within 48 hours of request.

4.3.4.2. DHS shall assist in the expeditious movement of public health, medical, and veterinary officials, equipment, supplies, and biological samples for testing through U.S. ports of entry/departure. Measure of performance: delivery of persons, equipment, and samples involved in the detection of and response to outbreaks of avian or pandemic influenza within 48 hours of decision to deploy.

c. Sustaining Infrastructure, Essential Services, and the Economy

4.3.5. Analyze the potential economic and social impact of a pandemic on the stability and security of the international community and identify means to address it.

4.3.5.1. DOS shall organize an interagency group to analyze the potential economic and social impact of a pandemic on the stability and security of the international community, within 3 months. Measure of performance: issues identified and policy recommendations prepared.

4.3.5.2. Treasury shall urge the IMF to enhance its surveillance of priority countries and regions, including further assessment of the macroeconomic and financial vulnerability to an influenza pandemic, within 3 months. Measure of performance: updated, expanded IMF analysis of the potential impact of an influenza pandemic on priority countries and regions, as defined above.

4.3.5.3. Treasury, in collaboration with the IMF and the multilateral development banks, shall take the lead on dialogue with creditor countries to ensure that financial assistance to affected economies is provided on terms consistent with the goals

of restoring economic activity and maximizing economic growth (within existing international financial agreements), within 6 months. Measure of performance: official financing strategies in place that are consistent with the goals above.

d. Ensuring Effective Risk Communication

4.3.6. Ensure that timely, clear, coordinated messages are delivered to the American public from trained spokespersons at all levels of government and assist the governments of affected nations to do the same.

4.3.6.1. DOS, in coordination with HHS, USAID, USDA, DOD, and DHS, shall lead an interagency public diplomacy group to develop a coordinated, integrated, and prioritized plan to communicate U.S. foreign policy objectives relating to our international engagement on avian and pandemic influenza to key stakeholders (e.g., the American people, the foreign public, NGOs, international businesses), within 3 months. Measure of performance: number and range of target audiences reached with core public affairs and public diplomacy messages, and impact of these messages on public responses to avian and pandemic influenza.

4.3.6.2. DOS, in coordination with HHS, shall provide at least monthly updates to its foreign counterparts, through diplomatic channels and U.S. Government websites, regarding changes to national policy or regulations that may result from an outbreak, and shall coordinate posting of such information to U.S. Government websites (e.g., **www.pandemicflu.gov**). Measure of performance: foreign governments and key stakeholders receive authoritative and regular information on U.S. Government avian influenza policy.

4.3.6.3. USDA, in coordination with DHS, USTR, and DOS, shall ensure that clear and coordinated messages are provided to international trading partners regarding animal disease outbreak response activities in the United States. Measure of performance: within 24 hours of an outbreak, appropriate messages will be shared with key animal/animal product trading partners.

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Chapter 5 — Transportation and Borders

Introduction

Our Nation's 317 official ports of entry and vast transportation network are critical elements in our preparation for and response to a potential influenza pandemic. Our border measures might provide an opportunity to slow the spread of a pandemic to the United States, but are unlikely to prevent it. The sheer volume of traffic and the difficulty of developing screening protocols to detect an influenza-like illness pose significant challenges. On a typical day, about 1.1 million passengers and pedestrians cross our borders, as do approximately 64,000 truck, rail, and sea containers, 2,600 aircraft, and 365,000 vehicles.

Our transportation system regularly delivers essential commodities to communities, and — in emergencies — rapidly moves critical supplies, emergency workers, and needed resources into affected areas. This vast and complex system moves billions of people and trillions of dollars worth of goods each year. Each of the six major transportation modes (i.e., aviation, rail, highway, maritime, pipeline, and mass transit) has unique characteristics, operating models, responsibilities, and stakeholders. As a decentralized network, the transportation sector is predominantly owned and operated by State and local governments and the private sector. Decisions made by State and local entities and the private sector can have cascading impacts across the transportation sector. Effective transportation management during a pandemic will require planning and close coordination across the sector — at the national, State, and local levels — and with those who depend on it.

Our ability to help maintain infrastructure services, mitigate adverse economic impacts, and sustain societal needs will hinge in part on our ability to make effective international and domestic transportation decisions. While the overall pandemic response will be driven by disease characteristics and the status of domestic preparation, transportation and border decisions should also be based on the effectiveness of an action in slowing the spread of a pandemic and related health benefits; its social and economic consequences; its international implications; and its operational feasibility.

Key Considerations

Goals of Transportation and Border Measures

The *National Strategy for Pandemic Influenza (Strategy)* guides our preparedness and response to an influenza pandemic, with the intent of (1) stopping, slowing, or otherwise limiting the spread of a pandemic to the United States, (2) limiting the domestic spread of a pandemic and mitigating disease, suffering, and death, and (3) sustaining infrastructure and mitigating impact to the economy and the functioning of society. Transportation and border measures, when combined with other social distancing and public health measures, can help support these goals.

The containment of an influenza virus with pandemic potential at its origin — whether the outbreak occurs abroad or within the United States — is a critical element of pandemic response efforts. Containment is most effective when approached globally, with all countries striving to achieve common goals. Even if such efforts prove unsuccessful, delaying the spread of disease could provide the Federal Government with valuable time to activate the domestic response. The Secretariat of the World Health

Organization (WHO) has established guidelines to support the control of spread of a pandemic virus across and within borders.[3] These guidelines provide a useful starting point for the development of U.S. Government national policy and could be modified and extended where necessary. The specifics of how a novel influenza virus will enter the United States and how the epidemic will actually unfold are unknown, and therefore, implementation of U.S. Government response must remain flexible and adaptable to a pandemic as it unfolds. To the extent possible and in accordance with treaties or other binding agreements, the United States will seek to coordinate containment measures with global organizations and partners.

Building on the International Efforts set forth in Chapter 4, this chapter identifies actions to address a number of key policy issues, including developing a cohesive, integrated U.S. border entry and exit strategy for aviation, maritime, and land border ports of entry, and a strategy to guide domestic efforts to delay the spread of disease. Within this policy framework, the Federal Government will develop a toolkit of options that can be used by individuals, within communities and States, and across the Nation. This toolkit will require significant, collaborative planning with States, communities, and the private sector to develop a range of scalable options, the protocols to implement them, and the trigger points that define thresholds to implement and remove measures. It will be critical to quantify, to the extent possible, the costs and benefits of these options, as many of the options will have significant second- and third-order effects.

Deciding which measures to use at which points in the lifecycle of a pandemic will require complex decisions that carefully weigh costs and benefits to evaluate which options best serve the public. Key factors that affect decision making include the ability to delay the pandemic and the resulting health benefits, the associated social and economic consequences, and the operational feasibility to implement transportation or border measures.

Ability to Delay a Pandemic and Resulting Health Benefits

There are many public health interventions and social distancing measures that can help limit international spread, reduce spread within nations and local populations, and reduce an individual's risk for infection.[4] Transportation and border measures are two of many social distancing measures that can reduce transmission by limiting the proximity of individuals and reducing interaction within and across social networks. Modeling indicates that these measures are most effective when used in combination with other social distancing and public health measures, such as school closures, canceling large public gatherings, and limiting work group interaction.

Research is underway to better understand the effects of movement restrictions and their interactions with other social distancing measures in delaying a pandemic. Current models suggest that highly restrictive border measures could delay a pandemic by a few weeks. However, given the economic and societal impacts of these measures, recent recommendations from WHO encourage countries to focus their efforts to contain spread of a pandemic at national and community levels rather than at international borders. Based on a review of prior pandemics, including quarantines enacted during the 1918 pandemic as well as the 2003 SARS and influenza outbreak, WHO recommendations for border-related measures focus on providing information to international travelers, screening travelers departing countries with transmissible human infection, and limiting travel to affected areas. The

[3] World Health Organization. WHO global influenza preparedness plan: the role of WHO and recommendations for national measures before and during pandemics. November 2005.

[4] World Health Organization. Non-pharmaceutical interventions for pandemic influenza, international measures. 2006. Emerging Infection Diseases, Vol. 12, No. 1, Jan 2006.

recommendations for national and community measures during a pandemic focus on delaying spread and reducing effects through population–based measures.[5] If the pandemic becomes severe, WHO recommends countries encourage social distancing measures and defer non-essential domestic travel to affected areas. As part of our pandemic planning efforts, guidance and protocols for border and domestic transportation measures will be developed that can be tailored, in the event of a pandemic, based on our level of domestic preparedness and real-time epidemiological disease characteristics, including transmission pattern, pandemic stage, and illness severity and extent.

Depending on the length, delay can provide valuable time to implement pandemic preparedness measures that have been planned in advance.[6] A delay in spread may also allow the administration of pre-pandemic vaccine, assessment of disease epidemiology, and mobilization of resources for screening and diagnosis. It should be noted that current estimates are that it will take approximately 5 months to develop, produce, and distribute a pandemic vaccine after the declaration of a pandemic and isolation of the pandemic virus. While delay may reduce peak overall demand on the health care system, this will not necessarily translate to benefits at the community level. It is unlikely that communities will be able to shift scarce resources that will be needed locally once the pandemic reaches their area. Unlike a hurricane or other localized disaster, national capacity will not be easily distributed across communities and States. Scarce resources, such as personnel and ventilators, will be needed to meet local demand, and it is unlikely that transporting large numbers of infected patients out of medically overwhelmed areas would be a viable option (see Chapter 6 - Protecting Human Health).

Further work will be done to better understand the potential delay that can be obtained through transportation and border measures, how these measures work in concert with other public health and social distancing measures, and the resulting health benefits.

Social and Economic Consequences

The transportation system and the choices it offers support the social, economic, and business needs of communities. Travel is a critical part of our daily routine, with Americans taking an average of 1.1 billion trips per day, or about four trips for every person in the United States each day.[7] A pandemic will require curtailment in travel and dramatically change our travel priorities, choices, and decisions, resulting in significant social and economic consequences.

By carefully examining the public's reliance on travel, existing travel patterns, and anticipated changes in travel during a pandemic, communities and States can develop a range of travel options that help delay spread of the pandemic, but also minimize social and economic consequences. For example, travel options can range from provision of travel information, voluntary advisories with health warnings, selective restrictions that limit certain types of travel, advance notification followed by a defined period of restriction, and mandatory measures under extreme circumstances.

At the onset of a pandemic, the public will almost certainly automatically limit vacation travel, and this would be recommended by public health authorities. It is anticipated that significant portions of business travel would be curtailed as well, with only essential travel continuing (related to overall pandemic response, sustaining critical infrastructure, and sustaining essential business functions). The purpose of

[5] World Health Organization. Non-pharmaceutical interventions for pandemic influenza, national and community measures. 2006. Emerging Infection Diseases, Vol. 12, No. 1, Jan 2006.

[6] World Health Organization. WHO global influenza preparedness plan: the role of WHO and recommendations for national measures before and during pandemics. November 2005.

[7] U.S. Department of Transportation, Bureau of Transportation Statistics, Federal Highway Administration, National Household Travel Survey data, CD-ROM, February 2004.

long-distance travel will also change. Initially, there may be a small surge in trips as people who are out of town return home. During an evolving pandemic it would not be surprising to expect family members to attempt to return home, as well as travel to assist other family members in need, such as elderly parents, ill family members, or others requiring special assistance.

In addition, it is presumed that the public will change daily travel patterns based on what they perceive will reduce their personal risk and the risk to their families and friends. Communities might see a surge in local travel as people gather groceries and other items similar to patterns before large snow storms where the public expects limitations in local travel for short durations. The planned length of travel curtailment is a significant factor that will help families and communities prepare for potential restrictions.

Clear messages regarding travel, risk of transmission, and specific travel recommendations for each stage of a pandemic will be important during a pandemic, and even more critical to guide preparedness efforts. There is a wide range of options that can be used to reduce overall travel, such as provision of travel information, voluntary advisories with health warnings, selective restrictions that limit certain types of travel, advance notification followed by a defined period of restriction, and mandatory measures that would prohibit all travel under extreme circumstances.

As travel restriction policies are evaluated, it will be critical to include the societal consequences of restrictions on individuals, families, and communities. Economic consequences vary widely based on transportation and border actions, but are discussed more under the following section.

Significant planning will be needed at local, State, and national levels to increase the Nation's preparedness, including joint planning to identify the range of transportation options and the supporting policies to facilitate safe transportation of food, fuel, and other critical supplies to affected communities, to help delay the spread with minimal societal and economic consequences.

Operational Feasibility

Effective transportation and border decisions must also consider operational feasibility, which includes evaluating how travel or trade measures could affect all relevant aspects of the transportation system and carefully weighing competing interests, views, and goals. Such an approach considers the complex, interconnected relationships of a decentralized network where small changes can strategically change travel and trade patterns or unknowingly transfer risk and/or create a secondary layer of challenges. For example, closure of a community to reduce spread would also sever that community from "just-in-time" deliveries to restock grocery stores, pharmacies, and could impede incoming emergency teams and or supplies for the medical and emergency response efforts underway. Even strong messages to reduce non-essential travel voluntarily, if not fully explained and accompanied by clear guidelines of how transport workers can reduce personal risk, could significantly reduce the movement of essential goods and availability of emergency transportation services. Transportation providers will be concerned about protecting their employees, risks to travelers and goods, and the potential impact on facilities and vehicles.

An operational approach gives full consideration to linkages, tradeoffs, or impacts on other transportation entities, facilities, systems, or users. Moreover, this approach considers non-health issues, such as manpower, market factors, how the transportation system operates, and the potential to transfer risk across the network. For example, mandatory restrictions in air travel could potentially transfer travel to other modes, such as rail or personal vehicles. The redundancies of the transportation network can make restrictions challenging to implement. However, a robust planning effort with the public, communities, and transportation providers and stakeholders can develop options based on a joint

understanding of risk, the natural changes in travel patterns, advance notice to aid preparedness, and, in extreme circumstances, mandatory restrictions to safeguard communities.

Curtailment and changes in border and transportation operations will be essential during a pandemic response and to a certain extent will likely occur spontaneously. Transportation professionals and planners will be a valuable resource to assist with the pre-pandemic planning that anticipates theses changes and help communities and public health professionals identify how to achieve public health goals related to travel and trade at the time of a pandemic. This demands inclusive decision making with all parties involved both during pre-pandemic planning and at the earliest stages of the process, when issues and potential problems are first defined.

Circumstances and Impacts of Complete Border Closure

Any nation, including the United States, has the sovereign right to control, and if necessary, close its borders. However, in the event of a pandemic, a border closure would likely delay but not stop the spread of influenza to the United States, and would have significant negative social, economic, and foreign policy consequences. Other less drastic measures could potentially be layered to provide similar benefits without the substantial negative consequences of a complete border closure. The discussion below addresses U.S. border closure, as well as the potential that foreign countries may close their borders in response to a pandemic influenza outbreak in the United States.

In the absence of any border or travel restrictions, cases of pandemic influenza would likely arrive in the United States within 1 to 2 months after the virus first emergence elsewhere in the world. Current models suggest that highly restrictive border measures might delay the peak of pandemic by a few weeks. Depending on the length of delay, national preparedness may be enhanced as previously described.

An outbreak of pandemic influenza abroad might result in other countries closing their borders and generate calls for similar action in the United States. Outbreaks in Canada or Mexico might further increase pressure to close U.S. borders. Conversely, an outbreak within the United States might result in other countries closing their borders to the United States to delay spread. This could have a significant impact on overseas commerce, military missions, and the movement of American citizens.

A United States border closure would have a devastating economic impact, interrupt delivery of essential services, and would disrupt substantial cross-border commerce, resulting in hardship at manufacturing and production plants that rely on export markets and just-in-time delivery. United States international trade was almost $2.3 trillion in 2004,[8] with $599 billion in international air freight alone.[9] Given the importance of maritime trade to the U.S. economy,[10] any significant disruptions to trade at our seaports will have immediate and significant economic impacts. During the 2002 West Coast dock shutdown, the economic loss was estimated at $140 million per day.[11] A complete closure of U.S. borders to international travel and trade would be unprecedented.

[8] U.S. Dept. of Commerce, U.S. Census Bureau, Foreign Trade Division, *U.S. Exports of Merchandise and U.S. Imports of Merchandise*, March 2005.

[9] Based on U.S. Dept. of Commerce, U.S. Census Bureau, Foreign Trade Division, *U.S. Exports of Merchandise and U.S. Imports of Merchandise*, March 2005.

[10] Ships are the primary mode of transportation for world trade. Ships carry more than 95 percent of the U.S.' non-North American trade by weight and 75 percent by value, and 80 percent of the foreign oil imported by the U.S. Waterborne cargo contributes about 7.5 percent to the U.S. gross domestic product. In addition to its economic significance, the marine transportation system is vital for national security. The Departments of Defense and Transportation have designated 17 U.S. seaports as strategic because they are necessary for use by DOD in the event of a major military deployment. Thirteen of these ports are commercial seaports.

[11] Calculated from Patrick L. Anderson and Ilhan K. Geckil, *Flash Estimate: Impact of West Coast Shutdown*, Anderson Economic Group (October 15, 2002).

Modeling suggests that border closure would not decrease the total number of illnesses or deaths. Moreover, when the Nation's economic needs require the re-opening of the border, there could be widespread public confusion about the safety of people, freight, and travel. Nevertheless, our level of preparedness when a pandemic strikes and the uncertainties about the characteristics of a pandemic virus requires us to plan for this possibility. The section below describes potential alternatives and later sections identify additional research to explore the effectiveness and economic consequences of these options.

Alternatives to Complete Border Closure and Other Containment Options

There are alternatives to complete border closure that may be effective in delaying the onset of a pandemic in the United States and can help minimize the risk of infection among travelers coming to the United States. These include targeted traveler restrictions to help contain the pandemic at its source, and implementation of layered, risk-based measures, including pre-departure, en route, and arrival screening and/or quarantine. While we should take measures to protect travelers and limit their ability to transmit disease, there is little benefit to trade restriction if there are adequate measures in place to limit exposure to infected individuals and potentially contaminated surfaces. Irrespective of the combination of interventions selected, our efforts should be taken collaboratively with other nations, although unilateral efforts may be necessary in extreme circumstances.

Travelers

The United States will work with the international community to implement targeted passenger travel restrictions (see Chapter 4 - International Efforts). As part of the preparedness effort, the United States will engage WHO and foreign governments to determine how countries with human outbreaks can support containment and help slow global spread of a pandemic. For example, pre-negotiated arrangements and partnerships with other countries could encourage all countries with outbreaks to rapidly restrict non-essential travel for all modes of transportation (e.g., air, vessel, and land travel) in return for technical and other forms of assistance. In addition, the United States could deny entry of travelers, or place conditions on the return of travelers from countries with outbreaks and other countries that have not instituted acceptable pre-departure screening, prohibit entry of travelers from the affected area, or continue to accept travelers with appropriate conditions from countries with outbreaks. Additional options would be considered for U.S. citizens planning to return home from affected areas, such as a voluntary quarantine to monitor for illness through one incubation period prior to departure. This could reduce risk of transmission for the United States, and help identify persons in need of medical care.

Individual screening, for influenza-like illness and risk factors for infection with a pandemic strain, of all persons entering the United States will help minimize the risk of transmission. However, such screening is challenged by a lack of sensitivity (e.g., asymptomatic infected individuals may not be detected) and specificity (e.g., many individuals with influenza-like illness will not be infected with a pandemic strain). The typical incubation period for influenza is 2 days and infected persons with influenza may be contagious for 24 hours prior to the onset of symptoms. Since some asymptomatic travelers, who are incubating influenza, may become symptomatic en route, overall screening effectiveness can be improved by adopting layered pre-departure, en route, and arrival screening measures. The policy of layered screening measures would apply to all U.S.-bound travelers from affected areas, but the characteristics of the outbreak, including the rapidity of spread, may make it necessary to implement this screening at all international airports from which U.S.-bound passengers originate. In addition, development of rapid diagnostic tests can dramatically change our ability to screen effectively.

- **Pre-departure Measures:** Effective host country health screening of all individuals prior to departure may reduce the risk of infected travelers exposing fellow travelers, aircraft and vessel crews, and others upon arrival. This is consistent with the WHO Global Influenza Preparedness Plan and with the newly revised International Health Regulations. Screening could be performed for signs of illness (e.g., temperature scanning) and for risk factors (e.g., contacts, travel history). A clear description of signs of illness and risk factors for infection with pandemic influenza will be critical to develop effective screening protocols. Significant additional personnel and resources will be needed to strengthen in-country pre-departure screening capacity, particularly in countries that are heavily affected by a pandemic. The number of infected persons traveling to the United States could also be reduced by isolating potentially exposed individuals for one incubation period prior to international travel. The need to develop pre-departure measures and identify the necessary staffing resources will apply equally to the United States when pandemic transmission occurs domestically.

- **En Route Measures:** Given the short incubation period of influenza, and the length of some international flights, one can assume that some travelers with influenza will develop their first symptoms during their journey. The training of flight and vessel crews to detect and manage ill travelers can decrease risk for others on the conveyance and permit assessment and treatment upon landing. When combined with pre-departure exit screening, this strategy would detect those who developed signs of illness while en route. Response would include moving ill persons away from other travelers, if possible, placing a surgical mask on the ill person, and emphasizing the importance of hygiene measures, such as hand washing. If a mask is not available, covering coughs and sneezes with a tissue or cloth that is disposed after use will also decrease risk. By regulation, the master of ship or commander of an aircraft destined for a U.S. port is required to report the presence of any ill persons (as defined in the regulation) or deaths on board to the nearest quarantine station at which the ship or aircraft will arrive. In its proposed rule, the Centers for Disease Control and Prevention (CDC) has proposed expanding the definition of ill persons to include additional illness criteria indicative of the presence of a quarantinable disease, such as pandemic influenza.

- **Arrival Measures:** Arrival screening may serve as an important additional layer if we cannot ensure the adequacy and effectiveness of other containment measures. It can also identify individuals who became ill during travel. Arrival screening can be imposed as a precautionary measure, irrespective of other containment measures. Travelers with influenza-like illness should be isolated and undergo diagnostic testing; other travelers may potentially be quarantined until definitive testing is complete. When developed, rapid diagnostic testing could greatly increase effectiveness of screening. These arrival procedures also provide an opportunity to educate travelers to increase their awareness of influenza symptoms and the need for seeking medical care and immediate home quarantine when compatible symptoms arise. It must be recognized that arrival screening will place additional demands on CDC Quarantine Station personnel and Customs and Border Protection officers and agents. It is critical that local quarantine plans leverage available Federal, State, and local assets to implement effective screening, quarantine, and isolation, and provide expanded access to medical treatment. Capacity could also be addressed by examining the costs and benefits of potentially funneling inbound international flights to a subset of U.S. airports. Preliminary research indicates that potentially 96 percent of all inbound

international flights arrive at 30 U.S. airports.[12] Additional work will be needed to explore and evaluate options with airlines, airports, and local authorities and public health professionals.

Cargo and Trade Goods

This risk of influenza transmission by cargo or trade goods, excluding live avian or animal cargo, is low. With effective protective measures for workers in specific settings, cargo shipments could continue. Because viable influenza virus may remain on surfaces for up to 48 hours, ship-borne cargo poses the lowest risk of virus transmission. Risk of transmission by or to the vessel's crew could be eliminated by confining them to the vessel and utilizing strict transmission prevention protocols with port personnel during loading/off loading operations. Given the greater speed of international air transport, additional measures may be needed for worker protection and, in some cases, to disinfect and/or isolate air cargo from a country with an outbreak.

Land Borders

Our approach to slowing the introduction of pandemic influenza through land borders will emphasize continental rather than national containment, and will respect our treaty commitments and other arrangements with Canada and Mexico. Our planning efforts with Canada and Mexico will include discussions of each country's efforts to support global containment, plans to implement travel restrictions, and commitments for rigorous screening at arrivals. Should the disease appear in Canada or Mexico, land borders would become the greatest point of vulnerability due to the high volume and nature of land border crossing. Specific measures used at land borders will depend on the temporal and geographic spread of disease and will require more intensive modeling to explore their potential effectiveness.

Unique challenges along our land borders will require significant outreach with the Canadian and Mexican governments and other stakeholders. On-time delivery of goods and workers being prevented from going to their jobs would create major challenges at land border locations, and could potentially affect the U.S. economy. On the northern border, the major manufacturing industries (e.g., automotive) would likely be adversely affected by restrictions or slow-downs at the border. On the southern border, textile and agriculture product importation could be impaired. In addition, there are a significant number of day workers that transit across the border. Therefore, planning should consider a range of alternatives, from approaches that permit the cross border flow of critical goods to complete border closure. Potentially infected illegal aliens attempting to cross between our ports of entry present another challenge and could create facility challenges related to quarantine.

Maintaining operational control of our Nation's borders is an essential function of the Department of Homeland Security (DHS). The presence of pandemic influenza in Central America or Mexico may trigger a mass migration. DHS would need to manage a large increase of additional attempted illegal entrants during a 2-month period. This spike will likely increase during a period when DHS resources are stretched due to employee absenteeism.

[12] U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, T100 SEGMENT data, year-end second quarter 2005. (Note: includes all scheduled flights, as well as most charter, military, and private international flights).

Complexity of Transportation Decisions in Emergencies

The complexities of the transportation system and its relationship with public safety, productivity, health, and the national economy require that its assets be managed wisely during any emergency. During some training exercises, emergency transportation decisions have been made without full appreciation of the resulting consequences, including serious economic implications.

Managing transportation decisions in a pandemic will require extraordinary cooperation between the varied and diverse elements of the sector. In many cases, decision makers will be simultaneously managing complex and competing interests. State and local governments, acting within their authorities, may impose restrictions or closures of transportation systems without consulting or coordinating with Federal entities. This can be in the form of State/county border closures or closure of transit systems, ports, or airports. This could have considerable impact on efforts to move patients, responders, medical personnel, critical pharmaceuticals, and essential supplies. A key role for the Federal Government will be to provide clear criteria to guide and inform State and local actions and to conduct outreach with State, community, and tribal entities to communicate a cohesive national strategy for maintaining movement of essential critical goods and services, while encouraging limitation of non-essential transportation. Closing State or local borders is highly unlikely to be cost-effective, may create significant shortages in essential commodities, and is not preferred (see also Chapter 9 - Institutions: Protecting Personnel and Ensuring Continuity of Operations).

Sustaining Critical Transportation Services

Sustaining critical services during a pandemic will be crucial to keep communities functioning and emergency supplies and resources flowing. Planning efforts need to assess systemic effects (i.e., supply chain impact, just-in-time delivery, warehousing, and logistics) and support the development of contingency plans to address lack of critical services and delivery of essential commodities, such as chlorine for water purification, gasoline, food, and medical supplies.

Due to expected high absenteeism, transportation services may be limited. Interstate movement will become increasingly constrained as the pandemic peaks and local travel restrictions may increase. Passenger transportation will likely decrease as the public opts not to travel due to possible exposure. This will likely begin in international aviation, cruise ships, and highway border crossings. Once cases are present in the United States, this decrease in passenger travel will occur domestically in private automobile, aviation, mass transit, passenger rail, and motor coach travel. However, there may also be a small surge of movement into affected areas as individuals try to return home or help stranded or ill relatives. Others may attempt to temporarily relocate to less populated areas in an attempt to reduce the likelihood of infection. At the beginning of the pandemic, there will also be requests to move emergency workers, equipment, and resources. As the disease spreads to multiple urban areas, emergency transportation of supplies and personnel could decrease because resources will be needed locally.

There is a need to examine critical junctures where the increase in demand for essential commodities and emergency services intersect with a large reduction in workforce due to absenteeism. Identifying these junctures will enable the sector to focus preparedness efforts on areas of the transportation system that will be under the greatest strain during a pandemic.

Emergency Transportation Services

A pandemic outbreak in the United States will result in the activation of the *National Response Plan* (NRP) and Emergency Support Function #1 - Transportation (ESF #1) to coordinate Federal support for emergency transportation services. Activation under pandemic conditions will be considerably more challenging, with many urban areas simultaneously affected for a sustained period of time, as opposed to historically localized and short-duration activations following natural disasters.

Management of a pandemic response during NRP activation will be driven by decisions at the State and local level. Transportation response in such an emergency will be vital, with the Federal role focusing on coordination and communication across the sector, in addition to its emergency transportation services under the NRP. Balancing the demands of a pandemic in the NRP context with existing resources and maintaining response capacity for other disasters or terrorist incidents will be a priority focus.

Another key area is patient movement, which is coordinated primarily by Emergency Support Function #8 - Public Health and Medical Services (ESF #8). It is unlikely that patient movement will be similar in scope and resource requirements to the patient evacuation that has occurred during major hurricanes. Patient movement is discussed in greater detail under Chapter 6 - Protecting Human Health.

Transportation and Border Preparedness

An influenza pandemic poses significant challenges that must be addressed in the border and transportation planning process. All private sector, State and local entity, and Federal Government plans need to address the following four key areas: (1) maintaining situational awareness; (2) rapidly containing cases or initial outbreaks; (3) sustaining critical transportation and border services; and (4) recovery of the transportation system.

Maintaining Situational Awareness

Due to the complexity of transportation and border decisions and the dynamic effect of local decisions on the national network, it will be essential to enhance and maintain situational awareness across the sector. Plans should address:

- Ensuring adequate information sharing, analysis, and coordination among the private sector, State and local governments, the Federal Government, and international partners.
- Providing updates on the status of the transportation system, including operations and closures across the country.
- Maintaining awareness of public health measures under consideration that may have transportation implications, such as vaccine/antiviral distribution, need for food, and other essential services during quarantines, school closures, "snow days," travel restrictions, or other measures for social distancing.
- Establishing clear notification protocols to keep the private sector, State, local, and tribal governments, and the Federal Government informed of the pandemic threat, including early warning signs and potential cases.

Rapidly Containing Cases or Initial Outbreak

Early transportation containment measures are more effective in slowing the spread of a pandemic if they are part of a larger comprehensive strategy that incorporates other measures, such as social distancing, isolation, vaccination, and antiviral medications. New models are being developed that will provide additional information on the potential benefits of containment options, including domestic travel restrictions. Plans should address:

- The need for close coordination between public health and transportation planners and local, State, and tribal entities, and the Federal Government to understand and integrate emerging modeling on border and transportation decisions to delay the spread of a pandemic and potential health benefits, social and economic consequences, and operational feasibility.

- Developing a range of transportation and border options based on the various stages of a pandemic. These options should include a full range of voluntary and mandatory travel restrictions, identify costs and benefits, and trigger points to use and remove measures.

- Border entry and exit polices for travelers and cargo, and detailed protocols for air, maritime, and land border ports of entry.

- Identifying and mitigating workforce risks and concerns regarding potential exposure, establishing risk-based priorities for protective equipment and limited countermeasures, acquiring/distributing equipment and countermeasures, and conducting outreach with workers.

Sustaining Critical Transportation and Border Service

The private sector, State and local entities, and the Federal Government all have key roles in sustaining critical services, delivering essential commodities, and supporting public health recommendations (e.g., vaccine distribution, social distancing measures). Plans should address:

- Identifying and maintaining essential services (e.g., maintaining the National Airspace System) given anticipated high rates of absenteeism rates and surges in demand for emergency medical supplies and services.

- Developing and implementing screening protocols for cargo and travelers and decontamination protocols for transportation and border personnel, assets, and facilities.

- Assessing systemic effects on the transportation system (e.g., supply chain impact, just-in-time delivery, warehousing, and logistics) and borders.

- Developing contingency plans to address lack of essential services, including delivery of essential commodities such as chlorine for water purification, gasoline, food, fuel, and medical supplies.

- Assessing and mitigating workforce risks and concerns regarding potential exposure, establishing risk-based prioritization for countermeasures, acquiring/distributing protective equipment and supplies, and conducting outreach.

- Addressing the need to provide security to protect shipments of critical, high-demand supplies (e.g., vaccine or antiviral medications and shipments of food and fuel).

Recovery of the Transportation System

Returning the transportation system to pre-pandemic conditions may be a complex and challenging task. Confidence in safety will need to be restored to travelers and transportation workers, and transportation assets may require deferred maintenance and possibly decontamination/disinfection/cleaning before being returned to service. Reprioritization of suspended or in-transit commodities may be required and some carriers may have permanently ceased operations due to the operational/financial burdens caused by the pandemic.

Roles and Responsibilities

The Federal Government, State and local governments, and the private sector, all have important and interdependent roles in transportation-related decisions to prepare for, respond to, and recover from a pandemic. Effective management of the Nation's transportation system in a pandemic will require a highly coordinated response from across the transportation sector. A pandemic's impact on the health and welfare of our citizens and the condition of our national economy will be directly affected by the degree of integration and coordination of the different levels of government and the private sector during the crises.

State and local governments have primary responsibility for detecting and responding to disease outbreaks and implementing measures to minimize the health, social, and economic consequences. The transportation decisions made at critical junctures and in multiple metropolitan areas can have cascading effects on the rest of the system and on the Nation's ability to keep supplies and services operational. The potentially catastrophic nature of a pandemic will likely overwhelm local and State capabilities. Federal agencies will be called upon to provide additional support, but even these resources may be overwhelmed at the peak of a pandemic.

The Federal Government

The Federal Government will use all capabilities within its authority to support private sector and State and local transportation preparedness, response, and recovery efforts. The Federal Government will increase readiness to sustain critical Federal transportation and border services during a pandemic and provide emergency transportation services under the NRP.

The Federal Government will incorporate the following elements in departmental preparedness plans: (1) carrying out assigned responsibilities, and exercising authorities where necessary, to ensure a comprehensive and coordinated national effort; (2) supporting private sector and State and local government transportation and border preparedness and response, including providing clear guidance to State and local authorities; (3) sustaining critical Federal transportation and border services; and (4) increasing their ability to provide emergency transportation under the NRP.

The Implementation Plan (Plan) outlines issues related to transportation and border preparedness that intersect with the missions and responsibilities of a number of key Federal departments and will require joint planning and close collaboration. To coordinate the Federal Government's development and execution of the Plan, the Department of Homeland Security will lead border preparedness, surveillance, and response and the Department of Transportation will lead overall transportation preparedness, surveillance, and response. Both departments will work closely to ensure coordination across these areas and with relevant departments and stakeholders.

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Department of Homeland Security: DHS is responsible for ensuring integrity of the Nation's infrastructure, domestic security, providing support to entry and exit screening for pandemic influenza at the borders, facilitating coordination for the overall response to a pandemic, and the provision of a common operating picture for all departments and agencies of the Federal Government. DHS is also responsible for securing the Nation's borders and facilitating legitimate trade and travel through U.S. ports of entry.

DHS supports coordination of the NRP, which is the primary mechanism for coordination of the Federal Government response to Incidents of National Significance, and will form the basis of the Federal pandemic response. The NRP provides an organizing framework for coordinating a variety of support areas, including transportation, mass care, and public affairs, which are led by other Federal departments (see Chapter 3 for more detail). DHS will collaborate with other departments on transportation and border decisions, including the ability to control the spread of a pandemic (Department of Health and Human Services (HHS), Department of Agriculture (USDA), Department of Transportation (DOT), and Department of the Interior (DOI)), understand social and economic consequences (Department of Commerce (DOC), DOT, Department of the Treasury (Treasury), Department of State (DOS), HHS, USDA, DHS components, DOI, and key stakeholders), international and domestic implications (DOS, DOT, DOC, DHS components, and key stakeholders), and to obtain the economic and operational feasibility of actions (DOT, DOC, DHS components, and key stakeholders).

Department of Health and Human Services: HHS's primary responsibilities are to protect the health of all U.S. citizens and provide essential human services. With respect to transportation and borders, HHS will be involved in entry and exit screening and, in consultation with Department of Labor (DOL), protecting the health of transportation and border workers who are implementing measures to limit spread. HHS will support rapid containment of localized outbreaks domestically. HHS will provide recommendations to State, local, tribal, and private sector entities on the ability of transportation restrictions to limit the spread of a pandemic, patient movement, and plans for traveler screening, isolation, and quarantine at ports of entry. In addition, HHS and USDA are responsible for the exclusion and seizure of infectious animals or animal products. HHS exercises this authority with respect to human health, while USDA exercises this authority with respect to animal health.

Department of Transportation: DOT will implement priorities to maintain essential functions of the national transportation system, and provide emergency management and guidance for civil transportation resources and systems. In its role in the global transportation network, DOT will conduct outreach with its established public and private stakeholders — strategically coordinating with international, domestic, and other Federal Government participants, consistent with its responsibilities under the NRP in support of DHS. DOT will consider the short- and long-term economic impacts of a pandemic on the transportation sector in order to develop strategies that might prevent disruption of transportation services.

Department of Defense: DOD's primary responsibilities are those actions required to protect DOD forces, maintain operational readiness, and sustain critical military missions. DOD will increase its readiness to sustain critical DOD services to support the NRP and elements of the U.S. Government's international response. DOD can provide additional support to the extent that DOD's National Security readiness is not compromised.

When directed by the Secretary of Defense in accordance with law, DOD will collaborate with DOS and DOT in building international partnerships and enhancing their transportation capability. Once an

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outbreak occurs, DOD may play a role, consistent with existing agreements and legal authorities, in implementation of movement controls, controlling movement into and out of areas/borders with affected populations, and assisting in the transportation/movement of rapid response teams, medical countermeasures (antiviral medications and vaccines, if available), and logistical support materials to infected and at-risk populations according to established plan and guidelines when other public or private sector assets are not available.

Department of State: DOS will facilitate international cooperation and coordination and keep foreign governments, international businesses and organizations, and the public informed of U.S. policies and measures affecting travel and transportation. DOS will also communicate travel risk information to U.S. citizens residing and traveling abroad so as to allow them to make informed decisions and plans. In the event of U.S. Government-sponsored evacuations, DOS will provide appropriate assistance to U.S. citizens overseas.

Department of Agriculture: USDA is responsible for protecting the Nation's livestock, including poultry, from exotic or foreign animal diseases, such as highly pathogenic avian influenza. With respect to transportation and borders, USDA will determine, based on the country of origin and other factors, which articles, live animals, or animal products have the potential for introducing or spreading an exotic disease and will establish restrictions or exclusions on their importation into, and/or movements within, the United States. If live animals are not excluded from importation, USDA determines which live animals must undergo USDA-supervised quarantine and health examination prior to final entry into the United States.

Department of the Interior: DOI is responsible for permitting and inspection of wildlife and wildlife products in trade into and out of the United States. With respect to transportation and borders, DOI will work in partnership with DHS, USDA, and DOS to enforce and publicize wildlife border controls and, if appropriate, utilize its own permitting authorities to restrict the import or export of wild birds.

Department of Labor: DOL's primary responsibilities are those actions required to protect the health and safety of workers, including communication of information related to pandemic influenza to workers and employers, and other relevant activities.

State, Local, and Tribal Entities

State and community pandemic preparedness plans should address key transportation issues and outline social distancing measures and strategies to mitigate consequences. States will face challenges in availability of essential commodities, demands for services that exceed capacity, and public pressure to restrict transportation in ways that may hinder economic sustainment and delivery of emergency services and supplies.

State, local, and tribal entities should develop and exercise pandemic influenza plans that address transportation's role in maintaining State and community functions, including delivery of essential services, containment strategies, providing critical services to citizens, support for public health measures, and other key regional or local issues. State and local governments should involve transportation and health professionals to identify transportation options, consequences, and implications. Transportation and border plans should be integrated as part of a comprehensive State plan that addresses the full range of pandemic preparedness (i.e., public health, animal health, protecting institutions, and law enforcement, public safety, and security). States will also need to coordinate closely with neighboring States/regions and the Federal Government to assess the interdependencies of local, State, and national decisions on the viability of the sector.

The Private Sector and Critical Infrastructure Entities

The private sector will play an integral role in preparedness before a pandemic begins and should be part of the national response. As they prepare, respond, sustain, and recover from a pandemic, transportation owners/operators will strive to maintain as close to normal operations as possible within the constraints of a pandemic.

The private sector should develop pandemic influenza plans that identify challenges and outline strategies to sustain core transportation and border functions and mitigate economic consequences. Entities should engage the full spectrum of preparedness planning to maintain essential services as close to normal operations as possible within the constraints of a pandemic.

Individuals and Families

It is important for U.S. citizens to recognize and understand the degree to which their actions will govern the course of a pandemic. The success or failure of border and transportation measures are ultimately dependent upon the acts of individuals, and the collective response of 300 million U.S. citizens will significantly influence the shape of the pandemic and its medical, social, and economic outcomes (see *Individual, Family, and Community Response to Pandemic Influenza* between Chapters 5 and 6). Individuals will, in general, respond to a pandemic and to public health interventions in ways that they perceive to be congruent with their interests and their instinct for self-preservation, and border and transportation authorities should tailor their risk communication campaigns and interventions accordingly. This will directly affect the willingness of the public to participate in travel-related screening and support voluntary domestic and international travel limitations.

International Partners

The response to a pandemic will be a global one, necessitating action by international organizations and governments. DOT and DHS have relationships with many international organizations, governments, and the private sector due to the global nature of today's economy. In close coordination with DOS, DOT and DHS will leverage their international relationships to assist in ensuring the continued movement of goods, services, and people (see Chapter 4 — International Efforts).

Actions and Expectations

5.1. Pillar One: Preparedness and Communication

This section provides an overview of planning expectations across the transportation and border sector (i.e., the private sector, State and local entities, and the Federal Government) and a detailed discussion of actions the Federal Government will take to support preparedness. Effective planning for a pandemic will require the development of plans, procedures, policies, and training to prepare for, respond to, and recover from a pandemic.

a. Planning for a Pandemic

5.1.1. Develop Federal implementation plans to support the *National Strategy for Pandemic Influenza*, to include all components of the U.S. Government and to address the full range of consequences of a pandemic.

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5.1.1.1. DHS and DOT shall establish an interagency transportation and border preparedness working group, including DOS, HHS, USDA, DOD, DOL, and DOC as core members, to develop planning assumptions for the transportation and border sectors, coordinate preparedness activities by mode, review products and their distribution, and develop a coordinated outreach plan for stakeholders, within 6 months. Measure of performance: interagency working group established, planning assumptions developed, preparedness priorities and timelines established by mode, and outreach plan for stakeholders in place.

5.1.1.2. HHS and DHS, in coordination with the National Economic Council (NEC), DOD, DOC, U.S. Trade Representative (USTR), DOT, DOS, USDA, Treasury, and key transportation and border stakeholders, shall establish an interagency modeling group to examine the effects of transportation and border decisions on delaying spread of a pandemic, and the associated health benefits, the societal and economic consequences, and the international implications, within 6 months. Measure of performance: interagency working group established, planning assumptions developed, priorities established, and recommendations made on which models are best suited to address priorities.

5.1.1.3. DHS and DOT, in coordination with DOD, HHS, USDA, Department of Justice (DOJ), and DOS, shall assess their ability to maintain critical Federal transportation and border services (e.g., sustain National Air Space, secure the borders) during a pandemic, revise contingency plans, and conduct exercises, within 12 months. Measure of performance: revised contingency plans in place at specified Federal agencies that respond to both international and domestic outbreaks and at least two interagency exercises carried out to test the plans.

5.1.1.4. DHS and DOT, in coordination with DOD, HHS, USDA, USTR, DOL, and DOS, shall develop detailed operational plans and protocols to respond to potential pandemic-related scenarios, including inbound aircraft/vessel/land border traffic with suspected case of pandemic influenza, international outbreak, multiple domestic outbreaks, and potential mass migration, within 12 months. Measure of performance: coordinated Federal operational plans that identify actions, authorities, and trigger points for decision making and are validated by interagency exercises.

5.1.1.5. DOD, in coordination with DHS, DOT, DOJ, and DOS, shall conduct an assessment of military support related to transportation and borders that may be requested during a pandemic and develop a comprehensive contingency plan for Defense Support to Civil Authorities, within 18 months. Measure of performance: Defense Support to Civil Authorities plan in place that addresses emergency transportation and border support.

5.1.1.6. DOT, in coordination with DHS, DOD, DOJ, HHS, DOL, and USDA, shall assess the Federal Government's ability to provide emergency transportation support during a pandemic under NRP ESF #1 and develop a contingency plan, within 18 months. Measure of performance: completed contingency plan that includes options for increasing transportation capacity, the potential need for military

support, improved shipment tracking, potential need for security and/or waivers for critical shipments, incorporation of decontamination and workforce protection guidelines, and other critical issues.

5.1.2. Continue to work with States, localities, and tribal entities to establish and exercise pandemic response plans.

5.1.2.1. DHS and HHS, in coordination with DOT and USDA, shall review existing grants or Federal funding that could be used to support transportation and border-related pandemic planning, within 4 months. Measure of performance: all State, local, and tribal governments are in receipt of, or have access to, guidance for grant applications.

5.1.2.2. DOT, in coordination with DHS, HHS, and transportation stakeholders, shall convene a series of forums with governors and mayors to discuss transportation and border challenges that may occur in a pandemic, share approaches, and develop a planning strategy to ensure a coordinated national response, within 12 months. Measure of performance: strategy for coordinated transportation and border planning is developed and forums initiated.

5.1.2.3. DOT and DHS, in coordination with HHS, USDA, and transportation stakeholders, shall develop planning guidance and materials for State, local, and tribal governments, including scenarios that highlight transportation and border challenges and responses to overcome those challenges, and an overview of transportation roles and responsibilities under the NRP, within 12 months. Measure of performance: State, local, and tribal governments have received or have access to tailored guidance and planning materials.

5.1.2.4. State, community, and tribal entities, in coordination with neighboring States and communities, the private sector, transportation providers, and health professionals, should develop transportation contingency plans that identify a range of options to respond to different stages of a pandemic, including support for public health containment strategies, maintaining State and community functions, transportation restriction options and consequences, delivery of essential goods and services, and other key regional or local issues, within 18 months.

5.1.2.5. DHS and DOT, in coordination with DOD and States, shall develop a range of options to cope with potential shortages of commodities and demand for essential services, such as building reserves of essential goods, within 20 months. Measure of performance: options developed and available for State, local, and tribal governments to refine and incorporate in contingency plans.

5.1.3. Continue to work with States, localities, and tribal entities to integrate non-health sectors, including the private sector and critical infrastructure entities, in these planning efforts.

5.1.3.1. DHS, in coordination with DOT, HHS, and USDA, shall conduct tabletop discussions and other outreach with private sector transportation and border

entities to provide background on the scope of a pandemic, to assess current preparedness, and jointly develop a planning guide, within 8 months. Measure of performance: private sector transportation and border entities have coordinated Federal guidance to support pandemic planning, including a planning guide that addresses unique border and transportation challenges by mode., within 8 months. Measure of performance: private sector transportation and border entities have coordinated Federal guidance to support pandemic planning, including a planning guide that addresses unique border and transportation challenges by mode.

5.1.3.2. DHS, in coordination with DOT, HHS, DOC, Treasury, and USDA, shall work with the private sector to identify strategies to minimize the economic consequences and potential shortages of essential goods (e.g., food, fuel, medical supplies) and services during a pandemic, within 12 months. Measure of performance: the private sector has strategies that can be incorporated into contingency plans to mitigate consequences of potential shortages of essential goods and services.

5.1.3.3. Private sector transportation and border entities, in coordination with States and customers, should develop pandemic influenza plans that identify challenges and outline strategies to sustain core functions, essential services, and mitigate economic consequences, within 16 months.

b. Communicating Expectations and Responsibilities

5.1.4. Provide guidance to the private sector and critical infrastructure entities on their role in the pandemic response, and considerations necessary to maintain essential services and operations despite significant and sustained worker absenteeism.

5.1.4.1. HHS, in coordination with DHS, DOT, and DOL, shall establish workforce protection guidelines and develop targeted educational materials addressing the risk of contracting pandemic influenza for transportation and border workers, within 6 months. Measure of performance: guidelines and materials developed that meet the diverse needs of border and transportation workers (e.g., customs officers or agents, air traffic controllers, train conductors, dock workers, flight attendants, transit workers, ship crews, and interstate truckers).

5.1.4.2. DHS, in coordination with DOT, DOL, Office of Personnel Management (OPM), and DOS, shall disseminate workforce protection information to stakeholders, conduct outreach with stakeholders, and implement a comprehensive program for all Federal transportation and border staff within 12 months. Measure of performance: 100 percent of workforce has or has access to information on pandemic influenza risk and appropriate protective measures.

5.1.4.3. HHS, in coordination with DHS, DOT, DOD, Environmental Protection Agency (EPA), and transportation and border stakeholders, shall develop and disseminate decontamination guidelines and timeframes for transportation and border assets and facilities (e.g., airframes, emergency medical services transport vehicles, trains, trucks, stations, port of entry detention facilities) specific to

pandemic influenza, within 12 months. Measure of performance: decontamination guidelines developed and disseminated through existing DOT and DHS channels.

5.2. Pillar Two: Surveillance and Detection

Early warning of a pandemic is critical to being able to rapidly employ resources to contain the spread of the virus. An effective detection system will save lives by allowing us to activate our response plans before the arrival of a pandemic virus in the United States. DHS will work closely with DOT, HHS, USDA, and DOS to develop and be prepared to implement screening protocols to enhance pre-departure, en route, and arrival screening at the U.S. border (land, air, and sea) for potentially infected travelers, animals, and other cargo.

a. Ensuring Rapid Reporting of Outbreaks

5.2.1. Advance mechanisms for "real-time" clinical surveillance in domestic acute care settings such as emergency departments, intensive care units, and laboratories to provide local, State, and Federal public health officials with continuous awareness of the profile of illness in communities, and leverage all Federal medical capabilities, both domestic and international, in support of this objective.

5.2.1.1. HHS and USDA, in coordination with DHS, DOT, DOS, DOD, DOI, and State, local, and international stakeholders, shall review existing transportation and border notification protocols to ensure timely information sharing in cases of quarantinable disease, within 6 months. Measure of performance: coordinated, clear interagency notification protocols disseminated and available for transportation and border stakeholders.

5.2.2. Develop and deploy rapid diagnostics with greater sensitivity and reproducibility to allow onsite diagnosis of pandemic strains of influenza at home and abroad, in humans, to facilitate early warning, outbreak control, and targeting of antiviral therapy.

5.2.2.1. DHS, in coordination with HHS and DOD, shall deploy human influenza rapid diagnostic tests with greater sensitivity and specificity at borders and ports of entry to allow real-time health screening, within 12 months of development of tests. Measure of performance: diagnostic tests, if found to be useful, are deployed; testing is integrated into screening protocols to improve screening at the 20-30 most critical ports of entry.

b. Using Surveillance to Limit Spread

5.2.3. Develop mechanisms to rapidly share information on travelers who may be carrying or may have been exposed to a pandemic strain of influenza, for the purposes of contact tracing and outbreak investigation.

5.2.3.1. DHS, in coordination with HHS, DOT, DOS, and DOD, shall work closely with domestic and international air carriers and cruise lines to develop and implement protocols (in accordance with U.S. privacy law) to retrieve and

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rapidly share information on travelers who may be carrying or may have been exposed to a pandemic strain of influenza, within 6 months. Measure of performance: aviation and maritime protocols implemented and information on potentially infected travelers available to appropriate authorities.

5.2.4. Develop and exercise mechanisms to provide active and passive surveillance during an outbreak, both within and beyond our borders.

5.2.4.1. HHS, in coordination with DHS, DOT, DOS, DOC, and DOJ, shall develop policy recommendations for aviation, land border, and maritime entry and exit protocols and/or screening and review the need for domestic response protocols or screening within 6 months. Measure of performance: policy recommendations for response protocols and/or screening.

5.2.4.2. HHS, DHS, and DOT, in coordination with DOS, DOC, Treasury, and USDA, shall develop policy guidelines for international and domestic travel restrictions during a pandemic based on the ability to delay the spread of disease and the resulting health benefits, associated economic impacts, international implications, and operational feasibility, within 8 months. Measure of performance: interagency travel curtailment policy guidelines developed that address both voluntary and mandatory travel restrictions.

5.2.4.3. DOS, in coordination DHS, DOT, and HHS, in consultation with aviation, maritime, and tourism industry stakeholders as appropriate, and working with international partners and through international organizations as appropriate, shall promote the establishment of arrangements through which countries would: (1) voluntarily limit travel if affected by outbreaks of pandemic influenza; and (2) establish pre-departure screening protocols for persons with influenza-like illness, within 16 months. Measure of performance: arrangements for screening protocols are negotiated.

5.2.4.4. DOS and HHS, in coordination with DHS, DOT, and transportation and border stakeholders, shall assess and revise procedures to issue travel information and advisories related to pandemic influenza, within 12 months. Measure of performance: improved interagency coordination and timely dissemination of travel information to stakeholders and travelers.

5.2.4.5. DOT and DHS, in coordination with HHS, DOD, DOS, airlines/air space users, the cruise line industry, and appropriate State and local health authorities, shall develop protocols[13] to manage and/or divert inbound international flights and vessels with suspected cases of pandemic influenza that identify roles, actions, relevant authorities, and events that trigger response, within 12 months. Measure of performance: interagency response protocols for inbound flights completed and disseminated to appropriate entities.

[13] Protocols will be revised as new rapid diagnostic tests become available.

[14] Protocols will be revised as new rapid diagnostic tests become available.

5.2.4.6. HHS, in coordination with DHS, DOT, DOS, DOD, air carriers/air space users, the cruise line industry, and appropriate State and local health authorities, shall develop en route protocols for crewmembers onboard aircraft and vessels to identify and respond to travelers who become ill en route and to make timely notification to Federal agencies, health care providers, and other relevant authorities, within 12 months. Measure of performance: protocols developed and disseminated to air carriers/air space users and cruise line industry.

5.2.4.7. DHS, DOT, and HHS, in coordination with transportation and border stakeholders, and appropriate State and local health authorities, shall develop aviation, land border, and maritime entry and exit protocols and/or screening protocols,[14] and education materials for non-medical, front-line screeners and officers to identify potentially infected persons or cargo, within 10 months. Measure of performance: protocols and training materials developed and disseminated.

5.2.4.8. DHS and HHS, in coordination with DOT, DOJ, and appropriate State and local health authorities, shall develop detection, diagnosis, quarantine, isolation, EMS transport, reporting, and enforcement protocols and education materials for travelers, and undocumented aliens apprehended at and between Ports of Entry, who have signs or symptoms of pandemic influenza or who may have been exposed to influenza, within 10 months. Measure of performance: protocols developed and distributed to all ports of entry.

5.2.4.9. DHS, in coordination with DOS, HHS, Treasury, and the travel and trade industry, shall tailor existing automated screening programs and extended border programs to increase scrutiny of travelers and cargo based on potential risk factors (e.g., shipment from or traveling through areas with pandemic outbreaks) within 6 months. Measure of performance: enhanced risk-based screening protocols implemented.

5.2.4.10. HHS, DHS, and DOT, in coordination with DOS, State, community and tribal entities, and the private sector, shall develop a public education campaign on pandemic influenza for travelers, which raises general awareness prior to a pandemic and includes messages for use during an outbreak, within 15 months. Measure of performance: public education campaign developed on how a pandemic could affect travel, the importance of reducing non-essential travel, and potential screening measures and transportation and border messages developed based on pandemic stages.

5.2.5. Develop screening and monitoring mechanisms and agreements to appropriately control travel and shipping of potentially infected products to and from affected regions if necessary, and to protect unaffected populations.

5.2.5.1. HHS and DHS, in coordination with DOS, DOT, DOD, DOL, and international and domestic stakeholders, shall develop vessel, aircraft, and truck cargo protocols to support safe loading and unloading of cargo while preventing transmission of influenza to crew or shore-side personnel, within 12 months.

Measure of performance: protocols disseminated to minimize influenza spread between vessel, aircraft, and truck operators/crews and shore-side personnel.

5.2.5.2. USDA, in coordination with DHS, DOI, and HHS, shall review the process for withdrawing permits for importation of live avian species or products and identify ways to increase timeliness, improve detection of high-risk importers, and increase outreach to importers and their distributors, within 6 months. Measure of performance: revised process for withdrawing permits of high-risk importers.

5.2.5.3. USDA, in coordination with DOI, DHS, shall enhance protocols at air, land, and sea ports of entry to identify and contain animals, animal products, and/or cargo that may harbor viruses with pandemic potential and review procedures to quickly impose restrictions, within 6 months. Measure of performance: risk-based protocols established and in use.

5.2.5.4. USDA, in coordination with DHS, shall review the protocols, procedures, and capacity at animal quarantine centers to meet the requirements outlined in Part 93 of Title 9 of the Code of Federal Regulations, within 4 months. Measure of performance: procedures in place to respond effectively and efficiently to the arrival of potentially infected avian species, including provisions for adequate quarantine surge capacity.

5.2.5.5. USDA, in coordination with DHS, DOJ, and DOI, shall enhance risk management and anti-smuggling activities to prevent the unlawful entry of prohibited animals, animal products, wildlife, and agricultural commodities that may harbor influenza viruses with pandemic potential, and expand efforts to investigate illegal commodities, block illegal importers, and increase scrutiny of shipments from known offenders, within 9 months. Measure of performance: plan developed to decrease smuggling and further distribution of prohibited agricultural commodities and products with influenza risk.

5.2.5.6. USDA, DHS, and DOI, in coordination with DOS, HHS, and DOC, shall conduct outreach and expand education campaigns for the public, agricultural stakeholders, wildlife trade community, and cargo and animal importers/exporters on import and export regulations and influenza disease risks, within 12 months. Measure of performance: 100 percent of key stakeholders are aware of current import and export regulations and penalties for non-compliance.

5.3. Pillar Three: Response and Containment

As the threat of a pandemic increases, the United States will implement incremental, risk-based measures at ports of entry and require similar pre-departure measures at select foreign points of embarkation. Regardless of where an outbreak occurs, the U.S. Government will use its authorities and resources to support rapid containment – whether working with international partners to contain overseas outbreaks or supporting State, local, or private sector efforts to contain domestic outbreaks. DHS should work with DOS, DOT, HHS, Treasury, and USDA to implement risk-based measures to slow the spread of a pandemic, minimize social and economic

consequences both internationally and domestically, and ensure operational feasibility. Following is a range of options that will be considered and the agency or agencies responsible for implementation (see also Chapter 4 — International Efforts).

In support of DHS, DOT serves as the coordinator and primary agency for ESF #1. This support function is designed to provide transportation support to assist in domestic incident management and coordinate the recovery, restoration, and safety/security of the transportation sector. Under the NRP, other support agencies include USDA, DOC, DOD, Department of Energy (DOE), DHS, DOI, DOJ, DOS, General Services Administration (GSA), and the U.S. Postal Service.

a. Containing Outbreaks

5.3.1. Encourage all levels of government, domestically and globally, to take appropriate and lawful action to contain an outbreak within the borders of their community, province, state, or nation.

5.3.1.1. DOS and DHS, in coordination with DOT, DOC, HHS, Treasury, and USDA, shall work with foreign counterparts to limit or restrict travel from affected regions to the United States, as appropriate, and notify host government(s) and the traveling public. Measure of performance: measures imposed within 24 hours of the decision to do so, after appropriate notifications made.

5.3.1.2. DOS, in coordination with DOT, HHS, DHS, DOD, air carriers, and cruise lines, shall work with host countries to implement agreed upon pre-departure screening based on disease characteristics and availability of rapid detection methods and equipment. Measure of performance: screening protocols agreed upon and put in place in countries within 24 hours of an outbreak.

5.3.1.3. DOS, in coordination with HHS, DHS, and DOT, shall offer transportation-related technical assistance to countries with outbreaks. Measure of performance: countries with outbreaks receive U.S. offer of technical support within 36 hours of an outbreak.

5.3.1.4. DHS, in coordination with DOS, USDA and DOI, shall provide countries with guidance to increase scrutiny of cargo and other imported items through existing programs, such as the Container Security Initiative, and impose country-based restrictions or item-specific embargoes. Measure of performance: guidance, which may include information on restrictions, is provided for increased scrutiny of cargo and other imported items, within 24 hours upon notification of an outbreak

5.3.1.5. DHS, in coordination with DOT, HHS, DOS, DOD, USDA, appropriate State and local authorities, air carriers/air space users, airports, cruise lines, and seaports, shall implement screening protocols at U.S. ports of entry based on disease characteristics and availability of rapid detection methods and equipment. Measure of performance: screening implemented within 48 hours upon notification of an outbreak.

5.3.1.6. DHS, in coordination with DOT, HHS, USDA, DOD, appropriate State, and local authorities, air carriers and airports, shall consider implementing response or screening protocols at domestic airports and other transport modes as appropriate, based on disease characteristics and availability of rapid detection methods and equipment. Measure of performance: screening protocols in place within 24 hours of directive to do so.

5.3.2. Where appropriate, use governmental authorities to limit non-essential movement of people, goods, and services into and out of areas where an outbreak occurs.

5.3.2.1. DHS, DOS, and HHS, in coordination with DOT and USDA, shall issue travel advisories/public announcements for areas where outbreaks have occurred and ensure adequate coordination with appropriate transportation and border stakeholders. Measure of performance: coordinated announcements and warnings developed within 24 hours of becoming aware of an outbreak and timely updates provided as required.

5.3.2.2. DHS and DOT, in coordination with DOS and Treasury, and international and domestic stakeholders, shall consider activating plans, consistent with international law, to selectively limit or deny entry to U.S. airspace, U.S. territorial seas (12 nautical miles offshore), and ports of entry, including airports, seaports, and land borders and/or restrict domestic transportation, based on risk, public health benefits, and economic impacts. Measure of performance: measures implemented within 6 hours of decision to do so.

5.3.2.3. DHS, in coordination with USDA, DOS, DOC, DOI, and shippers, shall rapidly implement and enforce cargo restrictions for export or import of potentially contaminated cargo, including embargo of live birds, and notify international partners/shippers. Measure of performance: measures implemented within 6 hours of decision to do so

b. Sustaining Infrastructure, Essential Services, and the Economy

5.3.3. Encourage the development of coordination mechanisms across American industries to support the above activities during a pandemic.

5.3.3.1. HHS and USDA, in coordination with DHS, DOT, DOS, and DOI, shall provide emergency notifications of probable or confirmed cases and/or outbreaks to key international, Federal, State, local, and tribal transportation and border stakeholders through existing networks. Measure of performance: emergency notifications occur within 24 hours or less of events of probable or confirmed cases or outbreaks.

5.3.3.2. DHS and DOT, in coordination with DOS, shall gather information from the private sector, international, State, local, and tribal entities, and transportation associations to assess and report the status of the transportation sector. Measure of performance: decision makers have current and accurate information on the status of the transportation sector.

5.3.4. Provide guidance to activate contingency plans to ensure that personnel are protected, that the delivery of essential goods and services is maintained, and that sectors remain functional despite significant and sustained worker absenteeism.

5.3.4.1. DHS and DOT shall notify border and transportation stakeholders and provide recommendations to implement contingency plans and/or use authorities to restrict movement based on ability to limit spread, economic and societal consequences, international considerations, and operational feasibility. Measure of performance: border and transportation stakeholders receive notification and recommendations within no more than 24 hours (depending on urgency) of an outbreak or significant development that may warrant a change in stakeholder actions or protective measures.

5.3.4.2. DHS and DOT shall consider activating contingency plans as needed to ensure availability of Federal personnel at more critical facilities and higher volume crossings or hubs. Measure of performance: Federal services sustained at high-priority/high-volume facilities.

5.3.4.3. DHS, if needed, will implement contingency plans to maintain border control during a period of pandemic influenza induced mass migration. Measure of performance: contingency plan activated within 24 hours of notification.

5.3.4.4. DHS and DOT, in coordination with USDA, DOI, DOC, and DOS, shall consult with the domestic and international travel industry (e.g., carriers, hospitality industry, and travel agents) and freight transportation partners to discuss travel and border options under consideration and assess potential economic and international ramifications prior to implementation. Measure of performance: initial stakeholder contacts and solicitation for inputs conducted within 48 hours of an outbreak and re-established if additional countries affected.

5.3.4.5. DOT shall issue safety-related waivers as needed, to facilitate efficient movement of goods and people during an emergency, balancing the need to expedite services with safety, and States should consider waiving state-specific regulatory requirements, such as size and weight limits and convoy registration. Measure of performance: all regulatory waivers as needed balance need to expedite services with safety.

5.3.4.6. DOJ and DHS shall protect targeted shipments of critical supplies and facilities by providing limited Federal security forces under Emergency Support Function #13 - Public Safety and Security (ESF #13) of the NRP, as needed. Measure of performance: all appropriate Federal, State, local, and tribal requests for Federal law enforcement and security assistance met via activation of ESF #13 of the NRP. (See also Chapter 8 - Law Enforcement, Public Safety, and Security.)

5.3.4.7. DHS, in coordination with DOS, DOT, DOD, and the Merchant Marine, shall work with major commercial shipping fleets and the international community to ensure continuation of maritime transport and commerce, including activation of plans, as needed, to provide emergency medical support to crews of vessels that are not capable of safe navigation. Measure of performance: maritime

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transportation capacity meets demand and vessel mishaps remain proportional to number of ship movements.

5.3.4.8. DOD, in coordination with DHS and DOS, shall identify those domestic and foreign airports and seaports that are considered strategic junctures for major military deployments and evaluate whether additional risk-based protective measures are needed, within 18 months. Measure of performance: identification of critical air and seaports and evaluation of additional risk-based procedures, completed.

5.3.5. Determine the spectrum of infrastructure-sustainment activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

5.3.5.1. DOT, in coordination with DHS and other ESF #1 support agencies, shall monitor and report the status of the transportation sector, assess impacts, and coordinate Federal and civil transportation services in support of Federal agencies and State, local, and tribal entities (see Chapter 6 — Protecting Human Health, for information on patient movement (ESF #8)). Measure of performance: when ESF #1 is activated, regular reports provided, impacts assessed, and services coordinated as needed.

5.3.5.2. DOT, in coordination with DHS and other ESF #1 support agencies, shall coordinate emergency transportation services to support domestic incident management, including transport of Federal emergency teams, equipment, and Federal Incident Response supplies. Measure of performance: all appropriate Federal, State, local, and tribal requests for transportation services provided on time via ESF #1 of the NRP.

5.3.5.3. DOT, in coordination with DHS, State, local, and tribal governments, and the private sector, shall monitor system closures, assess effects on the transportation system, and implement contingency plans. Measure of performance: timely reports transmitted to DHS and other appropriate entities, containing relevant, current, and accurate information on the status of the transportation sector and impacts resulting from the pandemic; when appropriate, contingency plans implemented within no more than 24 hours of a report of a transportation sector impact or issue.

5.3.5.4. DOT, in support of DHS and in coordination with other ESF #1 support agencies, shall work closely with the private sector and State, local, and tribal entities to restore the transportation system, including decontamination and re-prioritization of essential commodity shipments. Measure of performance: backlogs or shortages of essential commodities and goods quickly eliminated, returning production and consumption to pre-pandemic levels.

5.3.5.5. DOD, when directed by Secretary of Defense and in accordance with law, shall monitor and report the status of the military transportation system and those military assets that may be requested to protect the borders, assess impacts (to include operational impacts), and coordinate military services in support of

Federal agencies and State, local, and tribal entities. Measure of performance: when DOD activated, regular reports provided, impacts assessed, and services coordinated as needed.

5.3.5.6. DOT and DHS, in coordination with NEC, Treasury, DOC, HHS, DOS, and the interagency modeling group, shall assess the economic, safety, and security related effects of the pandemic on the transportation sector, including movement restrictions, closures, and quarantine, and develop strategies to support long-term recovery of the sector, within 6 months of the end of a pandemic. Measure of performance: economic and other assessments completed and strategies implemented to support long-term recovery of the sector.

c. Ensuring Effective Risk Communication

5.3.6. Ensure that timely, clear, coordinated messages are delivered to the American public from trained spokespersons at all levels of government and assist the governments of affected nations to do the same.

5.3.6.1. DOT and DHS, in coordination with HHS, DOS, and DOC, shall conduct media and stakeholder outreach to restore public confidence in travel. Measure of performance: outreach delivered and traveling public resumes use of the transportation system at or near pre-pandemic levels.

5.3.6.2. DHS and DOT, in coordination with DOS, DOD, HHS, USDA, DOI, and State, local, and tribal governments, shall provide the public and business community with relevant travel information, including shipping advisories, restrictions, and potential closing of domestic and international transportation hubs. Measure of performance: timely, consistent, and accurate traveler information provided to the media, public, and business community.

WHO Global Pandemic Phases and the Stages for Federal Government Response

WHO Phases		Federal Government Response Stages	
INTER-PANDEMIC PERIOD			
1	No new influenza virus subtypes have been detected in humans. An influenza virus subtype that has caused human infection may be present in animals. If present in animals, the risk of human disease is considered to be low.	0	New domestic animal outbreak in at–risk country
2	No new influenza virus subtypes have been detected in humans. However, a circulating animal influenza virus subtype poses a substantial risk of human disease.		
PANDEMIC ALERT PERIOD			
3	Human infection(s) with a new subtype, but no human-to-human spread, or at most rare instances of spread to a close contact.	0	New domestic animal outbreak in at–risk country
		1	Suspected human outbreak overseas
4	Small cluster(s) with limited human-to-human transmission but spread is highly localized, suggesting that the virus is not well adapted to humans.	2	Confirmed human outbreak overseas
5	Larger cluster(s) but human-to-human spread still localized, suggesting that the virus is becoming increasingly better adapted to humans, but may not yet be fully transmissible (substantial pandemic risk).		
PANDEMIC PERIOD			
6	Pandemic phase: increased and sustained transmission in general population.	3	Widespread human outbreaks in multiple locations overseas
		4	First human case in North America
		5	Spread throughout United States
		6	Recovery and preparation for subsequent waves

PANDEMIC INFLUENZA

Stages of Federal Government Response

STAGE 0

New Domestic Animal Outbreak in At–Risk Country

GOALS

Provide coordination, support, technical guidance

Track outbreaks to resolution

Monitor for reoccurrence of disease

ACTIONS

Support coordinated international response

Prepare to deploy rapid response team and materiel

Offer technical assistance, encourage information sharing

POLICY DECISIONS

Deployment of countermeasures

WHO Phase 1 or 2
Inter-Pandemic Period

STAGE 1

Suspected Human Outbreak Overseas

GOALS

Rapidly investigate and confirm or refute

Coordination and logistical support

ACTIONS

Initiate dialogue with WHO

Deploy rapid response team

Amplify lab-based and clinical surveillance to region

Prepare to implement screening and/or travel restrictions from affected area

POLICY DECISIONS

Pre-positioning of U.S. contribution to international stockpile assets

Use of pre-pandemic vaccine

WHO Phase 3
Pandemic Alert Period

STAGE 2

Confirmed Human Outbreak Overseas

GOALS

Contain outbreak and limit potential for spread

Activate domestic medical response

ACTIONS

Declare Incident of National Significance

Support international deployment of countermeasures

Implement layered screening measures; activate domestic quarantine stations

Prepare to limit domestic ports of entry

Prepare to produce monovalent vaccine

POLICY DECISIONS

Contribution to countermeasures for affected region

Entry/exit screening criteria; isolation/quarantine protocols

Diversion of trivalent vaccine production to monovalent

Revise prioritization and allocation of pandemic vaccine and antiviral medications

WHO Phase 4 or 5
Pandemic Alert Period

STAGE 3

Widespread Outbreaks Overseas

GOALS

Delay emergence in North America

Ensure earliest warning of first case(s)

Prepare domestic containment and response mechanisms

ACTIONS

Activate domestic emergency medical personnel plans

Maintain layered screening measures at borders

Deploy pre-pandemic vaccine and antiviral stockpiles; divert to monovalent vaccine production

Real-time modeling; heighten hospital-based surveillance

Prepare to implement surge plans at Federal medical facilities

POLICY DECISIONS

Prioritize efforts for domestic preparedness and response

STAGE 4

First Human Case in North America

GOALS

Contain first cases in North America

Antiviral treatment and prophylaxis

Implement national response

ACTIONS

Ensure pandemic plans activated across all levels

Limit non-essential domestic travel

Deploy diagnostic reagents for pandemic virus to all laboratories

Continue development of pandemic vaccine

Antiviral treatment and targeted antiviral prophylaxis

POLICY DECISIONS

Revision of prioritization and allocation scheme for pandemic vaccine

STAGE 5

Spread throughout United States

GOALS

Support community response

Preserve critical infrastructure

Mitigate illness, suffering, and death

Mitigate impact to economy and society

ACTIONS

Maintain overall situational awareness

Evaluate epidemiology; provide guidance on community measures

Deploy vaccine if available; prioritization guidance

Sustain critical infrastructure, support health and medical systems, maintain civil order

Provide guidance on use of key commodities

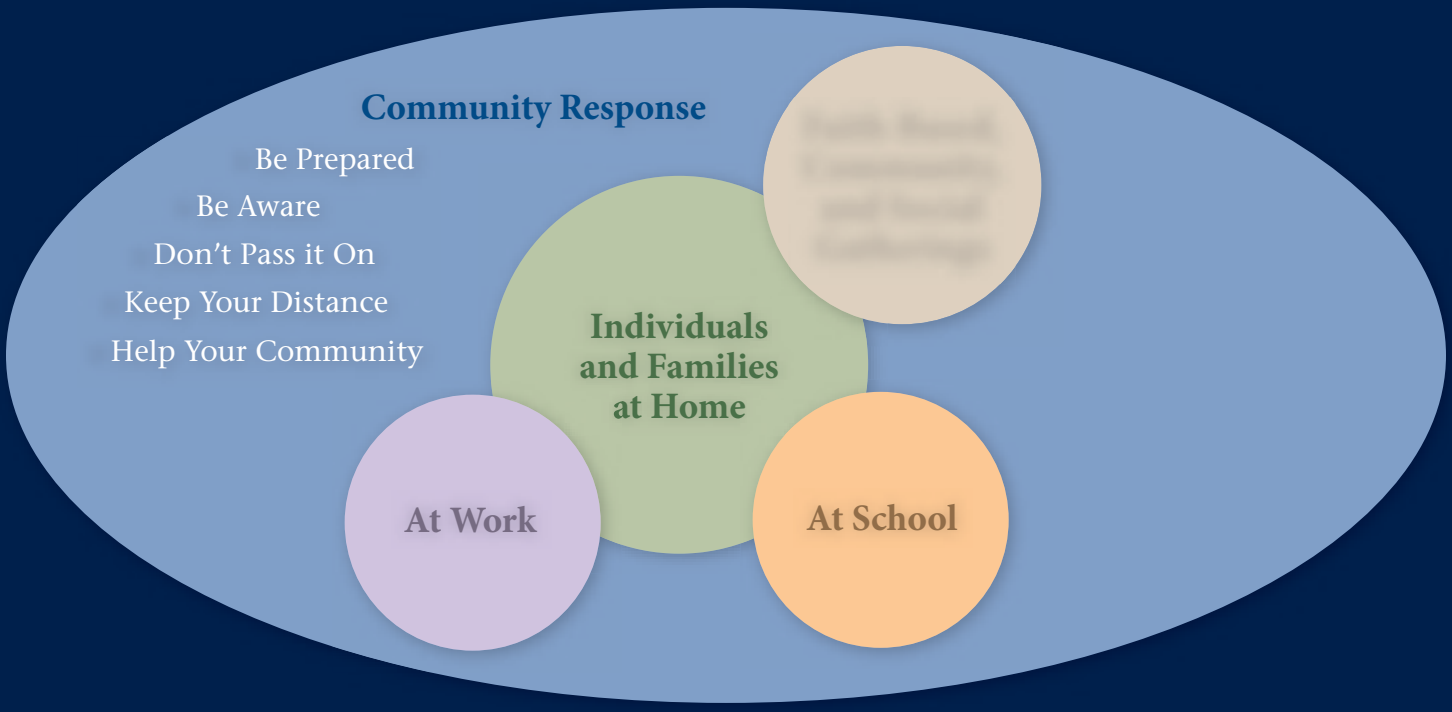
POLICY DECISIONS

Federal support of critical infrastructure and availability of key goods and services

Lifting of travel restrictions

WHO Phase 6
Pandemic Period

Individual, Family, and Community Response to Pandemic Influenza



Response	Individuals and Families	At School	At Work	Faith-Based, Community, and Social Gatherings
Be Prepared	Review Individuals and Families Planning Checklist www.pandemicflu.gov	Review School Planning Checklists www.pandemicflu.gov	Review Business Planning Checklist www.pandemicflu.gov	Review Faith-Based and Community Organizations Preparedness Checklist www.pandemicflu.gov
Be Aware	Identify trusted sources for information; stay informed about availability/use of anti-viral medications/vaccine	Review school pandemic plan; follow pandemic communication to students, faculty, and families	Review business pandemic plan; follow pandemic communication to employees and families	Stay abreast of community public health guidance on the advisability of large public gatherings and travel
Don't Pass it On	If you are ill--stay home; practice hand hygiene/cough etiquette; model behavior for your children; consider voluntary home quarantine if anyone ill in household	If you are ill--stay home; practice hand hygiene/cough etiquette; ensure sufficient infection control supplies	If you are ill--stay home; practice hand hygiene/cough etiquette; ensure sufficient infection control supplies	If you are ill--stay home; practice hand hygiene/cough etiquette; modify rites and religious practices that might facilitate influenza spread
Keep Your Distance	Avoid crowded social environments; limit non-essential travel	Prepare for possible school closures; plan home learning activities and exercises; consider childcare needs	Modify face-to-face contact; flexible worksite (telework); flexible work hours (stagger shifts); snow days	Cancel or modify activities, services, or rituals; follow community health social distancing recommendations
Help Your Community	Volunteer with local groups to prepare and assist with emergency response; get involved with your community as it prepares	Contribute to the local health department's operational plan for surge capacity of health care (if schools designated as contingency hospitals)	Identify assets and services your business could contribute to the community response to a pandemic	Provide social support services and help spread useful information, provide comfort, and encourage calm

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Chapter 6 — Protecting Human Health

Introduction

Protecting human health is the crux of pandemic preparedness, and the goals and pillars of the *National Strategy for Pandemic Influenza (Strategy)* reflect this. If we fail to protect human health, we are likely to fail in our secondary goals of preserving societal function and mitigating the social and economic consequences of a pandemic. Consequently, the components of the Strategy, the elements of this Implementation Plan (Plan), and the projected allocation of resources to preparedness, surveillance, and response activities all reflect the overarching imperative to reduce the morbidity and mortality caused by a pandemic. In order to achieve this objective, we must leverage all instruments of national power and ensure coordinated action by all segments of government and society, while maintaining constitutional government, law and order, and other basic societal functions.

The emergence of an easily transmissible novel strain of influenza into a human population anywhere poses a threat to societies everywhere. Influenza does not respect geographic or political boundaries. When pandemic strains emerge they sweep through communities and nations with frightening velocity. The three pandemics of the 20th century each encircled the globe, sparing few if any communities, within months of their emergence into human populations. The cumulative and concentrated mortality of a pandemic can be appalling. The 1918 pandemic, for example, killed more people in 6 months than acquired immunodeficiency syndrome (AIDS) has killed in the last 25 years and more than were killed in all of World War I. The primary strategy for protecting human health, therefore, must be prevention of emergence of a pandemic strain from animal reservoirs, if possible, or rapid containment of a human outbreak at the source, if emergence does occur. Federal Government efforts to prepare for and to support prevention and containment strategies are described throughout this document.

Protecting human health in the setting of a pandemic will require: (1) effective domestic and international surveillance for, and prompt response to, influenza outbreaks in both humans and animals; (2) improved diagnostic tests; (3) the rapid development, production, and distribution of definitive medical countermeasures (i.e., vaccines); (4) the targeted and effective use of antiviral medications and other potentially scarce medical resources to treat symptomatic individuals; (5) the judicious application of community infection control measures; (6) effective communication of risk reduction strategies to the private sector and to individuals; and (7) the full collaboration of the public and the private sector. A dynamic and resourceful public health and medical response has the potential to save lives by delaying the occurrence of outbreaks, decreasing the proportion of the population who develop influenza or become critically ill, and reducing the burden on critical health care facilities. For such a response to occur, Federal, State, local, and tribal officials must ensure that all stakeholders understand their responsibilities and are adequately prepared to play their part, they must prioritize the use of scarce resources, and they must ensure the continuity of essential government, emergency, and medical services.

Fortunately, we live in an era of great medical and scientific progress. Today we have a better understanding of the influenza virus and the illness that it causes than ever before. Vaccinology is making rapid strides and we are learning more about the use of adjuvants and other dose-sparing strategies. Two new and effective antiviral medications (oseltamivir and zanamivir) have received Food and Drug Administration (FDA) approval in the last 7 years. We understand much more about the transmission dynamics and epidemiology of influenza than we did at the time of the last pandemic, in 1968. We have better international and domestic disease surveillance systems and we have developed a national network

of diagnostic laboratories incorporating standardized reagents and protocols. Since September 11, 2001, we have made significant investments in all aspects of public health emergency preparedness. We are, in short, better prepared than ever to meet the immense challenge posed by a pandemic.

But the challenge will be formidable. We do not understand why some influenza viruses are efficiently transmitted and some are not. In the event of a pandemic, we will have to overcome severe shortfalls in surge capacity in our health care facilities. Our current vaccine production capabilities cannot keep pace with an evolving pandemic. We lack adequate stockpiles of antiviral medications and plans to distribute the supplies we have. Most surveillance systems do not operate in real time. We cannot quantify the value of many infection control strategies and do not know the optimal timing for or sequencing of those that would affect entire communities. Finally, and perhaps most importantly, members of the public may not appreciate the importance of the care they will provide to ill family members, the degree to which they can modify their risk of becoming ill, nor the extent to which their collective actions will shape the course of a pandemic.

Key Considerations

The overarching strategic goals of the *Strategy* are to: (1) stop, slow, or limit the spread of disease; (2) mitigate disease, suffering, and death; and (3) sustain infrastructure and mitigate impact to the economy and the functioning of society. These goals are not sequential but mutually supportive. The objective of the *Strategy* is to accomplish all three goals, to whatever extent possible, at all times during a pandemic.

Epidemiology

The transmission of a communicable agent between individuals is a chance event, the probability of which varies according to the nature and intimacy of their interactions. Epidemics occur when, on average, an infected individual transmits infection to more than one other person (R_0, or reproductive rate, >1). Conversely, and critically, outbreaks of infectious disease will diminish and ultimately terminate when, on average, an infected individual transmits infection to less than one other person (reproductive rate less than one). *The key to stopping an epidemic is to bring the reproductive rate below 1 and keep it there through whatever means, or combination of means, feasible.* These means can include the administration of effective vaccines or antiviral prophylaxis, the identification and isolation of infected individuals and quarantine of their contacts, and the implementation of appropriate infection control and social distancing measures.

The velocity of an epidemic — the speed with which an epidemic spreads through a community — is a function of the basic reproductive rate for the disease in question and how long it takes for infected individuals to infect others (generation time, or T_g). Influenza is moderately infectious but has a very short generation time. Recent estimates have suggested that while the reproductive rate for most strains of influenza is less than 2, the generation time may be as little as 2.6 days. These parameters predict that in the absence of disease containment measures the number of cases of epidemic influenza will double about every 3 days. It is important to note that the magnitude of the reproductive rate determines the intensity of measures required to halt transmission, while the components of the generation time — that is, the duration of the latent and infectious periods — determine how and when these measures must be applied.

Patients with influenza typically become infectious after about 1 to 1.5 days and prior to becoming symptomatic. At about 2 days, most infected persons will develop symptoms of illness, the spectrum and severity of which may vary considerably. Understanding the natural history of influenza makes it possible

to assess potential response measures and determine the factors critical for their success. Given that 2 days will elapse between infection and illness in most cases, for example, a significant percentage of infected persons who travel internationally to the United States and are asymptomatic when boarding a flight will still be well upon arrival and will not be detected by screening at the border.

Pivotal Importance of Initial Conditions

While we cannot predict the severity of a pandemic before it begins, the initial analysis of the characteristics of the virus and its epidemiology will tell us much about the way in which the pandemic will unfold. The cardinal determinants of the public health response to a pandemic will be its severity, as defined by the ability of the pandemic virus to cause severe morbidity and mortality, especially in otherwise low-risk populations, and the availability and effectiveness of vaccine and antiviral medications.[15] Decisions about the prioritization and distribution of medical countermeasures; the content of risk communication campaigns; the application of community infection control measures; and whether and when to make adjustments in the delivery of care commensurate with available resources are interrelated and all fundamentally determined by these factors, which will be known from the beginning of an outbreak. These are the critical triggers that will dictate the actions of public health authorities.

Severe pandemics, for example, pose the greatest threat to critical infrastructure and national security. Groups receiving priority access to medical countermeasures during a severe pandemic will reflect the need to maintain infrastructure and security functions. When vaccine and antiviral drug supplies are very limited, targeting necessarily will be narrower and the importance of community infection control measures will be greater. An inadequate supply of countermeasures in the setting of a severe pandemic would also be an indication to authorities to expand surge capacity and prepare to alter standards of care by expanding staff, extending the defined roles of providers, and establishing infirmaries. Public messaging to health care professionals, other stakeholders, and the general public would seek to prepare them for a severe pandemic and the shortage of medical countermeasures. It would not be necessary to wait for numbers of cases to rise exponentially.

Greater vaccine and antiviral drug supply, on the other hand, would permit more flexibility in the strategies and objectives for the use of medical countermeasures. Preservation of critical infrastructure and security functions would still be crucial, but consideration might also be given to efforts to decrease transmission of infection in communities through the early immunization of children or by providing post-exposure prophylaxis to household contacts of ill persons. Anticipating a pandemic caused by a highly pathogenic virus, authorities would still move to expand surge capacity and prepare to change the way care is delivered by expanding staff, extending the defined roles of providers, and establishing infirmaries. Public messaging would be tailored accordingly.

In a less severe pandemic, where infrastructure and security concerns are not as significant, efforts could be focused on protecting those at high risk for severe disease and death from the beginning, especially if supplies of medical countermeasures are inadequate. Public health authorities might recommend home care, with or without isolation, for the great majority of patients and the costs and benefits of community infection control measures would be calculated differently.

[15] It is important to emphasize that the severity of a pandemic is a function not of the attack rate or transmissibility of the virus, both of which appear to be relatively constant between pandemics, but of its ability to produce severe illness or death. The severity of illness caused by a strain of influenza with pandemic potential will be quickly apparent, although continued monitoring and analysis will be necessary to refine initial assessments.

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The value of a decision framework based on pandemic severity and the supply of vaccines and antiviral medications is that such a framework facilitates decisive and concrete pre-pandemic planning and allows the construction, in advance, of response algorithms and decision trees. It is important to caveat these observations by noting that since antiviral resistance can develop over time and the virulence of circulating strains may change as the virus adapts to its human hosts, ongoing monitoring for antiviral resistance and geographically circumscribed or more global changes in vaccine effectiveness or viral pathogenicity during a pandemic will be essential. Strategies for use of vaccine and antiviral medications that are in short supply may shift in response to such observations or as the supply of countermeasures changes over time.

Maintaining Situational Awareness

Surveillance

The goal of influenza surveillance is to track novel influenza subtypes and detect clusters of severe human infection heralding the emergence of strains with pandemic potential, so as to facilitate early and aggressive attempts at containment. International surveillance programs and goals are described in Chapter 4 - International Efforts. Domestic surveillance goals include detection of initial U.S. cases if the pandemic begins abroad, defining its spread, elucidating health impacts and high-risk groups, and monitoring characteristics of the virus, including antigenic and genetic changes, and changes in antiviral resistance patterns.

The Federal Government collects outpatient, hospital, and mortality surveillance data through a variety of systems and networks, and in recent years has improved its capability to aggregate and analyze data in real time. Unfortunately, current systems do not provide sufficient depth and coverage to guide all elements of the national response, and a great deal of analysis and time is required to assess the consequences of seasonal influenza outbreaks and the effectiveness of the annual vaccine. To remedy this shortcoming, and to enhance their own situational awareness, State and local public health departments should make it a priority to establish or enhance influenza surveillance systems within their jurisdictions. To improve national surveillance capabilities, the National Biosurveillance Integration System (NBIS) has been established to provide an all-source biosurveillance common operating picture to improve early-warning capabilities and facilitate national response activities through better situational awareness.

In the event of a pandemic, States should be prepared to increase diagnostic testing for influenza as well as the frequency of reporting to the Centers for Disease Control and Prevention (CDC). Early detection of pandemic virus at a local level requires the collection and testing of appropriate specimens as recommended. The most intense testing will be necessary during the early stages of a pandemic, when detecting the introduction of the virus into a State or community is the primary goal.

Response

Maintaining situational awareness during a pandemic will be extremely difficult. In addition to the surveillance and disease reporting activities described above, Federal, State, and local authorities will also be called upon to collect, analyze, integrate, and report information about the status of their hospitals and health care systems, critical infrastructure, and materiel requirements, and they will be called upon to supply such information at a time when their capabilities may be eroded by significant absenteeism.

Hospital and health care resource tracking can and should be performed in real time. The identification of stress points and focal insufficiencies in real time will permit the burden of patient care to be distrib-

uted across health care systems more equitably, preserving core functionalities despite significant and even extreme surges in demand. Additionally, the early recognition of increased systemic loads could serve as a trigger to public health officials to implement or promote more stringent disease containment measures and to make adjustments in the delivery of care commensurate with available resources.

Implementing disease containment and infection control measures is likely to impose significant costs on affected communities. Determining the optimal timing and thresholds for interventions with significant associated costs will be difficult in the absence of quantitative data about their effectiveness and the benefits they will confer. Insights into the biology and patterns of transmission of pandemic influenza, as well as the efficacy of various disease containment strategies, will evolve in real time and should be tractable to analysis and modeling.

Role of Rapid and Reliable Diagnostic Tests

During periods of heightened surveillance for the emergence of novel influenza strains and early in a pandemic, when disease is localized in one or several countries, both clinical and epidemiological (e.g., exposure) characteristics are important for surveillance and case detection. As the pandemic begins to spread, rapid diagnostic tests may be widely used to distinguish influenza A from other respiratory illnesses. Once pandemic disease is widespread, cases will be identified primarily by clinical presentation. Historically, most patients with pandemic influenza have presented with signs and symptoms similar to those of seasonal influenza, although in some the presentation is more fulminant and progresses very rapidly.

Rapid diagnostic tests for influenza are screening tests for influenza virus infection that provide results within 60 minutes and can be used for individuals or groups. Diagnostic tests will be most critical in the early phases of a pandemic, when identification of the first cases in a locality is important, and they may also be useful as the epidemic declines and pandemic disease becomes less prevalent. Depending on their sensitivity and specificity, such tests might also facilitate screening of travelers at ports of entry or prior to boarding inbound flights. At present, widely available rapid diagnostic tests and testing protocols do not distinguish between specific subtypes and strains of influenza and, because of their suboptimal sensitivity and specificity, cannot even definitively distinguish between influenza and other causes of similar illness. Because the available diagnostic tests have differing sensitivities, specificities, and technical requirements, they may find use in different settings and for different purposes during a pandemic.

New technologies and new approaches are driving down costs and improving the specificity and sensitivity of rapid diagnostic tests to the point that subtype- and strain-specific tests may be available for large-scale screening within the next couple of years. If these tests can be packaged in a way that facilitates their use in non-clinical settings, their potential to facilitate disease containment efforts will be even greater, by allowing more effective screening of travelers (and thus the more targeted application of movement restrictions) or even by identifying patients before they become symptomatic or infectious. The Federal Government will continue to support research in this area, in an effort to promote such advances.

In the interim, existing diagnostic technologies must be used to greatest effect to rapidly screen individuals infected with pandemic influenza. To this end, the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), the Department of Energy (DOE), the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Federal Bureau of Investigation (FBI), and the Department of Homeland Security (DHS) participate, with State and local public health laboratories, in the Laboratory Response Network (LRN), the member laboratories of which have adopted

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uniform diagnostic standards, protocols, and reagents, and can perform subtype- and strain-specific confirmation testing for influenza. HHS and the private sector have also developed high-throughput rapid diagnostic kits that will undergo field testing by U.S. and Southeast Asian scientists and public health officials to ascertain the utility and robustness of these products.

Countermeasure Production, Prioritization, Distribution, and Security

The optimal way to control the spread of a pandemic and reduce its associated morbidity and mortality is through the use of vaccines. Broadly speaking, vaccines may be divided into those that are developed against strains of animal influenza viruses that have caused isolated infections in humans, which may be regarded as "pre-pandemic" vaccines, and those that are developed against strains that have evolved the capacity for sustained and efficient human-to-human transmission ("pandemic" vaccines). Because emergence in human populations necessarily reflects genetic changes within the pandemic virus, pre-pandemic vaccines may be a good or poor match for — and offer greater or lesser protection against — the pandemic strain that ultimately emerges.

Current FDA-licensed inactivated influenza vaccines are based on technologies developed more than 30 years ago. Scientists first select the three virus strains that they expect to circulate in the United States during the following season. These strains are then adapted to grow in fertilized chicken eggs and manufacturers inject each adapted virus strain separately into millions of eggs, which are subsequently incubated to produce influenza virus. Large batches of these eggs are harvested and the viral particles that are obtained are inactivated, chemically disrupted, and blended into a single vaccine product that includes all three influenza virus strains. A single dose of the trivalent vaccine contains 15 ug of hemagglutinin for each of the three antigenic components. The total dose (45 ug) is approximately the amount of purified virus obtained from the allantoic fluid of one egg. Current manufacturing processes thus require manufacturers to procure one fertilized chicken egg for every dose of vaccine produced and are dependent on the timely availability of vaccine seed strains.

Antiviral medications can be used for treatment or prophylaxis of people exposed to influenza. Currently only two classes of medication — the neuraminidase inhibitors and the adamantanes — demonstrate efficacy against circulating influenza viruses. Both classes of medication are most effective if administered in the earliest stages of infection. Adamantane resistance emerges fairly quickly (adamantane-resistant H5N1 influenza already circulates, for example) and does not appear to affect viral fitness, in terms of the transmissibility of the virus or its ability to produce illness. Resistance to oseltamivir, the oral neuraminidase inhibitor, emerges more slowly but has been associated with treatment failure in patients with H5N1 influenza. Resistance to zanamivir, the inhaled neuraminidase inhibitor, has not been documented in immunocompetent hosts, but its efficacy in treating patients with H5N1 or other subtypes and strains with pandemic potential requires further assessment.

Production

The Federal Government has established two primary vaccine goals: (1) establishment and maintenance of stockpiles of pre-pandemic vaccine adequate to immunize 20 million persons against influenza strains that present a pandemic threat; and (2) expansion of domestic influenza vaccine manufacturing surge capacity for the production of pandemic vaccines for the entire domestic population within 6 months of a pandemic declaration.

While progress can be made toward the first goal with current egg-based manufacturing methods, the existing domestic influenza vaccine manufacturing base lacks sufficient surge capacity to meet the

second. Moreover, since populations have no baseline immunity to strains of influenza with pandemic potential, it is highly probable that more vaccine antigen will be required per person to induce protective immunity. The amount of vaccine antigen that is currently manufactured is matched to the usual requirements for seasonal influenza vaccine, and not the requirements for a pandemic vaccine, which may require significantly more hemagglutinin per person than a seasonal vaccine to induce an effective immune response. Furthermore, in the event of a pandemic it is likely that bulk influenza vaccine manufactured outside the United States (and accounting for about 40 percent of annual domestic supply) will be unavailable. Thus, the measures taken by the Federal Government over the past several years to ensure a secure egg supply and support the expansion and diversification of influenza vaccine manufacturing capacity will require significant enhancement and acceleration.

The Federal Government has adopted a three-pronged strategy to secure the required surge capacity for pre-pandemic and pandemic vaccines. Current initiatives fall broadly under the categories of advanced vaccine development, establishment, and expansion of new U.S. vaccine manufacturing facilities, and vaccine acquisition. In keeping with our goal of developing a rapid response vaccine manufacturing capability, we will support the advanced development of cell-based influenza vaccine candidates. The Federal Government will also support the renovation of existing U.S. manufacturing facilities that produce other FDA-licensed cell-based vaccines or biologics as well as the establishment of new domestic cell-based influenza vaccine manufacturing facilities.[16] To accommodate pre-pandemic vaccine needs without disturbing seasonal influenza vaccine manufacturing campaigns, the Federal Government will continue through 2008 to procure H5N1 vaccine from manufacturers of U.S.-licensed influenza vaccines. With these and other initiatives, the pandemic vaccine capacity goal for the United States may be within reach by the end of 2010.

Improvements in vaccine technology may alleviate some vaccine capacity concerns. Dose-sparing strategies for influenza vaccines that are currently under evaluation may reduce the requirement for vaccine antigen per dose and/or allow for effective immunization with a single shot. In the future, broad-spectrum influenza vaccines may supplement seasonal and pandemic influenza vaccines to provide broader virus specificity and longer persistence of enhanced immunity, especially in the populations most vulnerable to influenza — children, the elderly, and the chronically ill.

The Federal Government has established two primary goals for stockpiling existing antiviral medications: (1) establishment and maintenance of stockpiles adequate to treat 75 million persons, divided between Federal and State stockpiles; and (2) establishment and maintenance of a Federal stockpile of 6 million treatment courses reserved for containment efforts. In an effort to expand the medical armamentarium, the Federal Government is also supporting research projects to optimize dosing strategies for existing antiviral medications, identify novel drug targets, and develop compounds that inhibit viral entry, replication, and maturation.

[16] Cell-based manufacturing methods use mammalian cells to grow the influenza viruses used in the vaccine and offer a number of advantages. Vaccine manufacturers can bypass the step needed to adapt the virus strains to grow in eggs. Cells may be frozen in advance and large volumes grown quickly. U.S. licensure and manufacture of influenza vaccines produced in cell culture also will provide security against risks associated with egg-based production, such as shortages and the potential for egg supplies to be contaminated by various poultry-based diseases. Finally, the new cell-based influenza vaccines will provide an option for people who are allergic to eggs and therefore unable to receive the currently licensed vaccines. It should be noted that certain issues must be addressed by extensive testing and characterization prior to the banking and use of mammalian cells for vaccine production. For example, such cells may be at risk of contamination with various disease-causing organisms affecting the animals from which the cells or cell-growth media components were derived, and there may be tumorigenicity concerns with cells that may be useful for high-yield manufacturing.

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Prioritization

The Federal Government is developing guidelines to assist State and local governments and the private sector in defining groups that should receive priority access to scarce medical countermeasures. Priority recommendations will reflect the pandemic response goals of limiting mortality and severe morbidity; maintaining critical infrastructure and societal function; diminishing economic impacts; and maintaining national security. Limiting transmission also may be an objective. Antiviral prophylaxis of household contacts of infected individuals and vaccination of children may decrease disease spread in affected communities but would require large quantities of drug and vaccine. If supplies and public health resources were sufficient, these strategies might be pursued in certain settings.

Priorities for vaccine and antiviral drug use will vary based on pandemic severity as well as the vaccine and drug supply. In settings of very limited vaccine and drug supply, narrow targeting and efficient use are required. Vaccine may be reserved for critical personnel, while antiviral medications are reserved for symptomatic individuals who are at high risk of serious complications or death. With greater availability, it may be feasible to expand priority groups and implement strategies to limit disease transmission. Recognizing that no single priority list is appropriate for all scenarios, Federal guidance will be developed for multiple contingencies.

The use of pre-pandemic vaccine will be targeted to maintain critical societal functions through the protection of critical infrastructure personnel and to protect those who are at greater risk of early exposure and infection during a pandemic, such as health care providers or first responders. Pre-pandemic vaccination objectives may include primary immunization if the match between the pre-pandemic vaccine and the circulating virus is close, or priming the immune system to respond more rapidly and robustly to an initial dose of pandemic vaccine, when it becomes available, if the match is suboptimal.

Recommendations put forward by the Advisory Committee on Immunization Practices and the National Vaccine Advisory Committee are included in the *HHS Pandemic Influenza Plan* and provide initial guidance to Federal, State, local, and tribal partners regarding many of the potential target groups being considered.

Distribution

When sustained and efficient human-to-human transmission of a potential pandemic influenza strain is documented anywhere in the world, the Federal Government will develop and distribute recommendations on target groups for vaccine and antiviral drugs. These recommendations will reflect data from the pandemic and available supplies of medical countermeasures in light of the considerations outlined above. These recommendations will be provided to Federal health care providers and State, local, and tribal authorities.

A treatment course of oseltamivir for adults and adolescents ages 13 and above is 1 capsule taken twice daily for 5 days, or 10 capsules. A typical prophylaxis course for adults and adolescents is one capsule taken once daily for at least 10 days, although oseltamivir has been shown to be safe and effective when taken for up to 6 weeks. Because prophylaxis requires significantly more medication, results in the administration of a scarce medical resource to people who might not have become sick in any case, and only reduces risk during the period when the medication is being taken, current plans propose using antiviral medication stockpiles only for treatment once a pandemic is underway. Prophylactic use of antiviral medications will be reserved for initial containment efforts and other highly select circumstances.

Given the highly distributed nature of a pandemic, the need to deliver antiviral prophylaxis within 2 days of exposure or to provide therapy to infected patients within 2 days of the onset of symptoms presents significant unresolved logistical challenges. It will be necessary to develop and exercise pandemic influenza countermeasure distribution plans in each of the States and territories and public-private partnerships supporting the seamless, efficient, and timely distribution of these countermeasures may also be required.

Security

It is conceivable that criminal elements may try to take advantage of medical countermeasure scarcity and citizens' fears regarding a pandemic by producing and distributing counterfeit vaccines and antiviral medications. The Federal Government will aggressively monitor efforts to produce and distribute counterfeit drugs, both domestically and internationally, and ensure that existing laws are vigorously enforced in order to deter such conduct, protect the integrity of our drug supply, and maintain public confidence.

Reducing Disease Transmission and Rates of Illness

While preventing a pandemic after person-to-person transmission becomes well established may be impossible, the systematic application of disease containment measures can significantly reduce disease transmission rates with concomitant reductions in the intensity and velocity of any pandemics that do occur. The goals of disease containment after a pandemic is underway are to delay the spread of disease and the occurrence of outbreaks in U.S. communities, to decrease the clinical attack rate in affected communities, and to distribute the number of cases that do occur over a longer interval, so as to minimize social and economic disruption and to minimize, so far as possible, hospitalization and death. Investigation of early local outbreaks of pandemic influenza will provide helpful clinical and epidemiological information and support real-time modeling of pandemic response measures.

The primary strategies for preventing pandemic influenza are the same as those for seasonal influenza: vaccination; early detection and treatment with antiviral medications; and the use of infection control measures to prevent transmission. However, when a pandemic begins, a vaccine might not be widely available, and the supply of antiviral drugs may be limited. The ability to limit transmission and delay the spread of the pandemic will therefore rely primarily on the appropriate and thorough application of infection control measures in health care facilities, the workplace, the community, and for individuals at home. CDC recommendations in this regard are described at length in Supplement 4 of the *HHS Pandemic Influenza Plan.*

In the initial stages of a domestic outbreak, it might be feasible to perform case tracking and contact tracing, with isolation of individuals with known pandemic influenza and voluntary quarantine of their close contacts. Antiviral post-exposure prophylaxis targeted at contacts of the first cases identified in the United States may slow the spread of the pandemic. Quarantine of case contacts has played an important role in the management of outbreaks of other diseases transmitted by large-particle droplets, but its role in containing influenza has not been fully defined.

Depending on the severity of a pandemic and its anticipated effects on health care systems and the functioning of critical infrastructure, communities may recommend or implement general measures to promote social distancing and the disaggregation of disease transmission networks. As a general rule, the value of such measures will be greatest if the interventions are implemented early in the course of a community outbreak and sustained until definitive countermeasures are available. In the case of a pandemic, where it may not be possible to delay the spread of disease indefinitely, the goal of such meas-

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ures will be to decrease the clinical attack rate and to distribute the number of cases that do occur over a longer interval, so as to minimize social and economic disruption.

Some social distancing measures, such as the recommendation to maintain one-yard spatial separation between individuals or the recommendation to businesses to conduct meetings by teleconference, will be sustainable indefinitely at comparatively minimal cost, whereas others (e.g., implementation of "snow day" restrictions) are associated with substantial costs and can be sustained only for limited periods. Low-cost or sustainable social distancing measures should be introduced immediately after a community outbreak begins, while the more costly and non-sustainable measures should be reserved for situations in which the need for disease containment is critical. Decisions as to how and when to implement such social distancing measures will be made on a community-by-community basis, with the Federal Government providing technical support and guidance to local officials.

The clinical attack rates for seasonal and pandemic influenza are highest among children. Closure of schools and targeted vaccination of children have demonstrated efficacy in diminishing community influenza rates. Modeling supports school closure as an effective means of reducing overall attack rates within communities and suggests that the value of this intervention is maximized if school closure occurs early in the course of a community outbreak. Cancellation of non-essential public gatherings, restrictions on long-distance travel, and social distancing within the workplace could also potentially decrease rates of influenza transmission, but the real-world effectiveness of these interventions has not been quantified. Measures to be considered within schools and in the workplace are described in Chapter 9.

"Snow day" restrictions — the recommendation or mandate by authorities that individuals and families limit social contacts by remaining within their households — should reduce community transmission rates and would afford protection to households where infection has not yet occurred. How long and how effectively snow day restrictions can be maintained has not been determined and thus the value of such restrictions has not been quantified. For maximum effectiveness and to the extent possible, snow day restrictions should be maintained for at least two incubation periods, as defined by epidemiological analysis of the circulating pandemic strain. In the absence of definitive countermeasures (i.e., an effective vaccine), snow day restrictions will serve to disrupt but not stop community transmission of influenza. The uses of snow day restrictions during a pandemic will vary. They might be employed to decompress health care facilities by temporarily reducing the rate of new infections within an affected community. The optimal timing for the implementation of snow day restrictions has not been determined but should be tractable to modeling. The economic impacts of snow day restrictions could be quite large and should be weighed against the likely health benefits.

Geographic Quarantine *(Cordon Sanitaire)*

Geographic quarantine is the isolation, by force if necessary, of localities with documented disease transmission from localities still free of infection. It has been used intermittently throughout history in efforts to contain serious epidemics and must be differentiated from the quarantine of case contacts, where exposure to an infectious agent but not infection per se has been confirmed. Geographic quarantine results in the detention, within an epidemic zone, of persons who may or may not have been exposed to the pathogen in question. Some nations, notably Australia in the fall of 1918, have imposed reverse geographic quarantines, in an effort to keep epidemic disease out. The value of efforts to impose modified forms of reverse geographic quarantine is discussed at greater length in Chapter 5. In summary, even if such efforts prove unsuccessful, delaying the spread of the disease could provide the Federal Government with valuable time to activate the domestic response.

Once influenza transmission has occurred in multiple discrete locations, and it is clear that containment efforts have failed, the value of conventional geographic quarantine as a disease containment measure in any particular locality will be profoundly limited. Whether geographic quarantine should play a role in efforts to contain an outbreak of influenza with pandemic potential at its source will depend on the area and population affected, whether the implementation of a *cordon sanitaire* is feasible, the likelihood of success of other public health interventions, the ability of authorities to provide for the needs of the quarantined population, and in all likelihood geopolitical considerations that are beyond the scope of this chapter. The implementation of conventional geographic quarantine imposes significant opportunity costs and may result in the diversion of significant resources and assets that might be used to better effect supporting less draconian disease containment measures.

Quarantine at the level of families and individuals is a legitimate public health intervention that figured prominently in the public health response to severe acute respiratory syndrome (SARS). It is important to underscore that the value of individual quarantine as a public health intervention is determined by the biology of the agent against which it is directed. Because influenza infection can be transmitted by persons who are not ill, and because viral shedding occurs prior to the onset of clinical illness, isolation of ill persons or exclusion from work of those who are ill will reduce but not prevent transmission in public settings. Because of influenza's short generation period, isolation and quarantine must be implemented very quickly to have an impact and will not be as effective as for a disease like SARS or smallpox where the generation time is longer and asymptomatic shedding of virus does not appear to be significant. Nevertheless, the value of isolating patients with pandemic influenza and quarantining their contacts is clearly supported by recent modeling efforts.

Expanding Medical Surge Capacity

While a pandemic may strain hundreds of communities simultaneously, each community will experience the pandemic as a local event. In the best of circumstances, patients and health care resources are not easily redistributed; in a pandemic, conditions would make the sharing of resources and burdens even more difficult. The Federal Government will provide medical countermeasures, resources, and personnel, if available, in support of communities experiencing pandemic influenza, but communities should anticipate that in the event of multiple simultaneous outbreaks, the Federal Government may not possess sufficient medical resources or personnel to augment local capabilities. The development of medical and public health mutual aid arrangements through the Emergency Management Assistance Compact (EMAC) and other mechanisms is encouraged, but States and localities should anticipate that all sources of external aid may be compromised during a pandemic.

Personnel

During a pandemic, the number of persons seeking medical care is expected to increase significantly and overcrowding may lead hospital and other health care institutions to adjust clinical care algorithms in order to optimize the allocation of scarce resources. Since most health professionals are already geographically dispersed, local and State governments are in a position to take primary responsibility for identifying, registering, and coordinating volunteer medical and health care personnel within their jurisdictions to respond to any surge in demand for health care. HHS has partnered with States and localities through the Medical Reserve Corps and the Emergency System for the Advanced Registration of Volunteer Health Professionals (ESAR-VHP) Programs to develop locally sponsored emergency response teams and state-based volunteer registries to recruit, credential, and mobilize health care personnel in the event of a large scale medical emergency.

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Medical Standards of Care

If a pandemic overwhelms the health and medical capacity of a community, it will be impossible to provide the level of medical care that would be expected under pre-pandemic circumstances. It may be necessary because of hospital overcrowding to establish pre-hospital facilities and alternate-care sites to provide supplemental capacity. In some circumstances, it may be necessary to apply triage principles in the hospital to regulate which patients gain access to intensive care units (ICUs) and ventilators, and it is likely that vaccine, pharmaceuticals, and other medical materiel will also be rationed. Non-clinical personnel and family members may be asked to assist with administrative and environmental tasks, while qualified clinicians may be asked to perform unfamiliar functions such as staffing temporary medical care facilities, visiting patients in their homes, or providing medical advice via on-line or hot-line connections.

The terms 'altered' and 'degraded' standards of care have often been applied to such situations in both government documents and the medical literature. The legal and ethical 'standard of care,' however, is what is reasonably expected of medical systems and providers and is determined by extant circumstances. Relevant conditions include the availability of hospital, ICU, or specialty care beds; medical equipment and materiel; and personnel who are trained and qualified to provide care. As in all situations involving the allocation of scarce medical resources, the standard of care will be met if resources are fairly distributed and are utilized to achieve the greatest benefit. In a pandemic, hospital and ICU beds, ventilators, and other medical services may be rationed. As in other situations of scarce medical resources, preference will be given to those whose medical condition suggests that they will obtain greatest benefit from them. Such rationing differs from approaches to care in which resources are provided on a first-come, first-served basis or to patients with the most severe illnesses or injuries.

Given the strain that a pandemic would place on a community's medical system, it will be necessary for hospitals, medical providers, and oversight agencies to maximize hospital bed surge capacity, and triage and treat patients in a manner that affords each the best chance of survival and recovery within the limits of available resources. In addition, the public must be informed regarding when, how, and where to obtain medical care. In all cases, the goal should be to provide care and allocate scarce equipment, supplies, and personnel in a way that saves the largest number of lives. Planning should therefore include thresholds for altering triage algorithms and otherwise optimizing the allocation of scarce resources. Where prospective and mature data are available, changes in clinical care algorithms should be evidence-based.

In planning for a prolonged mass casualty event, it must be recognized that persons with unrelated medical conditions will continue to require emergency, acute, and chronic care. It is important to keep the health care system functioning and to deliver the best care possible to preserve as many lives as possible. Planning a health and medical response to a mass casualty event must be comprehensive, community-based, and coordinated at the regional level. In making adjustments in the delivery of care because of constrained resources, individual autonomy, privacy, and dignity should be protected to the extent possible and reasonable under the circumstances. Finally, clear communication with the public is essential before, during, and after a mass casualty event such as a pandemic.

Availability of Medical Materiel

Health care facilities typically maintain limited inventories of supplies on-site and depend on just-in-time restocking programs. Replenishment of critical inventories is thus dependent upon an intact supply chain from manufacturing and distribution to transportation and receiving. During a pandemic there

would be an increased demand for both consumable and durable resources. Examples of critical supplies are listed in Supplement 3 to the *HHS Pandemic Influenza Plan*. Competition for these resources at a time of increased demand could result in critical shortages.

Manufacturers and suppliers are likely to report inventory shortages because of the massive simultaneity of need and supply chains may also be disrupted by the effects of a pandemic on critical personnel. Medical facilities should make provision for these considerations in their planning efforts and consider stockpiling critical medical materiel individually or collaborating with other facilities to develop local or regional stockpiles maintained under vendor managed inventory systems.

Facilities

Health care facilities will face increased demand for isolation wards, intensive care unit beds, and ventilators. Historical comparisons and recent severe seasonal influenza epidemics suggest that U.S. health care facilities would be overwhelmed with influenza patients during a pandemic. Extrapolating from the 1918 pandemic, a severe pandemic could result at its peak in the need for significantly more hospital and intensive care unit beds than the U.S. health care system currently supports.

Because of the intense but transient demand for clinical care areas, and because cohorting of patients with pandemic influenza in common treatment areas is an acceptable response to hospital overcrowding, establishing infirmaries in armories or other facilities of opportunity to supplement existing health care facilities is a reasonable consideration for those not critically ill. Suitable spaces can be identified in the pre-pandemic phase, medical materiel and supplies can be stockpiled prospectively, and actions to stand up the infirmary commenced in the early stages of an outbreak. The Federal Government has assembled a limited number of Federal Medical Stations (FMSs), which are scalable, modular, 250-bed deployable caches that require 40,000 square feet of enclosed space and an enabling environment (i.e., loading docks, electrical power source systems, climate control, communications, information technology support) and are configured to provide basic but essential medical care.[17]

Psychosocial Concerns

During a pandemic, psychosocial issues may play significantly contribute to, or hinder, the effectiveness of the response. Public anxiety and subjective perception of risk during the initial phases will impact the degree of medical surge; overall compliance with quarantine, snow days, and other control procedures; and participation of the workforce, including health care workers, in response efforts. In later stages of the epidemic, other psychosocial factors may also emerge. During the 1918-1919 "Spanish flu," for example, people experienced significant distress due to loss of family members and anxiety about work, food, transportation, and basic infrastructure, while the SARS outbreak in 2003 led to psychological distress for health care workers and the general public because of social isolation, stigmatization of groups perceived to be high risk, and general fears about safety and health. While most people are resilient and will need minimal psychological support to cope with catastrophic events such as an influenza pandemic, it is imperative that planning for behavioral health reactions be undertaken to support affected populations and possibly reduce the occurrence of long-term psychological distress. Such planning should involve efforts to recruit, credential, and mobilize mental health and substance abuse personnel (as part of personnel efforts discussed above), along with the development of materials on psychological self-care and related topics, including a plan for dissemination of such materials.

[17] Staffing for FMS units is not provided automatically but must be drawn from available Federal, State, or local medical personnel.

Emergency Medical Services

Emergency Medical Services (EMS) provide critical pre-hospital care and transportation and the individuals engaged in these services are among the high priority groups considered for vaccination. However, when a pandemic begins, a vaccine may not be widely available, and the supply of antiviral drugs may be limited. Illness and absenteeism may adversely affect these services and local governments and hospitals may need to explore alternative methods of transporting patients.

Pre-hospital EMS transportation capability will play a critical role in responding to requests for assistance, providing treatment, and in triaging patients. 9-1-1 call centers/public safety answering points (PSAPs) will experience a significant surge in calls and will determine how and when EMS units are dispatched. Coordination and communication between public health, PSAPs, EMS, and hospital officials will be necessary to ensure optimal patient care as hospital bed availability and pre-hospital resources are strained. Planners should consider modifying PSAP call-taker and dispatch protocols and developing pandemic-specific pre-hospital triage and treatment protocols. A robust statewide or regional system for monitoring PSAP medical calls, EMS responses and transports, and hospital bed availability will be critical for tracking and responding to a pandemic.

Persons with emergency medical licensure not engaged in transporting patients could potentially provide support to personnel working in hospitals and infirmaries and could, with additional education, training and legal authority, broaden their scopes of practice during the emergency and, for instance, administer vaccinations to the public or other emergency support personnel.

Home-based Care

Given that most persons with pandemic influenza will experience typical influenza symptoms, most persons who seek care can be managed appropriately by outpatient providers using a home-based approach. Appropriate management of outpatient pandemic influenza cases may reduce the risk of progression to severe disease and thereby reduce demand for inpatient care. A system of effective home-based care would decrease the burden on health care providers and hospitals and lessen exposure of uninfected persons to persons with influenza. Telephone call centers should be established or augmented within affected communities to provide advice on whether to stay home or to seek care. Home health care providers and organizations can provide follow-up for those managed at home, decreasing potential exposure of the public to persons who are ill and may transmit infection.

Fatality Management

Given the anticipated increase in the number of deaths associated with an influenza pandemic, hospitals and health care facilities working with State, local, or tribal health officials and medical examiners should assess current capacity for refrigeration of deceased persons, discuss mass fatality plans and identify temporary morgue sites, and determine the scope and volume of supplies needed to handle an increased number of deceased persons.

Risk Communication

Government and public health officials must communicate clearly and continuously with the public prior to and throughout a pandemic. To maintain public confidence and to enlist the support of individuals and families in disease containment efforts, public officials must provide unambiguous and consistent guidance on what individuals can do to protect themselves, how to care for family members at

home, when and where to seek medical care, and how to protect others and minimize the risks of disease transmission.

Individuals will, in general, respond to a pandemic and to public health interventions in ways that they perceive to be congruent with their interests and their instinct for self-preservation, and public health authorities should tailor their risk communication campaigns and interventions accordingly. The public will respond favorably to messages that acknowledge its concerns, allay anxiety and uncertainty, and provide clear incentives for desirable behavior. The information provided by public health officials should therefore be useful, addressing immediate needs, but it should also help private citizens recognize and understand the degree to which their collective actions will shape the course of a pandemic.

Providing regular messages through a single spokesperson with professional credibility is highly desirable. Conveying clinical information requires particular care to ensure that a lay audience can understand it. Distinguishing between political and professional messages is essential. Provisions should be made for communication in languages other than English and for those with disabilities.

Other important objectives for communication campaigns include providing information to the public about the status of the response; providing anticipatory guidance and dispelling unrealistic expectations regarding the delivery of health and medical care; providing guidance on how to obtain information about the status of missing persons; and providing information related to influenza complications, including where to seek help if people are having significant difficulties in coping with personal losses or fears about the pandemic.

Regulatory / Financial / Legal Matters

More than one in four Americans receive health care coverage through Medicare, Medicaid, the State Children's Health Insurance Program (SCHIP), the Veterans Health Administration, TRICARE, or other Federal programs. Ensuring access to, and timely payment for, covered services during a pandemic will be critical to maintaining a functional health care infrastructure. It may also be necessary to extend certain waivers or develop incident-specific initiatives or coverage to facilitate access to care. Pandemic influenza response activities may exceed the budgetary resources of responding Federal and State government agencies, requiring compensatory legislative action.

Depending on the severity of a pandemic, certain requirements may be waived or revised to facilitate efficient delivery of health care services. For example, certain Emergency Medical Treatment and Active Labor Act (EMTALA), Medicare, Medicaid, SCHIP, and Health Insurance Portability and Accountability Act (HIPAA) requirements may be waived following a declaration of a public health emergency by the Secretary of HHS and a Presidential declaration of a major disaster or emergency. The authority to waive or amend legal requirements during a pandemic corresponds with the level of government that issues the requirements, whether Federal, State, or local. Statutes and rules may provide flexibility without waiver or revision. For example, HIPAA regulations allow covered entities to disclose patient information in circumstances that could arise during a pandemic, including disclosures: to provide treatment; to public health authorities for disease prevention and control and public health surveillance, investigations, and interventions; to lessen an imminent threat to health and safety; and to contact family members, guardians, or caretakers. In all cases, it will be important to make providers and institutions aware of the established legal framework, so that it is clear which authorities and regulations do or do not apply in a given situation.

Prior to the declaration of a public health emergency, State and local planners should examine existing State public health and medical licensing laws, interstate emergency management compacts and mutual aid agreements, and other legal and regulatory arrangements to determine the extent to which they meet potential new threats. Waivers granted at any level are likely to be targeted to an affected area for a temporary and specified period of time. In the case of an evolving pandemic, it will therefore be important to have the flexibility to extend or expand such waivers as needed.

Roles and Responsibilities

The responsibility for preparing for, detecting, and responding to influenza outbreaks is shared by everyone. This includes private citizens, health care providers, the private sector, State, local, and tribal public health authorities, and the Federal Government. State, local, and tribal governments, the private sector, and the Federal Government all have important and interdependent roles in preparing for, responding to, and recovering from a pandemic. Effective management of the Nation's medical and public health response systems during a pandemic will require coordinated action by all segments of government and society.

State, local, and tribal governments are primarily responsible for detecting and responding to disease outbreaks and implementing measures to minimize the consequences of an outbreak. The Federal Government supports detection and response in many ways, including providing response personnel and expertise, response materiel, diagnostic reference services and testing support, and funding for certain response activities. It is anticipated that the potentially catastrophic nature of a pandemic may overwhelm local, State, and tribal capabilities. Federal agencies will be called upon to provide additional support, but even those resources may be overwhelmed at the peak of a pandemic.

The Federal Government

The Federal Government will use all capabilities within its authority to support the private sector and State, local, and tribal public health authorities in preparedness and response activities. It will increase readiness to sustain essential Federal public health and medical functions during a pandemic and provide public health and medical support services under the *National Response Plan* (NRP). It will be prepared to advise State, local, and tribal governments and the medical and public health communities at large on how to deploy scarce medical resources, use and sequence community infection control measures, and address the medical challenges posed by pandemic influenza. It will perform surveillance for and monitor the progress of a pandemic on a national and international scale, support the development and production of medical countermeasures, and sponsor research on influenza viruses with pandemic potential. It will provide financial support and technical assistance to State, local, and tribal governments as they develop pandemic preparedness plans.

Department of Health and Human Services: HHS's primary responsibilities are those actions required to protect the health of all Americans, including communication of information related to pandemic influenza, leading international and domestic efforts in surveillance and detection of influenza outbreaks, ensuring the provision of essential human services, implementing measures to limit spread, and providing recommendations related to the use, distribution, and allocation of countermeasures and to the provision of care in mass casualty settings. HHS will support rapid containment of localized outbreaks domestically and provide guidance to State, local, and tribal public health authorities on the use, timing, and sequencing of community infection control measures. HHS also supports biomedical research and development of new vaccines and medical countermeasures.

Department of Homeland Security: Pursuant to Homeland Security Presidential Directive 7 (HSPD-7), DHS coordinates overall domestic incident management and Federal response procedures under the NRP and National Incident Management System (NIMS). Under the NRP, DHS is responsible for coordinating the protection of the Nation's critical infrastructure, and within the framework of Emergency Support Function #8 - Public Health and Medical Services (ESF #8) for the deployment of available NDMS medical, mortuary, and veterinary response assets.

Department of Defense: The primary responsibility of DOD is to preserve national security by protecting American forces, maintaining operational readiness, and sustaining critical military missions. DOD's first priority with respect to protecting human health will be to ensure sufficient capability to provide medical care to DOD forces and beneficiaries. DOD can provide medical, public health, transportation, logistical, communications, and other support consistent with existing legal authorities and to the extent that DOD's National Security preparedness is not compromised. Ideally, the human and technical resources of the National Guard should be balanced between support to the Governors of the individual States and the overall needs of national security.

Department of Veterans Affairs: VA provides health care, monetary benefits, and burial benefits to our Nation's veterans. VA's priority with respect to protecting human health is to deliver health care to enrolled veterans and beneficiaries. VA also has a mission to provide medical surge capacity for treatment of casualties arising from DOD operations and can provide other support to the extent that VA's mission to serve veterans is not compromised.

Department of Labor: DOL's primary responsibilities are those actions required to protect the health and safety of workers, including communication of information related to pandemic influenza to workers and employers, and other relevant activities.

State, Local, and Tribal Entities

State, local, and tribal entities should have credible pandemic preparedness plans that address key response issues and outline strategies to mitigate the human, social, and economic consequences of a pandemic. They will initiate the request for the delivery and be primarily responsible for the distribution of medical countermeasures released from national stockpiles. States should be prepared to face challenges in the availability of essential commodities, demands for health care services that exceed existing capacity, and public pressure to enforce infection control measures in ways that may hinder the delivery of emergency services and supplies and exacerbate the economic repercussions of the pandemic. States, localities, and tribal entities should work to improve communication between public health departments and both private sector partners, such as health care facilities, community- and faith-based organizations, and clinical laboratories that are likely to be involved in the response to a pandemic. State, local, and tribal public health departments should coordinate their planning efforts with local Federal health care facilities.

The Private Sector and Critical Infrastructure Entities

The private sector will play an integral role in preparedness before a pandemic begins and should be part of the national response. Businesses and corporations, especially those within sectors constituting the Nation's critical infrastructure, should develop continuity of operations plans that provide for workforce health protection and ensure that essential functions and vital services can be performed in the setting of significant absenteeism. Businesses and corporations should be prepared for public health interventions and recommendations that may increase absenteeism. Elements of the private sector concerned with

health care should be prepared to support local, State, national, and international efforts to contain or mitigate a pandemic.

Individuals and Families

Private citizens must recognize and understand the degree to which their personal actions will govern the course of a pandemic. The success or failure of infection control measures is ultimately dependent upon the acts of individuals, and the collective response of 300 million Americans will significantly influence the shape of the pandemic and its medical, social, and economic outcomes (see *Individual, Family, and Community Response to Pandemic Influenza* between Chapters 5 and 6). Individuals will, in general, respond to a pandemic and to public health interventions in ways that they perceive to be congruent with their interests and their instinct for self-preservation, and public health authorities should tailor their risk communication campaigns and interventions accordingly. Institutions in danger of becoming overwhelmed will rely on the voluntarism and sense of civic and humanitarian duty of ordinary Americans. The talents and skills of individuals will prove crucial in our Nation's response to a pandemic.

Actions and Expectations

6.1. Pillar One: Preparedness and Communication

Preparedness and transparency are critical elements of the Strategy and the foundation of efforts to detect, contain, limit, delay, and mitigate a pandemic. Activities that should be undertaken before a pandemic to ensure preparedness and to communicate expectations and responsibilities to all levels of government and society are described below.

a. Planning for a Pandemic

6.1.1. Continue to work with States, localities, and tribal entities to establish and exercise pandemic response plans.

6.1.1.1. The Federal Government shall, and State, local, and tribal governments should, define and test actions and priorities required to prepare for and respond to a pandemic, within 6 months. Measure of performance: completion and communication of national, departmental, State, local, and tribal pandemic influenza response plans; actions and priorities defined and tested.

6.1.1.2. HHS, in coordination with DHS, shall review and approve State Pandemic Influenza plans to supplement and support DHS State Homeland Security Strategies to ensure that Federal homeland security grants, training, exercises, technical, and other forms of assistance are applied to a common set of priorities, capabilities, and performance benchmarks, in conformance with the National Preparedness Goal, within 12 months. Measure of performance: definition of priorities, capabilities, and performance benchmarks; percentage of States with plans that address priorities, identify capabilities, and meet benchmarks.

6.1.1.3. DHS, in coordination with HHS, DOJ, DOT, and DOD, shall be prepared to provide emergency response element training (e.g., incident management, triage, security, and communications) and exercise assistance upon request of State,

local, and tribal communities and public health entities within 6 months. Measure of performance: percentage of requests for training and assistance fulfilled.

6.1.2. Build upon existing domestic mechanisms to develop medical and veterinary surge capacity within or across jurisdictions to match medical requirements with capabilities.

6.1.2.1. All health care facilities should develop and test infectious disease surge capacity plans that address challenges including: increased demand for services, staff shortages, infectious disease isolation protocols, supply shortages, and security.

6.1.2.2. HHS, in coordination with DHS, DOD, and VA, shall develop a joint strategy defining the objectives, conditions, and mechanisms for deployment under which NDMS assets, U.S. Public Health Service (PHS) Commissioned Corps, Epidemic Intelligence Service (EIS) officers, and DOD/VA health care personnel and public health officers would be deployed during a pandemic, within 9 months. Measure of performance: interagency strategy completed and tested for the deployment of Federal medical personnel during a pandemic.

6.1.2.3. HHS, in coordination with DHS, DOT, DOD, and VA, shall work with State, local, and tribal governments and leverage Emergency Management Assistance Compact agreements to develop protocols for distribution of critical medical materiel (e.g., ventilators) in times of medical emergency within 6 months. Measure of performance: critical medical material distribution protocols completed and tested.

6.1.2.4. HHS, in coordination with DOD and VA, in collaboration with medical professional and specialty societies, within their domains of expertise, shall develop guidance for allocating scarce health and medical resources during a pandemic, within 6 months. Measure of performance: guidance developed and disseminated.

6.1.2.5. HHS shall package and offer to the States and Territories the core operating components of an ESAR-VHP system within 6 months and encourage all States and tribal entities to implement the ESAR-VHP program by providing technical assistance and orientations at State and territory request to implement and operate Federal guideline (ESAR-VHP) compliant systems within 12 months. Measure of performance: guidance and technical assistance, as requested, provided to States to implement ESAR-VHP capability, compliant with Federal guidelines, in all States and U.S. territories.

6.1.2.6. HHS, in coordination with the USA Freedom Corps and Citizen Corps programs, shall continue to work with States and local communities to expand the Medical Reserve Corps program by 20 percent within 12 months. Measure of performance: increase number of Medical Reserve Corps units by 20 percent, from 350 to 420 units.

6.1.2.7. HHS, in coordination with DHS, DOD, VA and the USA Freedom Corps and Citizen Corps programs, shall prepare guidance for local Medical Reserve Corps coordinators describing the role of the Medical Reserve Corps during a pandemic, within 3 months. Measure of performance: guidance materials developed and published on Medical Reserve Corps website (www.medicalreservecorps.gov).

6.1.2.8. DHS, in coordination with the USA Freedom Corps, shall direct other Citizen Corps programs to prepare guidance detailing appropriate pandemic preparedness activities for each program, within 3 months. Measure of performance: guidance materials developed and published on Citizen Corps website and component program websites.

b. Communicating Expectations and Responsibilities

6.1.3. Work to ensure clear, effective, and coordinated risk communication, domestically and internationally, before and during a pandemic. This includes identifying credible spokespersons at all levels of government to effectively coordinate and communicate helpful, informative messages in a timely manner.

6.1.3.1. HHS, in coordination with DHS, DOS, DOD, VA, and other Federal partners, shall develop, test, and implement a Federal Government public health emergency communications plan (describing the government's strategy for responding to a pandemic, outlining U.S. international commitments and intentions, and reviewing containment measures that the government believes will be effective as well as those it regards as likely to be ineffective, excessively costly, or harmful) within 6 months. Measure of performance: containment strategy and emergency response materials completed and published on www.pandemicflu.gov; communications plan implemented.

6.1.3.2. HHS, in coordination with DHS, shall develop, test, update and implement (if necessary) a multilingual and multimedia public engagement and risk communications strategy within 6 months. Measure of performance: risk communication material completed and published on **www.pandemicflu.gov** and other venues; State summit meetings held.

6.1.3.3. HHS, in coordination with DHS, DOD, and the VA, and in collaboration with State, local, and tribal health agencies and the academic community, shall select and retain opinion leaders and medical experts to serve as credible spokespersons to coordinate and effectively communicate important and informative messages to the public, within 6 months. Measure of performance: national spokespersons engaged in communications campaign.

6.1.4. Provide guidance to the private sector and critical infrastructure entities on their role in the pandemic response, and considerations necessary to maintain essential services and operations despite significant and sustained worker absenteeism.

6.1.4.1. State, local, and tribal public health and health care authorities, in collaboration with DHS, HHS, and the Department of Labor (DOL), should coordinate emer-

gency communication protocols with print and broadcast media, private industry, academic, and nonprofit partners within 6 months. Measure of performance: coordinated messages from communities identified above.

6.1.4.2. DOT, in cooperation with HHS, DHS, and DOC, shall develop model protocols for 9-1-1 call centers and public safety answering points that address the provision of information to the public, facilitate caller screening, and assist with priority dispatch of limited emergency medical services, within 12 months. Measure of performance: model protocols developed and disseminated to 9-1-1 call centers and public safety answering points.

c. Producing and Stockpiling Vaccines, Antiviral Medications, and Medical Material

6.1.5. Encourage and subsidize the development of State-based antiviral stockpiles to support response activities.

6.1.5.1. HHS shall encourage and subsidize the development of State, territorial, and tribal antiviral stockpiles to support response activities within 18 months. Measure of performance: State, territorial, and tribal stockpiles established and antiviral medication purchases made toward goal of aggregate 31 million treatment courses.

6.1.6. Ensure that our national stockpile and stockpiles based in States and communities are properly configured to respond to the diversity of medical requirements presented by a pandemic, including personal protective equipment, antibiotics, and general supplies.

6.1.6.1. HHS, in coordination with DOD, VA, and State, local, and tribal partners, shall define the mix of antiviral medications to include in the Strategic National Stockpile (SNS) and State stockpiles and develop recommendations for how the different agents are to be used, within 6 months. Measure of performance: development of policy concerning the selection, relative proportions, and use of antiviral medications in SNS and State stockpiles.

6.1.6.2. HHS, in coordination with DOD, VA, and State, local, and tribal partners, shall define critical medical material requirements for stockpiling by the SNS and States to respond to the diversity of needs presented by a pandemic, within 9 months. Measure of performance: requirements defined and guidance provided on stockpiling.

6.1.6.3. DOD, as part of its departmental implementation plan, shall conduct a medical materiel requirements gap analysis and procure necessary materiel to enhance Military Health System surge capacity, within 18 months. Measure of performance: gap analysis completed and necessary materiel procured.

6.1.6.4. HHS, DOD, VA and the States shall maintain antiviral and vaccine stockpiles in a manner consistent with the requirements of FDA's Shelf Life Extension Program (SLEP) and explore the possibility of broadening SLEP to include equivalently maintained State stockpiles, within 6 months. Measure of performance:

compliance with SLEP requirements documented; decision made on broadening SLEP to State stockpiles.

6.1.7. Establish domestic production capacity and stockpiles of countermeasures to ensure sufficient antiviral medications and vaccine for front-line personnel and at-risk populations, including military personnel.

6.1.7.1. HHS, in coordination with DHS, DOJ, VA, and in collaboration with State, local, and tribal partners, shall determine the national medical countermeasure requirements to ensure the sustained functioning of medical, emergency response, and other front-line organizations, within 12 months. Measure of performance: more specific definition of sectors and personnel for priority access to medical countermeasures and quantities needed to protect those groups; guidance provided to State, local, and tribal governments and to infrastructure sectors for various scenarios of pandemic severity and medical countermeasure supply.

6.1.7.2. HHS shall establish and maintain stockpiles of pre-pandemic vaccines adequate to immunize 20 million persons against influenza strains that present a pandemic threat, as soon as possible within the constraints of industrial capacity. Measure of performance: procurement of 20 million courses of pre-pandemic vaccine against influenza strains presenting a pandemic threat.

6.1.7.3. HHS in collaboration with State/local partners shall procure and allocate sufficient stockpiles of countermeasures to ensure continuity of critical medical and emergency response operations, within 18 months, within the constraints of industrial capacity. Measure of performance: sufficient quantities of antiviral medications and other countermeasures procured and distributed between SNS and State stockpiles.

6.1.7.4. DOD shall establish stockpiles of vaccine against H5N1 and other influenza subtypes determined to represent a pandemic threat adequate to immunize approximately 1.35 million persons for military use within 18 months of availability. Measure of performance: sufficient vaccine against each influenza virus determined to represent a pandemic threat in DOD stockpile to vaccinate 1.35 million persons.

6.1.8. Establish domestic production capacity and stockpiles of countermeasures to ensure sufficient vaccine to vaccinate the entire U.S. population within 6 months of the emergence of a virus with pandemic potential.

6.1.8.1. HHS shall work with the pharmaceutical industry toward the goal of developing, within 60 months, domestic vaccine production capacity sufficient to provide vaccine for the entire U.S. population within 6 months after the development of a vaccine reference strain. Measure of performance: domestic vaccine manufacturing capacity in place to produce 300 million courses of vaccine within 6 months of development of a vaccine reference strain during a pandemic.

6.1.9. Establish domestic production capacity and stockpiles of countermeasures to ensure antiviral treatment for those who contract a pandemic strain of influenza.

6.1.9.1. HHS shall, to the extent feasible, work with antiviral drug manufacturers and large distributors to develop agreements supporting the Federal procurement of available stocks of antiviral drugs both during the pre-pandemic and pandemic periods, within 12 months. Measure of performance: new antiviral medications procured by SNS, within the constraints of industrial capacity; Federal contracts in place with antiviral drug manufacturers and distributors.

6.1.9.2. HHS, in collaboration with the States, shall purchase sufficient quantities of antiviral drugs to treat 25 percent of the U.S. population, with reserve of 6 million treatment courses for outbreak containment within 18 months, within the constraints of industrial capacity. Measure of performance: 50 million treatment courses of antiviral drugs procured by SNS; States and tribes make stockpile purchases toward aggregate 31 million treatment course goal.

6.1.9.3. DOD shall procure 2.4 million treatment courses of antiviral medications and position them at locations worldwide within 18 months. Measure of performance: aggregate 2.4 million treatment courses of antiviral medications in DOD stockpiles.

6.1.10. Facilitate appropriate coordination of efforts across the vaccine manufacturing sector.

6.1.10.1. HHS, in coordination with the private sector, shall assess the ability of U.S.-based pharmaceutical manufacturing facilities to contribute surge capacity and to retrofit existing facilities for pandemic vaccine production. This assessment will be completed within 6 months and should inform efforts to expand vaccine capacity. Measure of performance: completed assessment.

6.1.10.2. HHS, in coordination with DHS, DOD, VA, DOC, DOJ, and Treasury, shall assess within whether use of the Defense Production Act or other authorities would provide sustained advantages in procuring medical countermeasures, within 6 months. Measure of performance: analytical report completed on the advantages/disadvantages of invoking the Defense Production Act to facilitate medical countermeasure production and procurement.

6.1.11. Address regulatory and other legal issues to the expansion of our domestic vaccine production capacity.

6.1.11.1. HHS shall assess its existing authorities and develop a plan of action to address any regulatory or other legal issues related to the expansion of domestic vaccine production capacity within 12 months. Measure of performance: regulatory and legal issues identified in assessment.

6.1.11.2. HHS shall develop a protocol and decision tools to implement liability protections and compensation, as authorized by the Public Readiness and Emergency Preparedness Act (Pub. L. 109-148), within 6 months. Measure of performance: publication of protocol and decision tools.

6.1.12. Expand the public health recommendations for domestic seasonal influenza vaccination and encourage the same practice internationally.

6.1.12.1. HHS shall collaborate with health care providers, industry partners, and State, local, and tribal public health authorities to develop public information campaigns and other mechanisms to stimulate increased seasonal influenza vaccination, within 12 months. Measure of performance: domestic vaccine use increased relative to historical norms.

d. Establishing Distribution Plans for Medical Countermeasures, Including Vaccines and Antiviral Medications

6.1.13. Develop credible countermeasure distribution mechanisms for vaccine and antiviral agents prior to and during a pandemic.

6.1.13.1. HHS, in coordination with DHS, DOD, VA, and DOJ, and in collaboration with State, local, and tribal partners and the private sector, shall ensure that States, localities, and tribal entities have developed and exercised pandemic influenza countermeasure distribution plans, and can enact security protocols if necessary, according to pre-determined priorities (see below) within 12 months. Measures of performance: ability to activate, deploy, and begin distributing contents of medical stockpiles in localities as needed established and validated through exercises.

6.1.13.2. HHS, in coordination with DOD, VA, States, and other public sector entities with antiviral drug stockpiles, shall coordinate use of assets maintained by different organizations, within 12 months. Measure of performance: plans developed for coordinated use of antiviral stockpiles.

6.1.13.3. HHS, in collaboration with State, territorial, tribal, and local health care delivery partners, shall develop and execute strategies to effectively implement target group recommendations described below, within 12 months. Measure of performance: guidance on strategies to implement target group recommendations developed and disseminated to State, local, and tribal authorities for inclusion in pandemic response plans.

6.1.13.4. HHS, in coordination with DOD, VA, and in collaboration with State, local, and tribal governments and private sector partners, shall assist in the development of distribution plans for medical countermeasure stockpiles to ensure that delivery and distribution algorithms have been planned for each locality for antiviral distribution. Goal is to be able to distribute antiviral medications to infected patients within 48 hours of the onset of symptoms within 12 months. Measure of performance: distribution plans developed.

6.1.13.5. HHS, in coordination with DHS, DOS, DOD, DOL, VA, and in collaboration with State, local, and tribal governments and private sector partners, shall develop plans for the allocation, distribution, and administration of pre-pandemic vaccine, within 9 months. Measure of performance: department plans developed and guidance disseminated to State, local, and tribal authorities

to facilitate development of pandemic response plans.

6.1.13.6. DOT, in coordination with HHS, DHS, State, local, and tribal officials and other EMS stakeholders, shall develop suggested EMS pandemic influenza guidelines for statewide adoption that address: clinical standards, education, treatment protocols, decontamination procedures, medical direction, scope of practice, legal parameters, and other issues, within 12 months. Measure of performance: EMS pandemic influenza guidelines completed.

6.1.13.7. HHS, in coordination with DHS, DOT, DOD, and VA, shall work with State, local, and tribal governments and private sector partners to develop and test plans to allocate and distribute critical medical materiel (e.g., ventilators with accessories, resuscitator bags, gloves, face masks, gowns) in a health emergency, within 6 months. Measure of performance: plans developed, tested, and incorporated into department plan, and disseminated to States and tribes for incorporation into their pandemic response plans.

6.1.13.8. DOD shall supply military units and posts, installations, bases, and stations with vaccine and antiviral medications according to the schedule of priorities listed in the DOD pandemic influenza policy and planning guidance, within 18 months. Measure of performance: vaccine and antiviral medications procured; DOD policy guidance developed on use and release of vaccine and antiviral medications; and worldwide distribution drill completed.

6.1.13.9. HHS, in coordination with DOD, VA, and in collaboration with State, territorial, tribal, and local partners, shall develop/refine mechanisms to: (1) track adverse events following vaccine and antiviral administration; (2) ensure that individuals obtain additional doses of vaccine, if necessary; and (3) define protocols for conducting vaccine- and antiviral-effectiveness studies during a pandemic, within 18 months. Measure of performance: mechanism(s) to track vaccine and antiviral medication coverage and adverse events developed; vaccine- and antiviral-effectiveness study protocols developed.

6.1.13.10. DOJ, in coordination with HHS, DHS, DOS, and DOC, shall lead the development of a joint strategic plan to ensure international shipments of counterfeit vaccine and antiviral medications are detected at our borders and that domestic counterfeit drug production and distribution is thwarted through aggressive enforcement efforts. Measure of performance: joint strategic plan developed; international and domestic counterfeit drug shipments prevented or interdicted.

6.1.14. Prioritize countermeasure allocation before an outbreak, and update this prioritization immediately after the outbreak begins based on the at-risk populations, available supplies, and the characteristics of the virus.

6.1.14.1. HHS, in coordination with DHS and Sector-Specific Agencies, DOS, DOD, DOJ, DOL, VA, Treasury, and State/local governments, shall develop objectives for the use of, and strategy for allocating, vaccine and antiviral drug stockpiles during pre-pandemic and pandemic periods under varying conditions of countermeasure supply and pandemic severity within 3 months. Measure of performance:

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clearly articulated statement of objectives for use of medical countermeasures under varying conditions of supply and pandemic severity.

6.1.14.2. HHS, in coordination with DHS and Sector-Specific Agencies, DOS, DOD, DOL, VA, Treasury, and State/local governments, shall identify lists of personnel and high-risk groups who should be considered for priority access to medical countermeasures, under various pandemic scenarios, according to strategy developed in compliance with 6.1.14.1, within 9 months. Measure of performance: provisional recommendations of groups who should receive priority access to vaccine and antiviral drugs established for various scenarios of pandemic severity and medical countermeasure supply.

6.1.14.3. HHS, in coordination with DHS and Sector-Specific Agencies, DOS, DOD, DOL, and VA, shall establish a strategy for shifting priorities based on at-risk populations, supplies and efficacy of countermeasures against the circulating pandemic strain, and characteristics of the virus within 9 months. Measure of performance: clearly articulated process in place for evaluating and adjusting pre-pandemic recommendations of groups receiving priority access to medical countermeasures.

6.1.14.4. HHS, in coordination with DHS and Sector-Specific Agencies, DOS, DOD, DOL, VA, and Treasury, shall present recommendations on target groups for vaccine and antiviral drugs when sustained and efficient human-to-human transmission of a potential pandemic influenza strain is documented anywhere in the world. These recommendations will reflect data from the pandemic and available supplies of medical countermeasures. Measure of performance: provisional identification of priority groups for various pandemic scenarios through interagency process within 2-3 weeks of outbreak.

e. Advancing Scientific Knowledge and Accelerating Development

6.1.15. Ensure that there is maximal sharing of scientific information about influenza viruses between governments, scientific entities, and the private sector.

6.1.15.1. HHS shall develop capability, protocols, and procedures to ensure that viral isolates obtained during investigation of human outbreaks of influenza with pandemic potential are sequenced and that sequences are published on GenBank within 1 week of confirmation of diagnosis in index case, within 6 months. Measure of performance: viral isolate sequences from outbreaks published on GenBank within 1 week of confirmation of diagnosis.

6.1.15.2. HHS shall increase and accelerate genomic sequencing of known human and avian influenza viruses and shall rapidly make this sequence information publicly available, within 6 months. Measure of performance: increased throughput of genomes sequenced (versus FY 2005 baseline) and decreased time interval between completion of sequencing and publication on GenBank.

6.1.15.3. HHS shall develop protocols and procedures to ensure timely reporting to Federal agencies and submission for publication of data from HHS-supported

influenza vaccine, antiviral medication, and diagnostic evaluation studies, within 6 months. Measure of performance: study data shared with Federal agencies within 1 month of analysis and publication of clinical trial data following completion of studies.

6.1.16. Accelerate the development of cell culture technology for influenza vaccine production and establish a domestic production base to support vaccination demands.

6.1.16.1. HHS shall continue to support the advanced development of cell-culture based influenza vaccine candidates. Measure of performance: research grants and/or contracts awarded to develop cell-culture based influenza vaccines against currently circulating influenza strains with pandemic potential within 6 months.

6.1.16.2. HHS shall support the renovation of existing U.S. manufacturing facilities that produce other FDA-licensed cell-based vaccines or biologics and the establishment of new domestic cell-based influenza vaccine manufacturing facilities, within 36 months. Measure of performance: contracts awarded for renovation or establishment of domestic cell-based influenza vaccine manufacturing capacity.

6.1.17. Use novel investment strategies to advance the development of next-generation influenza diagnostics and countermeasures, including new antiviral medications, vaccines, adjuvant technologies, and countermeasures that provide protection across multiple strains and seasons of the influenza virus.

6.1.17.1. HHS shall continue to support the development and clinical evaluation of novel vaccines and vaccination strategies (e.g., adjuvants, alternative delivery systems, common epitope vaccines). Measure of performance: research grants and/or contracts awarded to support the development of influenza vaccines (including polyvalent influenza vaccines), adjuvants and dose-sparing strategies, and more efficient delivery systems within 12 months, leading to initiation of phase I and II clinical trials to evaluate influenza vaccines and vaccination strategies.

6.1.17.2. HHS shall collaborate with the pharmaceutical, medical device, and diagnostics industries to accelerate development, evaluation (including the evaluation of dose-sparing strategies), licensure, and U.S.-based production of new antiviral drugs and diagnostics. Development activities should include design of preclinical and clinical studies to collect safety and efficacy information across multiple strains and seasons of circulating influenza illness, and advance design of protocols to obtain additional updated information to support revisions in product usage during circulation of novel strains and evolution of pandemic spread. Such collaborations should involve early and frequent discussions with the FDA to explore the use of accelerated regulatory pathways towards product approval or licensure. Collaborations concerning diagnostic tests should include CDC to facilitate access to pandemic virus samples for validation testing and ensure that the test is one that can be used to promote and protect the public health during an influenza pandemic. Measure of performance: initiation of clinical trials of new influenza antiviral drugs and diagnostics.

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6.1.17.3. HHS, in coordination with DHS, shall develop and test new point-of-care and laboratory-based rapid influenza diagnostics for screening and surveillance, within 18 months. Measure of performance: new grants and contracts awarded to researchers to develop and evaluate new diagnostics.

6.1.17.4. HHS shall increase access to standardized influenza reagents for use in influenza tests and research, within 6 months. Measure of performance: standardized influenza reagents distributed to domestic and international partners within 3 business days of a request.

6.2. Pillar Two: Surveillance and Detection

The ability to contain or delay the spread of pandemic influenza depends critically upon the early detection of outbreaks. Within the United States, we will work to establish surveillance systems and reporting mechanisms that provide continuous, real-time "situational awareness" to public health authorities at all levels of government. We will also work to enhance laboratory capacity, develop new and improved rapid diagnostic tests, and consolidate real-time analytical and modeling capabilities to support response activities.

a. Ensuring Rapid Reporting of Outbreaks

6.2.1. Support the development and sustainment of sufficient U.S. and host nation laboratory capacity and diagnostic reagents in affected regions and domestically, to provide rapid confirmation of cases in animals or humans.

6.2.1.1. HHS shall provide guidance to public health and clinical laboratories on the different types of diagnostic tests and the case definitions to use for influenza at the time of each pandemic phase. Guidelines for the current pandemic alert phase will be disseminated within 3 months. Measure of performance: dissemination on www.pandemicflu.gov and through other channels of guidance on the use of diagnostic tests for H5N1 and other potential pandemic influenza subtypes.

6.2.1.2. HHS shall ensure that testing by reverse transcriptase-polymerase chain reaction (RT-PCR) for H5N1 and other influenza viruses with pandemic potential is available at LRN laboratories and CDC within 3 months. Measure of performance: RT-PCR for H5N1 and other potential pandemic influenza subtypes and strains in use at CDC and LRN laboratories.

6.2.1.3. HHS, in coordination with DOD, VA, USDA, DHS, EPA, and other partners, in collaboration with its LRN Reference Laboratories, shall be prepared within 6 months to conduct laboratory analyses to detect pandemic subtypes and strains in referred specimens and conduct confirmatory testing, as requested. Measure of performance: initial testing and identification of suspect pandemic influenza specimens completed at LRN Reference and National Laboratories within 24 hours.

6.2.1.4. All Federal, State, local, tribal, and private sector medical facilities should ensure that protocols for transporting influenza specimens to appropriate reference

laboratories are in place within 3 months. Measure of performance: transportation protocols for laboratory specimens detailed in HHS, DOD, VA, State, territorial, tribal, and local pandemic response plans.

6.2.1.5. State, local, and tribal entities should be prepared, in the event of a pandemic, to increase diagnostic testing for influenza and increase the frequency of reporting to CDC.

6.2.2. Advance mechanisms for "real-time" clinical surveillance in domestic acute care settings such as emergency departments, intensive care units, and laboratories to provide tribal, local, State, and Federal public health officials with continuous awareness of the profile of illness in communities, and leverage all Federal medical capabilities, both domestic and international, in support of this objective.

6.2.2.1. HHS shall be prepared to provide ongoing information from the national influenza surveillance system on the pandemic's impact on health and the health care system, within 6 months. Measure of performance: surveillance data aggregated and disseminated every 7 days, or as often as the situation warrants, to DHS, Sector-Specific Agencies, and State, territorial, tribal, and local partners.

6.2.2.2. HHS, in coordination with Federal, State, local, tribal, and private sector partners, shall develop real-time (same-day) tracking capabilities of pneumonia or influenza hospitalizations and influenza deaths to enhance its surveillance capabilities at the onset of and during a pandemic, within 12 months. Measure of performance: real-time (same-day) nationwide hospital census and mortality tracking system is operational for use during a pandemic.

6.2.2.3. HHS, in coordination with DOD and VA, shall expand the number of hospitals and cities participating in the BioSenseRT program to improve the Nation's capabilities for disease detection, monitoring, and situational awareness within 12 months. Measure of performance: number of hospitals (including DOD and VA facilities) participating in the BioSenseRT program increased to 350 hospitals in 42 cities.

6.2.2.4. HHS shall reduce the time between reporting of virologic laboratory data from State, local, tribal, and private sector partners and collation, analysis, and reporting to key stakeholders, within 6 months. Measure of performance: time delay between receipt of data and collation, analysis, and reporting of results of 7 days or less.

6.2.2.5. HHS shall increase the frequency of reporting and the number and geographic location of reporting health care providers from which outpatient surveillance data are collected through the Sentinel Provider Network (SPN), the Emerging Infections Program (EIP) influenza project, and the New Vaccine Surveillance Network (NVSN), within 6 months. Measure of performance: number of reporting healthcare providers increased to one or more per 250,000 population.

6.2.2.6. HHS shall improve the speed at which it performs mortality surveillance through the 122 Cities Mortality Reporting System within 3 months. Measure of

performance: mortality data collected at CDC within 1 week of decedent's demise increased by 25 percent compared with 2005.

6.2.2.7. DHS, in collaboration with HHS, DOD, VA, USDA, and other Federal departments and agencies with biosurveillance capabilities and real-time data sources, shall enhance NBIS capabilities to ensure the availability of a comprehensive and all-source biosurveillance common operating picture throughout the Interagency, within 12 months. Measure of performance: NBIS provides integrated surveillance data to DHS, HHS, USDA, DOD, VA, and other interested interagency customers.

6.2.2.8. HHS, in coordination with DHS, DOD, and VA, and in collaboration with State, local, and tribal authorities, shall be prepared to collect, analyze, integrate, and report information about the status of hospitals and health care systems, health care critical infrastructure, and medical materiel requirements, within 12 months. Measure of performance: guidance provided to States and tribal entities on the use and modification of the components of the National Hospital Available Beds for Emergencies and Disasters (HAvBED) system for implementation at the local level.

6.2.2.9. DOD shall enhance influenza surveillance efforts within 6 months by: (1) ensuring that medical treatment facilities (MTFs) monitor the Electronic Surveillance System for Early Notification of Community-based Epidemics (ESSENCE) and provide additional information on suspected or confirmed cases of pandemic influenza through their Service surveillance activities; (2) ensuring that Public Health Emergency Officers (PHEOs) report all suspected or actual cases through appropriate DOD reporting channels, as well as to CDC, State public health authorities, and host nations; and (3) posting results of aggregated surveillance on the DOD Pandemic Influenza Watchboard; all within 18 months. Measure of performance: number of MTFs performing ESSENCE surveillance greater than 80 percent; DOD reporting policy for public health emergencies, including pandemic influenza completed.

6.2.2.10. State, local, and tribal public health departments should develop relationships with hospitals and health care systems within their jurisdictions to facilitate collection of real-time or near real-time clinical surveillance data from domestic acute care settings such as emergency departments, intensive care units, and laboratories.

6.2.2.11. State, local, and tribal public health departments should provide weekly reports on the overall level of influenza activity in their States or localities, with assistance from CDC epidemiologists and field officers posted within each State health department in collecting and reporting these data.

6.2.3. Develop and deploy rapid diagnostics with greater sensitivity and reproducibility to allow onsite diagnosis of pandemic strains of influenza at home and abroad, in animals and humans, to facilitate early warning, outbreak control, and targeting of antiviral therapy.

6.2.3.1. HHS, in coordination with DHS and DOD, shall work with pharmaceutical and medical device company partners to develop and evaluate rapid diagnostic tests for novel influenza subtypes including H5N1 within 18 months. Measure of performance: new investment in research to develop influenza diagnostics; new rapid diagnostic tests, if found to be useful, are available for influenza testing, including for novel influenza subtypes.

6.2.3.2. HHS, in coordination with DHS, DOD, and VA, shall compile an inventory of all research and product development work on rapid diagnostic testing for influenza and shall reach consensus on sets of requirements meeting national needs and a common test methodology to drive further private-sector investment and product development, within 6 months. Measure of performance: inventory developed and requirements paper disseminated.

6.2.3.3. HHS, in coordination with DOD, VA, and DHS, shall encourage and expedite private-sector development of rapid subtype- and strain-specific influenza point-of-care tests within 12 months of the publication of requirements. Measure of performance: rapid point-of-care test available in the marketplace within 18 months.

6.2.3.4. HHS-, DOD-, and VA-funded hospitals and health facilities shall have access to improved rapid diagnostic tests for influenza A, including influenza with pandemic potential, within 6 months of when tests become available.

6.2.3.5. State, local, and tribal public health departments should acquire and deploy rapid diagnostic tests that are specific and sensitive for pandemic influenza strains, as soon as those tests are available. Measure of performance: diagnostic tests, if found to be useful, are accessible to federally funded health facilities.

b. Using Surveillance to Limit Spread

6.2.4. Develop and exercise mechanisms to provide active and passive surveillance during an outbreak, both within and beyond our borders.

6.2.4.1. HHS, in coordination with DHS, DOD, VA, USDA, and DOS, shall be prepared, within 12 months, to continuously evaluate surveillance and disease reporting data to determine whether ongoing disease containment and medical countermeasure distribution and allocation strategies need to be altered as a pandemic evolves. Measure of performance: analyses of surveillance data performed at least weekly during an outbreak with timely adjustment of strategic and tactical goals, as required.

6.2.4.2. DHS, in coordination with Sector-Specific Agencies, HHS, DOD, DOJ, and VA, and in collaboration with the private sector, shall be prepared to track integrity of critical infrastructure function, including the health care sector, to determine whether ongoing strategies of ensuring workplace safety and operational continuity need to be altered as a pandemic evolves, within 6 months. Measure of performance: tracking system in place to monitor integrity of critical infrastructure function and operational continuity in near real time.

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6.2.4.3. DOD and VA shall be prepared to track and provide personnel and beneficiary health statistics and develop enhanced methods to aggregate and analyze data documenting influenza-like illness from its surveillance systems within 12 months. Measure of performance: influenza tracking systems in place and capturing beneficiary clinical encounters.

6.2.5. Develop rapid-response modeling capability to improve decision making during a pandemic.

6.2.5.1. HHS, in coordination with DOD and DHS, shall develop and maintain a real-time epidemic analysis and modeling hub that will explore and characterize response options as a support to policy and decision makers within 6 months. Measure of performance: modeling center with real-time epidemic analysis capabilities established.

6.3. Pillar Three: Response and Containment

In approaching the problem of pandemic influenza, the U.S. Government endorses a layered strategy of response and containment. As outlined in the other chapters of this document, the United States is working with other nations and relevant international organizations to detect and contain outbreaks of animal influenza with pandemic potential with the aim of preventing its spread to humans. In the event of sustained and efficient human-to-human transmission of an influenza virus with pandemic potential, all reasonable actions to contain the epidemic at its source and to delay its introduction to the United States should be attempted. If such efforts fail, all instruments of national power will be directed to limiting or otherwise delaying the spread of disease; minimizing suffering and death; sustaining critical infrastructure and a Constitutional form of government; and reducing the economic and social effects of the pandemic.

a. Containing Outbreaks

6.3.1. Encourage all levels of government, domestically and globally, to take appropriate and lawful action to contain an outbreak within the borders of their community, province, State, or nation.

6.3.1.1. State, local, and tribal pandemic preparedness plans should address the implementation and enforcement of isolation and quarantine, the conduct of mass immunization programs, and provisions for release or exception.

6.3.2. Provide guidance, including decision criteria and tools, to all levels of government on the range of options for infection control and containment, including those circumstances where social distancing measures, limitations on gatherings, or quarantine authority may be an appropriate public health intervention.

6.3.2.1. HHS, in coordination with DHS, DOT, Education, DOC, DOD, and Treasury, shall provide State, local, and tribal entities with guidance on the combination, timing, evaluation, and sequencing of community containment strategies (including travel restrictions, school closings, snow days, self-shielding, and quarantine during a pandemic) based on currently available data, within 6 months, and update this guidance as additional data becomes available. Measure

of performance: guidance provided on community influenza containment measures.

6.3.2.2. HHS shall provide guidance on the role and evaluation of the efficacy of geographic quarantine in efforts to contain an outbreak of influenza with pandemic potential at its source, within 3 months. Measure of performance: guidance available within 72 hours of initial outbreak.

6.3.2.3. HHS, in coordination with DHS and DOD and in collaboration with mathematical modelers, shall complete research identifying optimal strategies for using voluntary home quarantine, school closure, snow day restrictions, and other community infection control measures, within 12 months. Measure of performance: guidance developed and disseminated on the use of community control.

6.3.2.4. As appropriate, DOD, in consultation with its Combatant Commanders (COCOM), shall implement movement restrictions and individual protection and social distancing strategies (including unit shielding, ship sortie, cancellation of public gatherings, drill, training, etc.) within their posts, installations, bases, and stations. DOD personnel and beneficiaries living off-base should comply with local community containment guidance with respect to activities not directly related to the installation. DOD shall be prepared to initiate within 18 months. Measure of performance: the policies/procedures are in place for at-risk DOD posts, installations, bases, stations, and for units to conduct an annual training evaluation that includes restriction of movement, shielding, personnel protection measures, health unit isolation, and other measures necessary to prevent influenza transmission.

6.3.2.5. All HHS-, DOD-, and VA-funded hospitals and health facilities shall develop, test, and be prepared to implement infection control campaigns for pandemic influenza, within 3 months. Measure of performance: guidance materials on infection control developed and disseminated on www.pandemicflu.gov and through other channels.

6.3.2.6. All health care facilities should develop, test, and be prepared to implement infection control campaigns for pandemic influenza, within 6 months.

6.3.2.7. HHS, in coordination with DHS, DOC, DOL, and Sector-Specific Agencies, and in collaboration with medical professional and specialty societies, shall develop and disseminate infection control guidance for the private sector, within 12 months. Measure of performance: validated, focus group-tested guidance developed, and published on **www.pandemicflu.gov** and in other forums.

6.3.3. Emphasize the roles and responsibilities of the individual in preventing the spread of an outbreak, and the risk to others if infection control practices are not followed.

6.3.3.1. HHS, in coordination with DHS, VA, and DOD, shall develop and disseminate guidance that explains steps individuals can take to decrease their risk of acquiring or transmitting influenza infection during a pandemic, within 3

months. Measure of performance: guidance disseminated on **www.pandemicflu.gov** and through VA and DOD channels.

6.3.3.2. HHS, in coordination with DHS, DOD, VA, and DOT and in collaboration with State, local, and tribal partners, shall develop and disseminate lists of social distancing behaviors that individuals may adopt within 6 months and update guidance as additional data becomes available. Measure of performance: guidance disseminated on **www.pandemicflu.gov** and through other channels.

b. Leveraging National Medical and Public Health Surge Capacity

6.3.4. Implement State, local, and tribal public health and medical surge plans, and leverage all Federal medical facilities, personnel, and response capabilities to support the national surge requirement.

6.3.4.1. Major medical societies and organizations, in collaboration with HHS, DHS, DOD, and VA, should develop and disseminate protocols for changing clinical care algorithms in settings of severe medical surge. Measure of performance: evidence-based protocols developed to optimize care that can be provided in conditions of severe medical surge.

6.3.4.2. HHS, in coordination with DHS, DOD, and VA, and in collaboration with States, localities, tribal entities, and private sector health care facilities, shall develop strategies and protocols for expanding hospital and home health care delivery capacity in order to provide care as effectively and equitably as possible, within 6 months. Measure of performance: guidance and protocols developed and disseminated.

6.3.4.3. HHS shall work with State Medicaid and SCHIP programs to ensure that Federal standards and requirements for reimbursement or enrollment are applied with the flexibilities appropriate to a pandemic, consistent with applicable law. Preliminary strategies shall be developed within 6 months. Measure of performance: draft policies and guidance developed concerning emergency enrollment in and reimbursement through State Medicaid and SCHIP programs during a pandemic.

6.3.4.4. DHS assets, including NDMS medical materiel and mobile medical units, and HHS assets, such as the USPHS Commissioned Corps and FMSs, shall be deployed in a manner consistent with pre-defined strategic considerations. Measure of performance: development, within 6 months, of strategic principles for deployment of Federal medical assets in a pandemic; consistency of deployments during a pandemic with these principles.

6.3.4.5. DHS shall activate NDMS teams, if available, to augment efforts of State, local, and tribal governments as part of the Federal response. Measure of performance: number of NDMS teams activated and deployed during a pandemic.

6.3.4.6. HHS shall deploy the USPHS Commissioned Corps and FMSs, if available and in combination or separately as circumstances warrant, to augment efforts of

State/local governments as part of the Federal response. Measure of performance: USPHS Commissioned Corps personnel trained on FMSs within 9 months; Commissioned Corps personnel and FMSs deployed within 72 hours of order to mobilize during a pandemic.

6.3.4.7. DOD shall enhance its public health response capabilities by: (1) continuing to assign epidemiologists and preventive medicine physicians within key operational settings; (2) expanding ongoing DOD participation in CDC's EIS Program; and (3) within 18 months, fielding specific training programs for PHEOs that address their roles and responsibilities during a public health emergency. Measure of performance: all military PHEOs fully trained within 18 months; increase military trainees in CDC's EIS program by 100 percent within 5 years.

6.3.4.8. All hospitals should be prepared to treat patients with pandemic influenza (i.e., equipped and ready to care for: (1) a limited number of patients infected with a pandemic influenza virus, or other novel strain of influenza, as part of normal operations; and (2) a large number of patients in the event of escalating transmission of pandemic influenza).

6.3.4.9. All hospitals and health care systems should develop, test, and be ready to employ business continuity plans and identify the critical links in their supply chains as well as sources of emergency.

6.3.4.10. All health care systems, individually or collaborating with other facilities to develop local or regional stockpiles maintained under vendor managed inventory systems, should consider stockpiling consumable critical medical materiel (including but not limited to food, fuel, water, N95 respirators, surgical and /or procedural masks, gowns, and ethyl-alcohol based gels) sufficient for the peak period of a pandemic wave (2-3 weeks).

6.3.5. Activate plans to distribute medical countermeasures, including non-medical equipment and other material, from the Strategic National Stockpile and other distribution centers to Federal, State, local, and tribal authorities.

6.3.5.1. HHS, in coordination with DHS, DOL, Education, VA, and DOD, shall develop and disseminate guidance and educational tools that explain steps individuals can take to decrease their risk of acquiring or transmitting influenza infection during a pandemic, within 6 months. Measure of performance: interim guidance disseminated on **www.pandemicflu.gov** and through VA, DOD, and other channels within 3 months; complementary educational tools on social distancing, personal hygiene, mask use, and other infection control precautions developed within 6 months.

6.3.5.2. HHS, in collaboration with State, local, and tribal governments, shall develop and disseminate recommendations for the use, if any, of antiviral stockpiles for targeted post-exposure prophylaxis in civilian populations, within 3 months. Measure of performance: States, localities, and tribal entities have received recommendations for incorporation into response plans.

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6.3.5.3. HHS, in coordination with DHS, shall allocate and assure the effective and secure distribution of public stocks of antiviral drugs and vaccines when they become available. HHS and DHS are currently prepared to distribute stockpile as soon as countermeasures become available. Measure of performance: number of doses of vaccine and treatment courses of antiviral medications distributed.

6.3.6. Address barriers to the flow of public health, medical, and veterinary personnel across State and local jurisdictions to meet local shortfalls in public health, medical, and veterinary capacity.

6.3.6.1. Prior to the declaration of a public health emergency, State, local, and tribal public health authorities should examine existing Federal laws, regulations, and requirements, State public health and medical licensing laws, the provisions of interstate emergency management compacts and mutual aid agreements, and other legal and regulatory arrangements to determine the extent to which they address barriers to the flow of qualified public health and medical personnel across jurisdictional lines or between health care facilities.

c. Sustaining Infrastructure, Essential Services, and the Economy

6.3.7. Determine the spectrum of infrastructure-sustainment activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

6.3.7.1. HHS, in coordination with DHS, DOD, VA, and DOT, and as the lead for ESF #8, shall identify public health and medical capabilities required to support a pandemic response and work with other supporting agencies to identify and deploy or otherwise deliver the required capability or asset, if available. Measure of performance: inventory of public health and medical capabilities within 6 months; available public health or medical capabilities or assets deployed or delivered during a pandemic.

6.3.7.2. DOD and VA assets and capabilities shall be postured to provide care for military personnel and eligible civilians, contractors, dependants, other beneficiaries, and veterans and shall be prepared to augment the medical response of State, territorial, tribal, or local governments and other Federal agencies consistent with their ESF #8 support roles, within 3 months. Measure of performance: DOD and VA pandemic preparedness plans developed; in a pandemic, adequate health response provided to military and associated personnel.

6.3.7.3. VA shall develop draft emergency policies and directives allowing VA personnel and resources to be used for the treatment of non-veteran patients with pandemic influenza within 3 months. Measure of performance: emergency policies and directives drafted.

6.3.7.4. VA shall develop, test, and implement protocols and policies allowing VA personnel and resources to be used for the treatment of non-veteran patients during health emergencies, within 3 months. Measure of performance: protocols and policies developed and implemented.

6.3.7.5. DOD shall develop and implement guidelines defining conditions under which Reserve Component medical personnel providing health care in non-military health care facilities should be mobilized and deployed, within 18 months. Measure of performance: guidelines developed and implemented.

d. Ensuring Effective Risk Communication

6.3.8. Ensure that timely, clear, coordinated messages are delivered to the American public from authoritative sources at all levels of government and assist the governments of affected nations to do the same.

6.3.8.1. HHS, in coordination with DHS, DOD, and VA, shall develop and disseminate a risk communication strategy within 6 months, updating it as required. Measure of performance: implementation of risk communication strategy on **www.pandemicflu.gov** and elsewhere.

6.3.8.2. DOD and VA, in coordination with HHS, shall develop and disseminate educational materials, coordinated with and complementary to messages developed by HHS but tailored for their respective departments, within 6 months. Measure of performance: up-to-date risk communication material published on DOD and VA pandemic influenza websites, HHS website **www.pandemicflu.gov,** and in other venues.

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Chapter 7 — Protecting Animal Health

Introduction

Influenza viruses that cause severe disease outbreaks in animals, especially birds, are believed to be a likely source for the emergence of a human pandemic influenza virus. The avian influenza type A "H5N1" virus currently found in parts of Asia, Europe, and Africa is one of particular concern due to its demonstrated ability to infect both birds and mammals, including humans. Whether or not this H5N1 virus develops the ability to transmit efficiently between humans and cause a human pandemic, there will inevitably be other influenza viruses in animals that will pose such a threat in the future.

Most influenza viruses found in birds and other animals do not pose any threat to humans, but a few may have the potential to become a human pandemic strain and must be eradicated or otherwise controlled when they occur. Although there is no definitive way to identify all influenza viruses in animals that may have human pandemic potential, such potential could be evidenced by the ability of a virus that infects birds or other animals to also cause illness in humans or to cause illness in both birds and other animals.

Influenza viruses that cause severe illness and death in birds or other animals are known as "highly pathogenic" for the species in which that illness occurs. Some avian influenza viruses, such as the H5N1 in Asia, Europe, and Africa, cause high mortality in chickens and are referred to as highly pathogenic avian influenza (HPAI) viruses. Such avian viruses are generally of the H5 or H7 type, although not all H5 and H7 viruses are highly pathogenic for chickens. However, all H5 and H7 types have the potential to mutate into a highly pathogenic strain. In order to protect poultry and other birds in the United States, and also minimize or eliminate the possibility that a human pandemic strain might emerge from such viruses, all HPAI viruses or other H5 or H7 avian influenza viruses that infect domestic poultry in the United States will be eradicated or otherwise controlled. Because H5 and H7 types are not the only influenza A viruses that may have the potential to emerge as a human pandemic strain, other type A influenza viruses in animals that show evidence of human pandemic potential will also be eradicated or otherwise controlled.

Until a human pandemic influenza virus emerges, there is no way to know whether that virus will be able to infect and be transmitted by birds or other animals, or if it will "only" be transmissible from human-to-human. While it is possible that a human pandemic strain of influenza virus could infect and be transmitted by birds or other animals, it is probably unlikely.[18] In any case, if a human pandemic strain emerges, it will be very important to confirm through experimental and epidemiologic studies whether or not the virus can also infect, and be transmitted by, birds or other animals, so that any measures needed to mitigate the threat to humans and the impacts on poultry or other animals can be implemented.

A human pandemic influenza virus could emerge outside the United States or within our borders. Because of the potential for the HPAI H5N1 virus to become a pandemic strain, many international animal health initiatives are currently underway through the U.S. Agency for International Development

[18] It cannot be known what specific characteristics a human pandemic influenza virus will possess, but the virus will have to be able to efficiently bind to the receptors of, and replicate in, human respiratory cells, in order to be transmitted efficiently from human-to-human. Such a virus would not likely also be able to efficiently bind to cell receptors and replicate efficiently in avian hosts, due to differences in receptor specificity and other species-specific factors. A slightly greater, but still low, likelihood may exist for a virus adapted to humans to also replicate in swine.

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and the International Partnership on Avian and Pandemic Influenza to assist affected countries with control of the current outbreak. Many more international activities are planned (see Chapter 4 - International Efforts). The more that can be done through these efforts to address fundamental issues related to the detection and control of viruses with pandemic potential in birds or other animals, the lower the risk will be for the emergence of a human pandemic strain.

Regardless of where the risk for emergence exists, we must be prepared to respond appropriately. If an influenza virus with human pandemic potential is introduced into domestic birds or other animals in the United States, despite all international efforts to prevent it, we must detect and eradicate the virus as quickly as possible. If it is found in wild birds, efforts will be directed at preventing introduction into domestic birds or other susceptible animals, rather than eradication.

Key Considerations

The Department of Agriculture (USDA) has a history of success in working with Federal partners, State, local, and tribal entities, and the poultry industry to eradicate avian influenza viruses, including HPAI and H5 or H7 viruses with the potential to become HPAI, that have been introduced into U.S. poultry. Significant outbreaks of HPAI or potential HPAI in poultry were eradicated in 1984 and 2002, as was a smaller outbreak in 2004.

Although such eradication efforts may help to protect human health, they can result in significant costs due to poultry production losses from bird depopulation activities and from quarantine or other movement restrictions placed on birds. But eradication of these viruses also protects the production of U.S. poultry, worth almost $29 billion in 2004, including broiler production worth more than $20 billion. The United States is the second largest exporter of poultry meat in the world and our trading partners are not only concerned about HPAI, but also increasingly wary of importing poultry or poultry products from any country that may have avian influenza viruses with the potential to become highly pathogenic.

The economic consequences of an HPAI outbreak in the United States would depend on its size, location, and type, and on the amount of time necessary to eradicate the outbreak. Production losses would depend on the proximity of the outbreak to major poultry areas, but with limited backyard flocks and strong biosecurity in large facilities, any outbreak would likely be contained with only modest production losses. The most economically significant recent outbreak of avian influenza in the United States occurred in 1983 and 1984, primarily in Pennsylvania and Virginia. That outbreak affected mainly layer flocks and resulted in the depopulation of 17 million birds and destruction of 14 million eggs. While the amount of birds and eggs destroyed was small relative to total annual U.S. production, the loss of breeder and laying flocks had a greater impact than implied by the destruction of the birds and eggs since they represent future production. Losses were estimated at $65 million.

Unlike domestic birds, wild bird species are highly dispersed, highly mobile, and occupy a wide range of native habitats. These characteristics render any effort to eradicate avian influenza in wild bird populations impractical. The Department of the Interior (DOI), which is responsible for managing wild migratory birds under Federal law and international treaty, works closely with State wildlife agencies, other Federal agencies, and partners to conserve wild migratory bird populations through the management of habitats, regulation of sport hunting, and other management actions. The DOI maintains an intensive research and data management capability that allows it to track the movement of birds during the migration season, identify migratory stopover sites, and inform its partners of migratory bird arrivals.

USDA and DOI share the responsibility for managing the consequences of wildlife disease. USDA has the lead role in preventing the introduction of disease from wildlife to domestic birds and conducts a broad range of disease research, surveillance, and management activities associated with this role. DOI has the lead role in managing healthy wildlife populations for the benefit of the American public and conducts comprehensive field and laboratory wildlife disease investigations and disease research with emphasis on the ecology of disease and its impact on wild populations, surveillance, and management. The USDA and DOI programs complement one another such that the full range of management needs resulting from wildlife disease is addressed. Should H5N1 or any other HPAI virus be detected in wild birds, the departments will work together on a unified response, to include conducting additional surveillance of wild birds and recommending biosecurity measures to prevent interactions between domestic and wild birds.

Response Planning

To respond effectively to an introduction of influenza in birds or other animals in the United States, Federal and State/tribal-level response plans and resources must be in place. Once in place, plans should regularly be updated at the Federal, State, tribal, and animal industry sector levels, and exercised among those levels. Emergency management roles must be clearly defined and understood at all levels. The *National Response Plan* (NRP) and the National Incident Management System (NIMS) provide a response structure, but response plans for disease outbreaks in animals must be exercised between all levels so that roles and functions are clearly understood prior to a response.

Communicating and Mitigating Risks

There will be a need for timely and clear communication about the risks associated with the introduction of influenza and how to mitigate them, especially at the level of the individual producer or animal owner. Significant misconceptions may exist about risks, and accurate and open communication will be crucial in correcting any misconceptions. Owners and producers of birds or other animals at risk for influenza must understand their critical role in protecting those animals from infection and in reporting any illness that may indicate the presence of a pathogenic influenza virus. Similarly, State and tribal wildlife management authorities must understand their roles in identifying and reporting illness in wild animals that may presage the emergence of highly pathogenic influenza.

USDA currently conducts a multilevel outreach and education campaign called "Biosecurity for the Birds" to provide disease and biosecurity information to poultry producers, especially those with "backyard" production. The information provides guidance to bird owners and producers on preventing introduction of disease and mitigating spread of disease should it be introduced. The campaign also encourages producers to report sick birds, thereby increasing surveillance opportunities for avian influenza.

Animal industry groups should develop industry-specific standards for biosecurity and plans for outbreak response. Standards and plans should be as specific as required to deal with a highly contagious disease like influenza, but in particular need to address issues related to the zoonotic potential of an influenza outbreak. Response plans also need to help ensure successful eradication of the disease, yet preserve as much continuity of normal animal production activities as possible before, during, and after the outbreak. This kind of planning will require collaboration with Federal, State, local, and tribal entities to address issues that might otherwise negatively impact animal production during a disease response.

DOI conducts outreach to Federal, State, and tribal wildlife authorities, and the public through a multifaceted program of technical products related to wildlife disease. Through a series of bulletins, websites,

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and other means, the DOI alerts and advises those who may come into contact with infected wildlife. Using this advice, State and tribal wildlife agencies should develop specific standards for biosecurity and plans for outbreak response. These plans need to address conditions specific to wildlife populations.

Animal outbreaks caused by influenza viruses with human pandemic potential, including those known to cause human illness, present challenges for preparedness and response due to the zoonotic potential of such viruses and the resulting risk for infection and illness in persons exposed to infected animals, carcasses, or animal waste. Mitigation of these risks requires specific planning, including working with public health and occupational health and safety professionals to determine requirements for personal protective equipment (PPE), seasonal influenza vaccination, and/or antiviral prophylaxis for personnel performing response functions with potential exposure to virus. Plans also need to address the logistical requirements for providing the necessary worker protection and the safe disposal of animal carcasses and animal waste.

Resources for a Response

Potentially large quantities of response materiel will need to be distributed expeditiously and accurately. As prescribed in Homeland Security Presidential Directive 9, USDA has established a National Veterinary Stockpile (NVS) that can be rapidly distributed in the event of an animal disease outbreak. The NVS has a variety of materiel that would be necessary for a response to an influenza outbreak, including PPE, disinfectant, diagnostic reagents, and antiviral medication (for responders). In addition to the NVS materiel, there are currently 40 million doses of avian influenza vaccine available for use in poultry, should an outbreak occur. Half these doses are for an H5 virus and half are for an H7 virus. However, in the event of a large scale outbreak of avian influenza, additional stockpiles of avian influenza vaccine may be needed. In addition to vaccines, there will be a need for diagnostic reagents, equipment, and other materiel to be available for rapid deployment to the site(s) of an influenza outbreak in animals, especially in poultry or other birds.

Research and Development

Perhaps even more important than having the planning, communication, and response resources in place, is ensuring that we have the scientific knowledge and tools necessary to detect and respond to an influenza outbreak in animals. Research and development will play a vital role in our preparedness to protect animals against influenza infection, detect infections when they occur, and respond effectively to influenza outbreaks caused by viruses with human pandemic potential. Enhancement of our knowledge of the ecology of influenza viruses, viral evolution, novel influenza strains that emerge in animals, and the determinants of virulence of influenza viruses in animal populations is essential. Better tools are needed for detection of influenza viruses in the environment, for providing immunity to avian populations, and for validating disease response strategies. All of this will require an appropriate infrastructure for animal health research and development. Most critically, there must be an adequate amount of laboratory research space that meets biosafety requirements appropriate for conducting animal studies using an influenza virus with pandemic potential. Deficiencies in research facility capacity will limit development of science-based solutions for the prevention, management, and control or eradication of influenza in animal populations.

Rapid Detection

Although a human influenza pandemic may emerge outside the United States, early detection of influenza viruses with pandemic potential in animals within the United States is critical to minimizing

the chances of a human pandemic strain emerging here. A robust surveillance system in domestic animals and wildlife is required to ensure detection. Such surveillance of animals needs to integrate with human influenza surveillance activities at a national level. It is important for results of animal surveillance to serve as an input that may help target human surveillance efforts, relative to temporal, geographic, or other risk factors, especially if an influenza virus with human pandemic potential is detected in birds or other animals in the United States.

An extensive amount of influenza surveillance is currently conducted in poultry and wild birds in the United States. Commercial poultry operations are monitored for avian influenza through the National Poultry Improvement Plan (NPIP), and birds moving through the U.S. live bird marketing system (LBMS) are also tested for avian influenza. Wild birds are examined for avian influenza viruses through efforts involving the DOI, USDA, State wildlife authorities, and universities. Surveys of waterfowl and shore birds have been conducted in Alaska since 1998 looking for the presence of avian influenza viruses. Diagnostic testing of samples from these domestic and wild birds is carried out by many Federal, State, university, and private laboratories, including DOI's National Wildlife Health Center (NWHC) and USDA's National Veterinary Services Laboratories (NVSL) and Southeast Poultry Research Laboratory.

In addition to surveillance performed specifically to detect avian influenza in domestic and wild birds, the USDA employs specially trained wildlife disease biologists to survey for wildlife diseases and respond to disease outbreaks through its National Wildlife Disease Surveillance and Emergency Response System. This system ensures support to existing programs with appropriate sample collection, information exchange, and additional laboratory infrastructure. The USDA and State animal health authorities also employ specially trained veterinarians, called foreign animal disease diagnosticians, to investigate suspected cases of exotic disease in poultry and other influenza-susceptible species that are reported from USDA-accredited veterinary practitioners and from animal owners. Veterinary practitioners also submit specimens from sick birds and other influenza-susceptible species to State and university veterinary diagnostic laboratories, almost 40 of which have the capability to perform a rapid screening test for HPAI viruses as part of the National Animal Health Laboratory Network (NAHLN), a cooperative effort between USDA and the American Association of Veterinary Laboratory Diagnosticians.

Although substantial surveillance activities are already in place in the United States to detect avian influenza viruses with human pandemic potential in domestic poultry, enhancing surveillance in domestic animals (including at slaughter and processing) and wildlife will help ensure that reporting of these events will occur as early as possible. Animal populations that are most critical for additional surveillance activities are poultry and wild birds, not only in terms of increased numbers tested but also in the geographic distribution of testing to increase the probability of detection. In particular, domestic birds moving through the LBMS, farmed waterfowl and game birds, and migratory waterfowl and shore birds are important targets for increased avian influenza testing. Concomitant with increased targeting for animal sampling is the need for an increased capability to perform the necessary diagnostic testing to detect influenza viruses in those samples. Specifically, there is a need to enhance the capabilities of diagnostic laboratories participating in avian influenza surveillance of wild birds, and of commercial birds in the LBMS and in the NPIP, to be equivalent to those of laboratories in the NAHLN.

To fully utilize data collected as part of the national surveillance for influenza viruses with pandemic potential in animal populations, capabilities for capturing, analyzing, and sharing data must be in place. A database is needed to provide a means for evaluating the types of surveillance that should be conducted in the future, where the surveillance is needed, and the numbers of samples that must be collected. Such a database will also facilitate sharing of critical information with other animal health and

public health partners working to detect influenza viruses, especially those viruses that may have human pandemic potential.

Coordinated Response

Detection of an outbreak of avian or other influenza virus with human pandemic potential in an animal population in the United States will demand a rapid and coordinated response by Federal, State, and tribal entities, industry partners, and other stakeholders. Initially there will be a State, local, and/or tribal response supported by USDA (for domestic animals) or both USDA and DOI (for wildlife). If the scope of the outbreak is beyond the immediate resource capabilities of USDA/DOI and the animal health officials in an affected State or tribal entity, USDA can implement an integrated Federal, State, tribal, and local response utilizing all necessary Federal resources under the NRP and Emergency Support Function #11 - Agriculture and Natural Resources (ESF #11). USDA is the coordinator of ESF #11 for an animal disease response, with DOI serving as the primary agency responsible for issues related to the protection of natural and cultural resources, including wildlife, endangered species, and migratory birds. Because of the general zoonotic potential of influenza outbreaks in birds or other animals, USDA will work closely with the Department of Health and Human Services (HHS), the coordinator of Emergency Support Function #8 - Public Health and Medical Services (ESF #8). Outbreaks known to have both human and animal infections will be investigated jointly by public health authorities, including HHS, and animal health authorities, including USDA, that will then work together to implement appropriate response strategies.

The response will be organized using the Incident Command System as prescribed by the NIMS. Depending on the circumstances of the outbreak and the animal population involved, the Secretary of Agriculture may declare an "extraordinary emergency" to enhance the response authorities of the USDA. If necessary, USDA would make a request to the Department of Homeland Security (DHS) for declaration of an Incident of National Significance that would invoke the full support of NRP coordination mechanisms. If the outbreak becomes extremely large, there will be a need to utilize all potential sources of support. To meet the demand for skilled responders, it may be necessary to have licensed veterinary practitioners cross jurisdictional boundaries, either State or national, to assist in the response. These boundaries can present barriers to veterinarians wishing to work as responders in any jurisdiction where they are not already licensed to practice.

Goals

Overall, the goals for protecting animals against influenza viruses with human pandemic potential (or against a human pandemic virus, should it be able to infect animals) include: developing new capabilities in influenza preparedness, prevention, detection, and response; planning and preparedness for response to an outbreak; detecting influenza infections in animals, especially poultry and wild birds; and eradicating or controlling influenza outbreaks in animals that present a risk to human or animal health.

Roles and Responsibilities

The responsibility for preparing for, detecting, and responding to influenza infections in birds or other animals, domestic or wild, is shared by everyone associated with the animals at risk. This includes animal owners, animal industry groups, State, local, and tribal wildlife management and animal health authorities, and the Federal Government. All these individuals and entities have important and interdependent roles in animal health-related activities.

The Federal Government

The Federal Government will use all capabilities within its authority to support the private sector and State, local, and tribal animal health authorities in preparedness, surveillance, and response activities related to animal disease outbreaks. It will increase readiness to sustain essential Federal animal health functions during a human pandemic and provide animal health support services under the NRP.

Department of Agriculture: USDA is responsible for protecting American livestock, including poultry, from exotic or foreign animal diseases, such as HPAI. It advises individuals, the private sector, and State, local, and tribal entities, on appropriate biosecurity measures both before and after a disease is introduced, and helps to develop, support, and carry out surveillance for disease agents of concern. USDA provides diagnostic reference services and primary testing support, both prior to an outbreak and during an outbreak response. USDA stockpiles vaccines for possible use in a response to an outbreak of influenza with human pandemic potential in animals, and sponsors research on influenza viruses with pandemic potential and on vaccines that might be effective in controlling them. It provides assistance to the private sector and State, local, and tribal entities, in the development of influenza preparedness and response plans. Under the NRP, DHS has overall incident management coordination responsibilities and USDA will be the coordinator for ESF #11 for the response to a highly contagious disease like influenza, implementing an integrated national-level response with industry, State, local, and tribal responders. It provides response personnel, materiel, technical expertise, and funding for certain disease control and eradication activities. USDA is also responsible for providing Federal leadership to Federal, State, and tribal entities in managing problems caused by nuisance wildlife, including native wildlife, invasive species, and exotic animals. USDA partners with the DOI and others to coordinate the Federal Government's surveillance strategy for the early detection of HPAI in wild migratory birds and other wildlife when appropriate. USDA administers a National Wildlife Disease Surveillance and Emergency Response Program that is responsible for conducting daily surveillance on wildlife diseases, such as HPAI, and responding to a variety of emergencies including natural disasters and disease outbreaks. USDA also inspects and monitors meat, poultry, and egg products sold in interstate and foreign commerce to ensure products for public consumption are inspected for signs of disease.

Department of the Interior: DOI is responsible for managing and protecting certain wildlife, including migratory birds, under various laws and treaties and for protecting public health on more than 500 million acres of Federal land across the country. DOI coordinates the Federal Government's surveillance of wild migratory birds for the presence of HPAI virus, coordinates Federal surveillance with related surveillance activities of State, fish, and wildlife agencies, and provides leadership and support in the area of wildlife disease research and diagnostics to Federal and State natural resource agencies. DOI's NWHC works with department bureaus, as well as State, tribal, and other Federal entities, on wildlife disease investigations, providing the best available science and technical support for issues related to wildlife health and disease. This biosafety level 3 laboratory is actively involved in targeted surveillance of migratory birds and shorebirds, as well as wildlife morbidity and mortality event investigations to identify

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causative agents of wildlife disease. In the event of an HPAI outbreak in wild migratory birds, DOI will work with Federal and State natural resource, agricultural health, and public health agencies to support timely and effective response.

Department of Health and Human Services: HHS's primary responsibilities are those actions required to protect the health of all Americans, including communication of information related to pandemic influenza, leading international and domestic efforts in surveillance and detection of influenza outbreaks, ensuring the provision of essential human services, implementing measures to limit spread, and providing recommendations related to the use, distribution, and allocation of countermeasures and to the provision of care in mass casualty settings. HHS supports research, education, and prevention projects addressing the Nation's pressing agricultural health and safety problems, evaluating agricultural injury and disease prevention, and developing and evaluating control technologies to prevent illness and injuries among agricultural workers and their families. Through its Centers for Agricultural Disease and Injury Research, Education, and Prevention program, HHS supports consultation and/or training to researchers, health and safety professionals, graduate/professional students, and agricultural extension agents and others in a position to improve the health and safety of agricultural workers.

Department of Homeland Security: While DHS has overall incident management coordination responsibilities, it is also a support agency to USDA under ESF #11 - Agriculture and National Resources. Under this annex, DHS may provide additional support in interdicting adulterated products in transport and at ports of entry; subject-matter expertise and technical assistance (e.g., Customs and Border Protection Agricultural Specialists); and air and transport services (e.g., U.S. Coast Guard), as needed, for personnel and laboratory samples. DHS's Homeland Security Operations Center will also receive updates from USDA. In the event of a zoonotic disease outbreak, DHS will coordinate with USDA and HHS to release public information.

Department of Defense: In the event that an animal health emergency exceeds the capability of civil authorities, the Department of Defense (DOD) may provide defense support of civil authorities in accordance with the NRP and appropriate DOD Directives, as well as other procedures and authorities that exist for requesting assistance from DOD. If authorized by the Secretary of Defense, DOD can provide personnel, equipment, facilities, materials, and pharmaceuticals to the extent that national security readiness is not compromised. USDA may request and receive support from DOD in the event that the presence of animal/plant diseases and/or pests, endemic or exotic, constitutes an actual or potential emergency. For the purposes of this plan, an emergency is defined as any sudden negative economic impact, either perceived or real, such as a "foreign animal disease" event or a natural disaster that threatens the viability of U.S. animal agriculture and thereby the food supply of the United States.

State, Local, and Tribal Entities

State, local, and tribal entities are primarily responsible for detecting and responding to disease outbreaks and implementing measures to minimize the consequences of an outbreak. State, local, and tribal entities should have preparedness plans that address key issues in dealing with a disease outbreak in animals. They will be the first line of defense in limiting the spread of disease. Appropriate movement controls for susceptible birds or other animals and their products, and the ability to implement those controls, will be essential. For that purpose, there may be a need to integrate State, local, and tribal law enforcement entities into an animal disease response plan. Reporting mechanisms for use in early identification of suspect cases of influenza in animal populations should be established, as should mechanisms for communicating with the local animal agriculture community about influenza and response activities.

The Private Sector and Critical Infrastructure Entities

The private sector plays an integral role in preparedness for, and successful response to, an animal disease outbreak. Animal industry groups should develop standards for biosecurity and plans for outbreak response that help ensure successful eradication of the disease yet preserve as much continuity of normal animal production activities as possible during the outbreak.

Individuals and Families

Animal owners should practice appropriate biosecurity to prevent or minimize the risk of disease introduction prior to an outbreak, and must comply with quarantines or other movement restrictions to prevent or minimize the spread of disease during an outbreak.

Actions and Expectations

7.1. Pillar One: Preparedness and Communication

To help ensure that response plans can be successfully implemented, a capability must exist to rapidly provide personnel for response activities and surge capacity for veterinary diagnostic laboratories. If an influenza outbreak occurs in animals, owners and producers of susceptible animals, as well as natural resource managers, must understand their role, and the role of Federal, State, and tribal entities, in responding to an influenza outbreak in domestic animals or wildlife and limiting spread of the disease. Stockpiled materiel and vaccines need to be increased, and additional research and development is essential, including simulation modeling to refine disease mitigation strategies.

a. Planning for a Pandemic

7.1.1. Support the development and exercising of avian and pandemic response plans.

7.1.1.1. USDA, in coordination with DHS, HHS, DOD, and DOI, and in partnership with State and tribal entities, animal industry groups, and (as appropriate) the animal health authorities of Canada and Mexico, shall establish and exercise animal influenza response plans within 6 months. Measure of performance: plans in place at specified Federal agencies and exercised in collaboration with States believed to be at highest risk for an introduction into animals of an influenza virus with human pandemic potential.

7.1.2. Continue to work with States, localities, and tribal entities to develop medical and veterinary surge capacity plans.

7.1.2.1. USDA shall partner with State and tribal entities to establish, organize, train, and exercise incident management teams and a veterinary reserve corps within 12 months. Measure of performance: a veterinary reserve corps and incident management teams trained for each of the States believed to be at highest risk for an introduction into an animal population of an influenza virus with human pandemic potential.

7.1.2.2. USDA, in coordination with DOD, HHS, DHS, and DOI, shall partner with States and tribal entities to ensure sufficient veterinary diagnostic laboratory

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surge capacity for response to an outbreak of avian or other influenza virus with human pandemic potential, within 6 months. Measure of performance: plans and necessary agreements to meet laboratory capacity needs for a worst case scenario influenza outbreak in animals validated by utilization in exercises.

b. Communicating Expectations and Responsibilities

7.1.3. Provide guidance and support to poultry, swine, and related industries on their role in responding to an outbreak of avian influenza, including ensuring the protection of animal workers and initiating or strengthening public education campaigns to minimize the risks of infection from animal products.

7.1.3.1. USDA, in coordination with DHS, shall develop, disseminate, and encourage adoption of best practices and recommendations for maintaining the biosecurity of animals, especially poultry and swine, against infection and spread of influenza viruses and for reporting suspected cases of influenza with human pandemic potential in animals to State or Federal authorities, within 4 months. Measure of performance: incorporation of best practices by industry.

7.1.3.2. USDA, in coordination with DHS, shall partner with State and tribal entities, and industry groups representing poultry and swine producers and processors, and other stakeholders, to define and exercise response roles and capabilities within 9 months. Measure of performance: exercises involving State or tribal entities, at least one poultry industry group, and one swine industry group, conducted and after action reports produced.

7.1.3.3. HHS, in coordination with USDA, DHS, and the Department of Labor (DOL), shall work with the poultry and swine industries to provide information regarding strategies to prevent avian and swine influenza infection among animal workers and producers, within 6 months. Measure of performance: guidelines developed and disseminated to poultry and swine industries.

7.1.3.4. USDA, in coordination with DOI, shall collaborate with DHS and other Federal partners, with State, local, and tribal partners, including State wildlife authorities, and with industry groups and other stakeholders, to develop guidelines to reduce the risk of transmission between domestic animals and wildlife during an animal influenza outbreak, within 6 months. Measure of performance: guidelines for various outbreak scenarios produced, disseminated, and incorporated by partners.

7.1.3.5. DOI, in coordination with USDA, shall work with other Federal, State, and tribal partners to develop appropriate response strategies for use in the event of an outbreak in wild birds, within 4 months. Measure of performance: coordinated response strategies in place that can rapidly be tailored to a specific outbreak scenario.

c. Producing and Stockpiling Vaccines, Antiviral Medications, and Medical Material

7.1.4. Expand the domestic supply of avian influenza vaccine to control a domestic outbreak of avian influenza in bird populations.

7.1.4.1. USDA shall augment the current stockpile of 40 million doses of avian influenza vaccine with an additional 70 million doses within 9 months. Measure of performance: avian influenza vaccine stockpiles increased to 110 million doses.

7.1.4.2. USDA shall stockpile diagnostic reagents, PPE, antiviral medication for protection of response personnel, and other response materiel within 9 months. Measure of performance: materiel pre-positioned for rapid delivery to areas where poultry or other animals are believed to be at highest risk for an introduction of an influenza virus with human pandemic potential.

d. Advancing Scientific Knowledge and Accelerating Development

7.1.5. Ensure that there is maximal sharing of scientific information about influenza viruses between governments, scientific entities, and the private sector.

7.1.5.1. USDA and DOI shall perform research to understand better how avian influenza viruses circulate and are transmitted in nature, in order to improve information on biosecurity distributed to local animal owners, producers, processors, markets, auctions, wholesalers, distributors, retailers, and dealers, as well as wildlife management agencies, rehabilitators, and zoos, within 18 months. Measure of performance: completed research studies provide new information, or validate current information, on the most useful biosecurity measures to be taken to effectively prevent introduction, and limit or prevent spread, of avian influenza viruses in domestic and captive animal populations.

7.1.5.2. USDA and DOI shall perform research to develop and validate tools that will facilitate environmental surveillance for avian influenza viruses, especially in wild birds, through the evaluation of feathers, feces, water, or nesting material, within 24 months. Measure of performance: new environmental surveillance tools researched and made available for use by Federal, State, tribal, university, and other entities performing avian influenza surveillance.

7.1.5.3. USDA shall sequence genomes of all available avian influenza viruses to provide diagnostic sequences, identify possible vaccine antigens, and provide potential information on viral evolution, relationships, and determinants of virulence within 12 months. Measure of performance: genomes of avian influenza viruses sequenced and submitted to GenBank, and information reported on potential diagnostic sequences and viral relationships.

7.1.5.4. USDA shall perform research to improve vaccines and mass immunization techniques for use against influenza in domestic birds within 36 months. Measure of performance: an effective avian influenza vaccine that can be delivered simultaneously to multiple birds ready for commercial development.

7.1.5.5. USDA, in coordination with DHS, shall identify any deficiencies relative to needs for Federal animal research facility capacity, including appropriate biosafety levels, for performing studies of avian, swine, and other animal influenza viruses with pandemic potential, and establish a plan of action to ensure that needed facilities will be available to carry out those studies, within 6 months. Measure

of performance: deficiencies in capacity of Federal animal research facilities identified and plans developed for addressing those needs.

7.1.5.6. USDA, in coordination with DHS, DOI, and DOD, shall partner with State and tribal authorities to refine disease mitigation strategies for avian influenza in poultry or other animals through outbreak simulation modeling, within 6 months. Measure of performance: simulation models produced and reports issued on the results of influenza outbreak scenario modeling.

7.2. Pillar Two: Surveillance and Detection

Even with the large amount of surveillance and significant diagnostic capabilities currently targeted at detecting avian influenza, additional actions need to be taken to help ensure rapid detection of influenza in birds or other animals, bolster our diagnostic capabilities, and improve our ability to analyze and share surveillance data.

a. Ensuring Rapid Reporting of Outbreaks

7.2.1. Expand our domestic livestock and wildlife surveillance activities to ensure early warning of the spread of an outbreak to our shores.

7.2.1.1. DOI and USDA shall collaborate with State wildlife agencies, universities, and others to increase surveillance of wild birds, particularly migratory water birds and shore birds, in Alaska and other appropriate locations elsewhere in the United States and its territories, to detect influenza viruses with pandemic potential, including HPAI H5N1, and establish baseline data for wild birds, within 12 months. Measure of performance: reports detailing geographically appropriate wild bird samples collected and influenza virus testing results.

7.2.1.2. USDA and DOI shall collaborate to develop and distribute information to State and tribal entities on the detection, identification, and reporting of influenza viruses in wild bird populations, within 6 months. Measure of performance: information distributed and a report available describing the type, amount, and audiences for the information.

7.2.1.3. USDA shall work with State and tribal entities, and industry groups, to perform surveys of game birds and waterfowl raised in captivity, and implement surveillance of birds at auctions, swap meets, flea markets, and public exhibitions, within 12 months. Measure of performance: samples collected at 50 percent of the largest auctions, swap meets, flea markets, and public exhibitions held in at least five States or tribal entities believed to be at highest risk for an avian influenza introduction.

7.2.1.4. USDA shall work with State and tribal entities to provide additional personnel in additional locations to increase the number of facilities inspected and number of samples collected for avian influenza virus testing within the LBMS, within 12 months. Measure of performance: number of facilities inspected and sampled increased by 50 percent compared to previous year.

7.2.2. Support the development and sustainment of sufficient U.S. and host nation laboratory capacity and diagnostic reagents in affected regions and domestically, to provide rapid confirmation of cases in animals or humans.

7.2.2.1. USDA shall increase the capacity of the NVSL and the NAHLN to process influenza surveillance samples from commercial and LBMS sources, as well as wild birds, and develop and contract for the production of test reagents for distribution at no cost to collaborating State and industry laboratories within 12 months. Measure of performance: national capacity for laboratory testing increased by 100 percent compared to previous year and contracts for production of required avian influenza test reagents in place.

7.2.2.2. USDA shall partner with State and tribal entities to provide additional support for laboratory activities associated with NPIP surveillance for avian influenza within 12 months. Measure of performance: cooperative support agreements with States and tribal entities developed and implemented.

7.2.2.3. DOI and USDA shall increase the wild bird testing capacity of the NWHC and the National Wildlife Research Center, respectively, to process avian influenza samples from wild birds, within 12 months. Measure of performance: national wild bird testing capacity for avian influenza virus increased by 50 percent compared to previous year.

b. Using Surveillance to Limit Spread

7.2.3. Expand and enhance mechanisms for screening and monitoring animals that may harbor viruses with pandemic potential.

7.2.3.1. USDA shall develop an integrated database, or enhance existing databases, to support the national initiative for comprehensive surveillance for influenza viruses with pandemic potential in domestic animals using data collected from multiple sources, within 12 months. Measure of performance: functioning animal influenza surveillance database producing reports for a variety of queries and supporting multiple analyses of data.

7.2.3.2. DOI, in coordination with USDA, shall work with State and tribal entities, universities, and others to implement the Avian Influenza Data Clearinghouse developed by the NWHC to support the integrated surveillance program for influenza in wild birds within 12 months. Measure of performance: a functional wild bird influenza data clearinghouse utilized by multiple stakeholders.

7.3. Pillar Three: Response and Containment

If an outbreak of influenza occurs in birds or other animals in the United States it will be necessary to respond rapidly and in a coordinated manner with Federal, State, and tribal officials, industry partners, natural resource managers, and other stakeholders. The capability to utilize all possible Federal sources of wildlife management and veterinary response surge capacities will need to be in place. In order to prevent the outbreak from spreading, the movements of susceptible species of domestic animals and their products must be controlled or halted in the outbreak

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"control area." During an outbreak it will be essential to implement an effective communication strategy to keep stakeholders and the public informed of response activities and to clearly elucidate and put into perspective the risks and hazards that may exist and how to mitigate them.

a. Containing Outbreaks

7.3.1. Provide guidance for States, localities, and industry on best practices to prevent the spread of avian influenza in commercial, domestic, and wild birds, and other animals.

7.3.1.1. USDA, in coordination with DHS, HHS, DOI, and the Environmental Protection Agency, shall partner with State and tribal entities, animal industries, individual animal owners, and other affected stakeholders to eradicate any influenza outbreak in commercial or other domestic birds or domestic animals caused by a virus that has the potential to become a human pandemic strain, and to safely dispose of animal carcasses. Measure of performance: at least one incident management team from USDA on site within 24 hours of detection of such an outbreak.

7.3.1.2. USDA shall coordinate with DHS and other Federal, State, local, and tribal officials, animal industry, and other affected stakeholders during an outbreak in commercial or other domestic birds and animals to apply and enforce appropriate movement controls on animals and animal products to limit or prevent spread of influenza virus. Measure of performance: initial movement controls in place within 24 hours of detection of an outbreak.

7.3.1.3. USDA shall be prepared to provide near real-time technical information and policy guidance for State and tribal entities, animal industries, and individuals, on best practices to prevent the spread of avian influenza in commercial and other domestic birds and animals during an outbreak, within 4 months. Measure of performance: information and guidance distributed within 72 hours of confirmed outbreak and report available describing type and amount of information, and audiences to whom delivered.

7.3.1.4. DOI shall coordinate with Federal, State, local, and tribal officials to identify and apply appropriate measures to limit the spread of influenza virus should an outbreak occur in free-ranging wildlife populations. Measure of performance: initial control measures implemented within 24 hours of detection of an outbreak in free-ranging wildlife.

b. Leveraging National Medical and Public Health Surge Capacity

7.3.2. Activate plans to distribute medical countermeasures, including non-medical equipment and other material, from the Strategic National Stockpile and other distribution centers to Federal, State, and local authorities.

7.3.2.1. USDA shall activate plans to distribute veterinary medical countermeasures and materiel from the NVS to Federal, State, local, and tribal influenza outbreak responders within 24 hours of confirmation of an outbreak in animals of

influenza with human pandemic potential, within 9 months. Measure of performance: NVS materiel distributed within 24 hours of confirmation of an outbreak.

7.3.3. Address barriers to flow of public health, medical, and veterinary personnel across State and local jurisdictions to meet local shortfalls in public health, medical, and veterinary capacity.

7.3.3.1. USDA, in coordination with DOS, shall partner with appropriate international, Federal, State, and tribal authorities, and with veterinary medical associations, including the American Veterinary Medical Association, to reduce barriers that inhibit veterinary personnel from crossing State or national boundaries to work in an animal influenza outbreak response, within 9 months. Measure of performance: agreements or other arrangements in place to facilitate movement of veterinary practitioners across jurisdictional boundaries.

7.3.4. Determine the spectrum of public health, medical, and veterinary surge capacity activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

7.3.4.1. USDA shall assess the outbreak response surge capacity activities that other Federal partners, including the DOD, may be able to support during an outbreak of influenza in animals and ensure that mechanisms are in place to request such support, within 6 months. Measure of performance: written assessment completed and all necessary activation mechanisms in place.

c. Ensuring Effective Risk Communication

7.3.5. Work with State and local governments to develop guidelines to assure the public of the safety of the food supply and mitigate the risk of exposure from wildlife.

7.3.5.1. USDA, in coordination with DHS, DOI, and HHS, shall work with State, local, and tribal partners, industry groups, and other stakeholders to develop, clear and coordinated pre-scripted public messages that can later be tailored to the specifics of a given outbreak and delivered by trained spokespersons, within 3 months. Measure of performance: appropriate informational and risk mitigation messages developed prior to an outbreak, then shared with the public within 24 hours of an outbreak.

7.3.5.2. USDA and HHS, in coordination with DHS, State, local, and tribal partners, industry groups, and other stakeholders, shall develop guidelines to assure the public of the safety of the food supply during an outbreak of influenza in animals, within 6 months. Measure of performance: guidelines for various outbreak scenarios produced and shared with partners; within first 24 hours of an outbreak, appropriately updated guidelines on food safety shared with the public.

7.3.5.3. USDA, in coordination with DOI, shall collaborate in working with Federal partners, with State, local, and tribal partners, including State wildlife authorities, and with industry groups and other stakeholders, to update and distribute guidelines to reduce the risk of transmission between domestic animals and wildlife and reduce the risk of spread to other wildlife species during an animal influenza outbreak. Measure of performance: guidelines updated and shared with the public within first 24 hours of an outbreak.

Chapter 8 — Law Enforcement, Public Safety, and Security

Introduction

If a pandemic influenza outbreak occurs in the United States, it is essential that governmental entities at all levels continue to provide essential public safety services and maintain public order. It is critical that all stakeholders in State and local law enforcement and public safety agencies, whose primary responsibility this is, be fully prepared to support public health efforts and to address the additional challenges they may face during such an outbreak. Federal law enforcement and military officials should be prepared to assist in a lawful and appropriate manner, and all involved should be familiar with the established protocols for seeking such assistance and have validated plans to provide that assistance.

Key Considerations

State, local, tribal, and private sector entities have primary responsibility for the public safety and security of persons and non-Federal property within their jurisdictions, and are typically the first line of response and support in these functional areas. However, the unique challenges that might confront State, local, tribal, and private sector entities could require them to request additional assistance, either of a logistical or operational nature, from within their States, from other States pursuant to a mutual aid compact, or from the Federal Government. Civil disturbances and breakdowns in public order might occur in several different situations: as health care facilities are overwhelmed with those seeking care and treatment for themselves or family members; as persons vie for limited doses of vaccines and antiviral medications; as supply-chain disruptions cause shortages in basic necessities; as individuals attempt to leave areas where outbreaks have occurred or where containment measures are in place, and, potentially, in border communities if neighboring countries are impacted. 9-1-1 emergency call centers and public safety answering points may be overwhelmed with calls for assistance, including requests to transport influenza patients.

In addition to facing these challenges and dealing with the day-to-day situations they normally face, State, local, and tribal law enforcement agencies may be called upon to enforce movement restrictions or quarantines, thereby diverting resources from traditional law enforcement duties. To add to these challenges, law enforcement and public safety agencies can also expect to have their uniform and support ranks reduced significantly as a result of the pandemic, especially if they are not vaccinated.

It also essential to protect the health and safety of law enforcement and public safety and security workers to ensure these critical personnel can safely and effectively perform their assigned roles given these additional challenges.

Response Planning

It is essential that as part of State, local, and tribal overall pandemic response planning, their respective law enforcement and public safety agencies formulate comprehensive response plans based on in-depth understanding of the salient facts regarding a potential influenza outbreak and the related issues. The plans should establish close coordination and communications protocols between law enforcement and public safety agencies and public health and medical officials. Responsible elected officials, emergency management officials, public health officials, and members of the law enforcement and emergency response communities should then undergo training related to the execution of their plans

and participate in exercises and other activities to ensure their ability to execute their plan if necessary. Such exercises will raise their awareness of the pertinent issues and initiate dialogue concerning issues such as interagency cooperation, incident command, and agency-specific roles and responsibilities during a pandemic influenza outbreak.

As part of the planning process, outreach and coordination should also be conducted with respect to private sector entities responsible for safeguarding and sustaining critical infrastructure during an outbreak. It is essential that the services provided by these entities continue without interruption and that those private sector personnel responsible for providing security develop plans to continue to provide security despite the effects pandemic influenza will have on their respective workforces and the understanding that the availability of local law enforcement resources to respond or otherwise assist may be limited.

While this chapter outlines the types of Federal assistance that can be provided when States, territories, and localities need assistance, especially direct law enforcement assistance, planning officials should note that the Federal Government's ability to provide such assistance across the United States will be limited due to the relatively small numbers of Federal law enforcement personnel available to assist as well as the effects the outbreak will have on the Federal Government workforce. The ability of military personnel will likewise depend on many factors including whether such support is feasible in light of other national defense functions being provided at the time, and the impact of the pandemic on military personnel.

Understanding the Legal Framework

Because emergency management in public health emergencies will depend heavily on the effective use of relevant legal authorities, public health, law enforcement, and emergency management officials, and fire and EMS first responders will benefit from joint training on the legal authorities essential to effective response in public health emergencies *before* the emergency occurs. While significant progress has been made since the terrorist attacks on September 11, 2001, in establishing joint investigative protocols and linkages among the key components of public health, emergency management, law enforcement, and emergency response communities, an influenza pandemic will present new challenges, and it is important that all concerned understand their roles and the governing legal authorities so that they can coordinate their efforts under a complex set of Federal, State, tribal, and local laws. Federal, State, local, and tribal governments should review their legal authorities to respond to an influenza pandemic, identify needed changes in the law, and pursue legislative action as appropriate.

Sharing Ideas and Experiences

To facilitate coordination and planning at all levels and to identify issues, key Federal, State, local, and tribal law enforcement and public safety officials should be brought together with subject matter experts, including those in the public health and medical community, to discuss the influenza preparedness and response issues they may face, including maintaining civil order and how to effectively implement and enforce a quarantine or other restrictive measures. The unique needs and challenges faced by departments and agencies of all sizes should be considered. Those with relevant experience dealing with actual incidents such as the Toronto SARS experience should also be consulted. Their findings should result in the publication of best practices and model protocols, which should then be disseminated to their colleagues and counterparts throughout the Nation.

Protecting Law Enforcement and Public Safety Personnel

Ensuring the health and safety of law enforcement officers and others who may be called upon to respond in a pandemic influenza outbreak or any other public health emergency is critical. The law enforcement and public safety community should take appropriate protective measures to minimize their risk of infection, and selected personnel should be provided training to ensure they are knowledgeable about these measures. Law enforcement personnel should obtain immunizations or other prophylaxis in accordance with the priorities established for the circumstance in the event quantities are limited.

Continuity of Operations

Agencies should have continuity plans to ensure essential services are provided if significant numbers of their employees become ill during the outbreak as well as if disruptions in other sectors they depend on occur. Ideally such plans should address issues such as the reassignment of personnel to perform critical functions, encouraging personnel to have plans to take care of their families while they are assigned to critical functions, and determining at what point it would be necessary to seek additional assistance.

Outside Assistance

To prepare for the possibility that assistance from partners such as the National Guard may be required to supplement State or local law enforcement and public safety response agencies that are undermanned or overwhelmed, State and local officials should prepare in advance the processes and procedures for assessing the need for such forces and how they will be utilized in the event they are needed. Critical to this contingency is a clear understanding within the law enforcement and public safety community as to the processes that will be required to request such augmentation. Additionally, appropriate joint training should be provided as necessary to Guard forces and the potential supported agencies to ensure they are prepared for their possible missions. Once training has been completed, joint exercises between Guard units and law enforcement and other emergency responders would allow them to work through command and control and interoperability issues.

Conducting Training and Preparedness Exercises

Once all law enforcement and public safety stakeholders have formulated their plans, they should engage in joint discussions, training, and exercises to ensure that plans at the Federal, State, tribal, and local levels are effectively integrated. These discussions should identify issues such as how the Incident Command System (ICS) will function during a pandemic influenza outbreak if there are requirements for a quarantine or other similar restrictive efforts to deal with an extraordinary situation. While most incidents are managed at the local level by a member of the fire or law enforcement community, it may well be that local officials choose to designate a public health official to coordinate their response. Regardless of who is in the lead, however, public health and medical officials should participate in training on ICS policies and procedures, since they will undoubtedly be key players in these incidents and it is likely that many of them will not have had prior experience or training in this area. All Hazard Incident Management Team training would also be beneficial as it would bring together law enforcement, fire and rescue, public health, public works, and other key personnel so that each discipline learns how to work together with other disciplines.

Implementing Control Measures

While a detailed discussion of quarantine and related containment measures that may be implemented in the event of a pandemic influenza outbreak are set forth in Chapter 6 of this Implementation Plan (Plan), a brief outline of those measures is warranted here. The main goal of these containment measures is to delay the spread of disease and resulting adverse effects. Once cases are observed in the United States, early cases may be isolated from others (in a hospital or elsewhere) and their contacts (who may have been exposed) could be asked to remain out of contact with others for a period of time (voluntary quarantine). Other social distancing measures may be recommended or mandated by communities. These measures could involve recommendations on limiting personal contact, work-at-home options, limits on public gatherings, and school closures.

Geographic quarantine (*cordon sanitaire*) is the isolation of localities with documented disease transmission from localities still free of infection. It has been used occasionally throughout history in efforts to contain serious epidemics. It is important to distinguish this from the quarantine of case contacts described above, where exposure to an infectious agent, but not infection per se, has been confirmed. Although it is very unlikely that public health professionals would recommend a geographic quarantine once influenza transmission is observed in different locations, State, local, and tribal entities should still consider plans to assist with the implementation of such a measure. Whether geographic quarantine would be implemented by public health officials to contain an outbreak of influenza with pandemic potential at its source will depend on a number of factors including both the feasibility of implementing the quarantine and the ability of authorities to provide for the needs of the quarantined population.

Planning for the enforcement of quarantine or other control measures at the local level will likewise require extensive advance planning among stakeholders. Procedures for requesting mutual aid from other State and local jurisdictions should be examined and updated as necessary. Difficult issues such as rules on the use of force to enforce quarantine if necessary and what to do with those who refuse to be quarantined should be settled as much as possible in advance of any quarantine implementation. Jurisdictions with international borders or international airports should coordinate in advance with Federal officials who may be required to quarantine persons arriving in the United States. States, local, and tribal entities may also seek Federal assistance in enforcing their own quarantines, so planning should also address the mechanism for doing so. Although it is quite unlikely to be used, quarantine of a geographic area will present especially unique challenges, as it will likely require close coordination between agencies from overlapping or adjacent jurisdictions.

Readiness through Situational Awareness

While law enforcement and public safety officials are not generally expected to play an active role in surveillance and detection, they should maintain close communication with public health, EMS, and fire rescue officials who will likely be more engaged in disease surveillance efforts. This will enable them to plan and prepare as needed. As the possibility of an outbreak grows they should continue to test response plans, policies, and procedures and update them as required to ensure a continuous state of preparedness. The Federal Bureau of Investigation (FBI) will closely monitor events through coordination with the Centers for Disease Control and Prevention (CDC) and take appropriate action in the event that it is suspected that there was deliberate human intervention in the spread of the pandemic.

Law Enforcement Response During an Outbreak

During the course of a pandemic influenza outbreak, State, local, and tribal law enforcement and public safety agencies will be conducting operations in accordance with their established plans and protocols. It is possible that the *National Response Plan* (NRP) will be activated and it is likely that State, local, and tribal operations will be coordinated through emergency operations centers. In the event that State and local authorities and tribal entities need additional law enforcement assistance, established procedures, as set forth below, must be followed to obtain such assistance.

State, Local, and Tribal Law Enforcement

In the event of a civil disturbance, including rioting or looting, State and local law enforcement will normally provide the first response pursuant to State and local law. Consistent with State law, the Governor may deploy National Guard as needed to prevent or respond to civil disturbances. Mutual aid agreements, such as Emergency Management Assistance Compacts, may also be used to obtain assistance from both within States and from neighboring States.

Federal Law Enforcement

Federal agencies with law enforcement capabilities may investigate and respond to Federal crimes and conduct security measures as a result of a domestic emergency.

Emergency Federal Law Enforcement Assistance

The Federal Government may assist a State in maintaining order at the request of a Governor when State and local resources are overwhelmed and not capable of an effective response. There are two primary ways the Federal Government can provide such assistance: (1) providing Federal law enforcement personnel; and (2) pursuant to exceptions to the Posse Comitatus Act, 18 U.S.C. § 1385, when civilian law enforcement resources are inadequate, by the President directing the Armed Forces to assist with civilian law enforcement functions.

When Federal departments and agencies are requested to provide public safety and security support, the assistance is provided through the mechanism of Emergency Support Function #13 – Public Safety and Security (ESF #13) of the NRP. ESF #13 provides Federal public safety and security assistance to support prevention, preparedness, response, and recovery priorities in circumstances where locally available resources are overwhelmed or are inadequate, or where a unique Federal capability is required.

Civilian Federal Law Enforcement Assistance

Under the Emergency Federal Law Enforcement Assistance Act, 42 U.S.C. § 10501 et seq., the Attorney General may provide law enforcement assistance, including Federal personnel, in response to a Governor's written request, when he determines that such assistance is necessary to provide an adequate response to a law enforcement emergency. The provisions define a law enforcement emergency as an uncommon situation requiring law enforcement resources that threatens to become of serious or epidemic proportions, and for which State and local resources are inadequate to protect lives or property, or to enforce criminal laws. To the extent Federal personnel would be used to enforce State or local law, they should be deputized or otherwise authorized under State or local law to exercise the key law enforcement powers (arrest, search, seizure) involved in enforcing those laws.

Use of the Military for Law Enforcement Duties

Although the primary mission of the Department of Defense (DOD) is the defense of the United States, the Department may, with approval of the Secretary of Defense, provide logistical support for law enforcement operations that does not involve the use of law enforcement powers such as arrest authority. In addition, in certain situations DOD personnel may be directed by the President -- traditionally only as a last resort and in support of civilian authorities -- to perform actual law enforcement responsibilities.

The Law Enforcement Role in Containment

Although as set forth above there are less-intrusive strategies for stopping the spread of disease, response to an influenza pandemic could require more restrictive measures such as isolation or quarantine and offer social distancing measures such as movement restrictions. Most States have broad quarantine authorities enacted pursuant to their police powers. The Federal Government also has statutory authority to order a quarantine to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or from one State or possession into any other State or possession. "Influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic" is on the list of specified communicable diseases for which Federal quarantine is available.

State Quarantine

If necessary, State and local law enforcement agencies, with assistance from their State's National Guard as needed, will normally enforce quarantines or other containment measures ordered by State or local authorities. Customs and Coast Guard officers may assist in enforcing State quarantines at the direction of the Secretary of Health and Human Services. At the request of State and local authorities, if authorized under the Emergency Law Enforcement Assistance Act, and with appropriate deputations under Federal, State, and local law, Federal law enforcement officers can assist in State and local quarantine enforcement. If directed by the President pursuant to the Insurrection Act, the military may suppress domestic unrest associated with resistance to a State quarantine.

Federal Quarantine and Other Movement Restrictions

Borders: The President has the authority to bar entry into the United States of aliens who have pandemic influenza if he determines that entry is detrimental to the interests of the United States. The Secretary of Health and Human Services may prohibit the entry of persons or property from foreign countries where the entry of such persons or property would present a serious danger of the introduction of a communicable disease. The Department of Homeland Security (DHS) has broad general authority pursuant to the customs and immigration laws to examine merchandise, cargo, conveyances, and persons upon their entry to the United States to ensure that imports comply with U.S. law, and to seize and forfeit vessels, animals, or other things used in the unlawful importation or transportation of articles contrary to U.S. law. Customs and Coast Guard officers are required to aid in the enforcement of Federal quarantine rules and regulations. Furthermore, Customs and Coast Guard officers and "military officers commanding in any fort or station upon the seacoast" are required to aid in the enforcement of State quarantines.

Air and other Transportation modes: The Federal Aviation Administration (FAA) can order United States flag air carriers not to enter designated airspace of a foreign country (e.g., to keep airspace clear for rescue operations). If FAA determines that an emergency exists related to safety in air commerce that

requires immediate action, FAA may prescribe regulations and issue orders immediately to meet that emergency. Likewise, the Transportation Security Administration (TSA) Assistant Secretary may issue regulations or security directives immediately to protect transportation security in all modes of transport.

Rail: Any movement in the United States by rail carrier (including commuter rail but excluding urban rapid transit not connected to the general system of rail transportation) may be stopped, redirected, or limited by the authority of the Surface Transportation Board (STB) or the Federal Railroad Administration (FRA), or both, irrespective of the commodity involved. FRA may issue an emergency order imposing any restrictions or prohibitions necessary to abate what FRA determines is an emergency situation involving a hazard of death or personal injury caused by unsafe conditions or practices.

Persons Arriving From Foreign Countries and Traveling Between States

Pursuant to regulation, the CDC may quarantine individuals arriving from foreign countries or possessions who are reasonably believed to be infected with or exposed to any of the communicable diseases specified by the President in an Executive Order. In addition, CDC may quarantine individuals reasonably believed to be infected with or exposed to such diseases and traveling from one State or possession into another.

Roles and Responsibilities

The Federal Government

Federal law enforcement officials are responsible for contingency planning relating to public safety and security missions in support of the Federal response to a pandemic. In particular, certain agencies are assigned specific security and other responsibilities in the NRP's ESF #13 and Emergency Support Function #8 - Public Health and Medical Services (ESF #8).

Department of Justice: The Attorney General, as the chief law enforcement officer of the United States, with appropriate coordination with other Federal officials, is responsible by law (42 U.S.C. § 10521), for determining whether to authorize Federal law enforcement assistance, upon the written request of a Governor, in the case of a law enforcement emergency for which State and local resources are inadequate to protect lives or property, or to enforce criminal laws. This is separate and distinct from the role the Attorney General has, in coordination with the Secretary of the Department of Homeland Security, under ESF #13, which provides a mechanism for coordinating and providing Federal-to-Federal support or Federal support to State and local authorities to include non-investigative/non-criminal law enforcement, public safety, and security capabilities and resources.

Designated Department of Justice (DOJ) officials, including those in the United States Marshals Service (USMS), may deputize Federal law enforcement personnel from other agencies as Special Deputy United States Marshals to broaden their law enforcement authorities.

The USMS serves as the lead Federal law enforcement security component for the Strategic National Stockpile (SNS). A Memorandum of Agreement between the Department of Health and Human Services (HHS) and DOJ details previously agreed-upon responsibilities that are to be fulfilled by the USMS during the movement and transition of SNS assets. The USMS also works with HHS in coordinating with State and local law enforcement officials concerning SNS future planning, exercises, and operations.

The FBI is responsible for monitoring the outbreak situation as it develops for any indications that it may not be the result of natural causes and upon learning of such information, taking the appropriate inves-

tigative action as well as notifying the DHS Homeland Security Operations Center and the National Counterterrorism Center as set forth in the Biological Incident Annex of the NRP.

Department of Homeland Security: Pursuant to the NRP, the Secretary of DHS will coordinate all Federal operations within the United States to prepare for, respond to, and recover from terrorist attacks, natural disasters, and other emergencies. The Secretary of DHS is designated by Homeland Security Presidential Directive 5 as the "principal Federal official" for domestic incident management. Additionally, DHS agencies with law enforcement components have authority and responsibility to take actions related to the Federal response to an influenza pandemic, and may exercise authority over certain modes of transportation.

DHS, in conjunction with DOJ, is the co-coordinator for ESF #13 of the NRP. As such, they coordinate preparedness activities with ESF #13 supporting agencies and ensure that all activities performed under the purview of ESF #13 are related to the safety and security of the public. Many of DHS's operational elements also possess law enforcement capabilities that could be leveraged during a pandemic. For example, United States Secret Service, Customs and Border Protection, Immigration and Customs Enforcement, and TSA agents can assist State and local authorities with additional public safety and security requirements not only at ports of entry, but also in other locations, as required.

Department of Defense: DOD is responsible, at the direction of the President, for supplementing law enforcement resources with military personnel performing law enforcement functions. Such assistance ordinarily would be rendered only if civilian law enforcement agencies were overwhelmed and only if such assistance could be rendered without adversely affecting DOD's ability to perform its primary mission of defending the United States. The assistance may be provided if the President invokes the Insurrection Act at the request of a State or on his own, suppressing domestic violence or enforcing Federal law. DOD is a support agency to ESF #13 and may also provide public safety and security assistance of a logistical or support nature under the concept of Defense Support of Civil Authorities, when approved and directed by the Secretary of Defense.

States, Local, and Tribal Entities

State, local, and tribal law enforcement and public safety agencies have primary responsibility for providing public safety and security during a pandemic outbreak. These agencies are responsible for learning about the challenges they will face in a potential pandemic influenza outbreak and collaborating with the appropriate stakeholders in their respective jurisdictions. These stakeholders should include public health, judicial, fire service, corrections, and emergency management personnel. It is critical that these stakeholders develop comprehensive and mutually supporting plans that will enable them to continue their operations and respond to the challenges they will face in an outbreak.

The Adjutant General of each State, with guidance from DOD (including the National Guard Bureau) and assistance as appropriate for situations when State National Guard forces are either federalized or operating under a Title 32 status, are responsible for contingency planning and training to prepare Guard units within their State for public safety and security missions they may be assigned in a pandemic influenza outbreak.

Actions and Expectations

8.1. Pillar One: Preparedness and Communication

a. Planning for a Pandemic

8.1.1. Develop Federal implementation plans on law enforcement and public safety, to include all components of the Federal Government and to address the full range of consequences of a pandemic, including human and animal health, security, transportation, economic, trade, and infrastructure considerations. Ensure appropriate coordination with State, local, and tribal governments.

8.1.1.1. States should ensure that pandemic response plans adequately address law enforcement and public safety preparedness across the range of response actions that may be implemented, and that these plans are integrated with authorities that may be exercised by Federal agencies and other State, local, and tribal governments.

8.1.1.2. DHS, in coordination with DOJ, HHS, DOL, and DOD, shall develop a pandemic influenza tabletop exercise for State, local, and tribal law enforcement/public safety officials that they can conduct in concert with public health and medical partners, and ensure it is distributed nationwide within 4 months. Measure of performance: percent of State, local, and tribal law enforcement/public safety agencies that have received the pandemic influenza tabletop exercise.

8.1.1.3. State, local, and tribal governments should review their legal authorities that may be needed to respond to an influenza pandemic, identify needed changes in the law, and pursue legislative action as appropriate.

8.1.1.4. DOJ shall ensure that appropriate Federal and State Court personnel are provided the information necessary to enable them to plan for the continuity of critical judicial functions during a pandemic. Measure of performance: this plan made available to all appropriate Federal and State court personnel.

8.1.1.5. States should ensure pandemic response plans address EMS, fire, public works, emergency management, and other emergency response and public safety preparedness.

8.1.2. Continue to work with States, localities, and tribal entities to establish and exercise pandemic response plans.

8.1.2.1. DOJ, in coordination with HHS, DOL, and DHS, shall convene a forum for selected Federal, State, local, and tribal law enforcement/public safety personnel to discuss the issues they will face in a pandemic influenza outbreak and then publish the results in the form of best practices and model protocols within 4 months. Measure of performance: best practices and model protocols published and distributed.

8.1.2.2. DOJ shall advise State Governors of the processes for obtaining emergency Federal law enforcement assistance, within 3 months. Measure of performance: all State Governors advised.

8.1.2.3. DOJ shall advise State Governors of the processes for requesting Federal military assistance under the Insurrection Act, within 3 months. DOD, after coordination with DOJ, shall publish updated policy guidance on Military Assistance during Civil Disturbances, within 6 months. Measure of performance: all State Governors advised and guidance published.

8.1.2.4. HHS and DOJ shall ensure consistency of the CDC Public Health Emergency Law Course with the *National Strategy for Pandemic Influenza (Strategy)*, this Plan and other Federal pandemic documents and then disseminate the CDC Public Health Emergency Law Course across the United States within 6 months. Measure of performance: distribution of presentations of reviewed public health emergency law course to all States.

8.1.2.5. DOD, in consultation with DOJ and the National Guard Bureau, and in coordination with the States as such training applies to support of State law enforcement, shall assess the training needs for National Guard forces in providing operational assistance to State law enforcement under either Federal (Title 10) or State (Title 32 or State Active Duty) in a pandemic influenza outbreak and provide appropriate training guidance to the States and Territories for units and personnel who will be tasked to provide this support, within 18 months. Measure of performance: guidance provided to all States.

8.1.2.6. DOD, in consultation with DOJ, shall advise State Governors of the procedures for requesting military equipment and facilities, training and maintenance support as authorized by 10 U.S.C. §§ 372-74, within 6 months. Measure of performance: all State Governors advised.

8.1.2.7. DHS, in coordination with DOJ, DOD, DOT, HHS, and other appropriate Federal Sector-Specific Agencies, shall convene a forum for selected Federal, State, local, and tribal personnel to discuss EMS, fire, emergency management, public works, and other emergency response issues they will face in a pandemic influenza outbreak and then publish the results in the form of best practices and model protocols within 4 months. Measure of performance: best practices and model protocols published and distributed.

b. Communicating Expectations and Responsibilities

8.1.3. Provide guidance to individuals on infection control behaviors they should adopt pre-pandemic, and the specific actions they will need to take during a severe influenza season or pandemic, such as self-isolation and protection of others if they themselves contract influenza.

8.1.3.1. HHS, in coordination with DOL, shall provide clear guidance to law enforcement and other emergency responders on recommended preventive measures,

including pre-pandemic vaccination, to be taken by law enforcement and emergency responders to minimize risk of infection from pandemic influenza, within 6 months. Measure of performance: development and dissemination of guidance for law enforcement and other emergency responders.

c. Establishing Distribution Plans for Vaccines and Antiviral Medications

8.1.4. Develop credible countermeasure distribution mechanisms for vaccine and antiviral agents prior to and during a pandemic.

8.1.4.1. State, local, and tribal law enforcement agencies should coordinate with appropriate medical facilities and countermeasure distribution centers in their jurisdictions (as recognized in Chapter 6, security at these facilities will be critical in the event of an outbreak) to coordinate security matters within 6 months.

8.3. Pillar Three: Response and Containment

a. Containing Outbreaks

8.3.1. Encourage all levels of government, domestically and globally, to take appropriate and lawful action to contain an outbreak within the borders of their community, province, State, or nation.

8.3.1.1. HHS, in coordination with DOJ, DOS, and DHS, shall determine when and how it will assist States in enforcing their quarantines and how it will enforce a Federal quarantine, within 9 months. Measure of performance: guidelines on quarantine enforcement available to all States.

b. Sustaining Infrastructure, Essential Services, and the Economy

8.3.2. Determine the spectrum of infrastructure-sustainment activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.

8.3.2.1. DOJ, DHS, and DOD shall engage in contingency planning and related exercises to ensure they are prepared to maintain essential operations and conduct missions, as permitted by law, in support of quarantine enforcement and/or assist State, local, and tribal entities in law enforcement emergencies that may arise in the course of an outbreak, within 6 months. Measure of performance: completed plans (validated by exercise(s)) for supporting quarantine enforcement and/or law enforcement emergencies.

8.3.2.2. DHS, in coordination with DOJ, DOD, DOT, HHS, and other appropriate Federal Sector-Specific Agencies, shall engage in contingency planning and related exercises to ensure they are prepared to sustain EMS, fire, emergency management, public works, and other emergency response functions during a pandemic, within 6 months. Measure of performance: completed plans (validated by exercise(s)) for supporting EMS, fire, emergency management, public works, and other emergency response functions.

Chapter 9 — Institutions: Protecting Personnel and Ensuring Continuity of Operations

Introduction

It is the policy of the United States to have in place a comprehensive and effective program to ensure survival of our constitutional form of government, the uninterrupted continuation of national-level essential functions under all circumstances, and the resumption of all government functions and activities quickly following any disruption. This policy is in effect for all hazards but will require specialized planning in the event of an influenza pandemic.

Continuity of operations (COOP) is defined as the activities of individual Federal departments and agencies and their sub-components to ensure that the capability exists to continue essential agency functions across a wide range of potential emergencies. The Federal Executive Branch provides guidance on effective continuity planning in *Federal Preparedness Circular — 65, Federal Executive Branch Continuity of Operations* (FPC-65) and for State and local continuity planners in *Interim Guidance on Continuity of Operations Planning for State and Local Governments*. COOP planning at the State and local government level mirrors Federal guidance to ensure the continuation of services to each level of government's communities and constituents. Similarly, most businesses engage in business continuity planning, which outlines a set of procedures that define how a business will sustain or recover its critical functions in the event of an unplanned disruption to normal business operations. Such planning for an influenza pandemic must recognize that the next pandemic may come in waves, each lasting weeks or months, and pass through communities of all sizes across the United States and around the world.

Unlike many other catastrophic events, an influenza pandemic will not directly affect the physical infrastructure of an organization. While a pandemic will not damage power lines, banks, or computer networks, it will ultimately threaten all critical infrastructure by its impact on an organization's human resources by removing essential personnel from the workplace for weeks or months. Employers should include considerations for protecting the health and safety of employees during a pandemic in their business continuity planning.

The Federal Government recommends that government entities and the private sector plan with the assumption that up to 40 percent of their staff may be absent for periods of about 2 weeks at the height of a pandemic wave with lower levels of staff absent for a few weeks on either side of the peak. These absences may be due to employees who: care for the ill; are under voluntary home quarantine due to an ill household member; care for children dismissed from school; feel safer at home; or are ill or incapacitated by the virus. Because the movement of essential personnel, goods and services, and the maintenance of critical infrastructure are necessary during an event that spans weeks to months in any given community, effective continuity planning including protection of personnel during an influenza pandemic is a "good business practice" that must become part of the fundamental mission of all Federal, State, local, and tribal governmental departments and agencies, private sector businesses and institutions, and schools and universities.

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The private sector will play an integral role in a community response to pandemic influenza by protecting employees' and customers' health and safety, and mitigating impact to the economy and the functioning of society. Because the private sector also owns and maintains approximately 85 percent of the U.S. critical infrastructure, it is imperative that business continuity plans include procedures to mitigate the potential disruptions caused by an influenza pandemic.

Numerous activities can be conducted now to plan for the potential of a pandemic, while other activities will require a plan for action when more information is available. This chapter provides guidance for organizations engaged in developing and improving plans to prepare for and respond to an influenza pandemic. All governmental departments and agencies at the Federal, State, local, and tribal levels, private sector businesses, and academic institutions must ensure that the capability exists to continue essential functions in the event of a disruption to normal operations. A checklist of key planning activities to supplement existing all-hazards business continuity plans for public and private organizations and businesses, schools and universities, and faith-based and community organizations is provided in Appendix A. Further guidance and references for these activities can be found at **www.pandemicflu.gov.**

Key Considerations

Planning Requirements for Pandemic Influenza Continuity of Operations

FPC-65 provides guidance on elements recognized across the Executive Branch as supportive of effective continuity planning. While the guidance in FPC-65 applies solely to the Federal Executive Branch, the planning elements that FPC-65 describes apply across all levels of government as well as the private sector and can be used to develop pandemic specific planning resources. Highlighted below are the 11 COOP program elements relevant to pandemic influenza planning.

1. Plans and Procedures

The foundation of a viable COOP program is the development and documentation of a COOP plan that, when implemented, will provide for the continued performance of an organization's essential functions under all circumstances. In order to reduce the pandemic threat, a portion of the COOP plan's objective should be to minimize the health, social, and economic impact of a pandemic on the United States.

2. Essential Functions

Essential functions are those functions that enable organizations to provide vital services, exercise civil authority, maintain the safety and well being of the general populace, and sustain the industrial/economic base in an emergency. During a pandemic, or any other emergency, these essential functions must be continued in order to facilitate emergency management and overall national recovery. Within the private sector, essential functions can be regarded as those core functions, services, and capabilities required to sustain business operations.

3. Delegations of Authority

Clearly pre-established delegations of authority are vital to ensuring that all organizational personnel know who has the authority to make key decisions in a COOP situation. Because absenteeism may reach a peak of 40 percent at the height of a pandemic wave, delegations of authority are critical.

4. Orders of Succession

An order of succession is essential to an organization's COOP plan to ensure personnel know who has authority and responsibility if the leadership is incapacitated or unavailable in a COOP situation. Since an influenza pandemic may affect regions of the United States differently in terms of timing, severity, and duration, businesses with geographically dispersed assets and personnel should consider dispersing their order of succession.

5. Alternate Operating Facilities

The identification and preparation of alternate operating facilities and the preparation of personnel for the possibility of an unannounced relocation of essential functions and COOP personnel to these facilities is part of COOP planning. Because a pandemic presents essentially simultaneous risk everywhere, the use of alternative operating facilities must be considered in a non-traditional way. COOP planning for pandemic influenza will involve alternatives to staff relocation/co-location such as social distancing in the workplace through telecommuting, or other means. In addition, relocation and redistribution of staff among alternative facilities may reduce the chance of infection impacting centralized critical operations staff simultaneously.

6. Interoperable and Effective Communications

The success of a viable COOP capability is dependent upon the identification, availability, and redundancy of critical communication systems to support connectivity of internal organizations, external partners, critical customers, and the public. Systems that facilitate communication in the absence of person-to-person contact can be used to minimize workplace risk for essential employees and can potentially be used to restrict workplace entry of people with influenza symptoms.

7. Critical Business Records and Databases

Businesses should identify, protect, and ensure the ready availability of electronic and hardcopy documents, references, records, and information systems needed to support essential functions. Pandemic influenza COOP planning must also identify and ensure the integrity of vital systems that require periodic maintenance or other direct physical intervention by employees.

8. Human Capital

Each organization must develop, update, exercise, and be able to implement comprehensive plans to protect its workforce. Although an influenza pandemic will not directly affect the physical infrastructure of an organization, a pandemic will ultimately threaten all operations by its impact on an organization's human resources. The health threat to personnel is the primary threat to continuity of operations during a pandemic.

9. Testing, Training and Exercises

Testing, training, and exercising of COOP capabilities are essential to assessing, demonstrating, and improving the ability of organizations to execute their COOP plans and programs during an emergency. Pandemic influenza COOP plans should test, train, and exercise sustainable social distancing techniques that reduce person-to-person interactions within the workplace.

10. Devolution of Control and Direction

Devolution is the capability to transfer authority and responsibility for essential functions from an organization's primary operating staff and facilities, to other employees and facilities, and to sustain operational capability under devolved authority for an extended period. Because local outbreaks will occur at different times, have variable durations, and may vary in their severity, devolution planning may need to consider rotating operations between regional/field offices as a pandemic wave moves throughout the United States.

11. Reconstitution

Reconstitution is the process by which an organization resumes normal operations. The objective during recovery and reconstitution after a pandemic is to expedite the return of normal services and operations as quickly as possible. Since a pandemic will not harm the physical infrastructure or facilities of an organization, and because long-term contamination of facilities is not a concern, the primary challenge for organizations after a pandemic will be the return to normal and bringing their systems back to full capacity. The mortality rate of a pandemic will depend on characteristics of the causative virus that cannot be predicted in advance, but for planning purposes it may be helpful to consider historical examples. The mortality rate of the 1918 pandemic in the United States — the worst influenza pandemic of the 20th century — is estimated to have been about 2 percent of those infected (about 0.5 percent of the total population). Using this historical information and current models of disease transmission, it is projected that a modern pandemic of equivalent lethality could lead to the deaths of 2 million people in the United States alone.

Continuity and Critical Infrastructure Protection

Public and private sector entities depend on certain critical infrastructure for their continued operations. Homeland Security Presidential Directive 7 (HSPD-7) identifies 17 critical infrastructure and key resources vital to national functioning.[19] Recognizing that more that 85 percent of the critical infrastructure is owned and operated by the private sector, the development of public-private partnership is paramount to securing our Nation's assets.[20]

Critical infrastructure protection (CIP) entails all the activities directed at safeguarding indispensable people, systems (especially communications), and physical infrastructure associated with the operations of the 17 critical infrastructure sectors. However, sustaining the operations of critical infrastructure under conditions of pandemic influenza will depend largely on individual organizations' development and implementation of (1) plans for business continuity under conditions of staffing shortages; and (2) plans to protect the health of their workforces. This is also true for maintaining economic activity generally, above and beyond the question of critical infrastructure. General recommendations for both of

[19] HSPD-7 defines critical infrastructure to include the following sectors: agriculture and food; public health and health care; drinking water and water treatment systems; energy (including the production, refining, storage, and distribution of oil and gas, and electric power except for nuclear facilities); banking and finance; national monuments and icons; defense industrial base; information technology; telecommunications; chemical; transportation systems (including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems); emergency services; and postal and shipping. HSPD-7 defines key resources to include: dams; government facilities; commercial facilities; and nuclear reactors, material, and waste.

[20] HSPD-7 and the Interim National Infrastructure Protection Plan define an architecture for the Federal Government to coordinate with representatives of these critical infrastructure and key resource sectors. The Federal Government will use this structure to develop sector-specific guidance and share information. Private sector-led Sector Coordinating Councils are being established to work with their appropriate Sector-Specific Agencies via Government Coordinating Councils, which represent the government agencies that have a role in protecting the respective sectors. Currently, the Department of Homeland Security's (DHS) Office of Infrastructure Protection is finalizing the National Infrastructure Protection Plan. This finalized document will refine the public-private partnership model and a process for protecting critical infrastructure.

these areas are provided in this chapter.

COOP is one of the basic goals of CIP. During a pandemic, all critical infrastructure sectors might not be affected to the same degree or at the same time. Although pandemic influenza would be expected to affect the workforce across all sectors, a pandemic's impact in terms of demand for services may disproportionately affect several sectors including transportation, health care, agriculture, and emergency services. Sector-specific guidance and recommendations regarding transportation systems, health care, animal health, and emergency services (including law enforcement) are provided in Chapters 5, 6, 7, and 8, respectively. Development of more refined sector-specific guidance in partnership with critical infrastructure owners and operators will require further action.

Business Continuity Under Conditions of Staffing Shortages

Because an influenza pandemic would not damage physical infrastructure, the workplace would remain viable and day-to-day operations could continue based on the number of available personnel. Most organizations would not completely halt business operations because employees are ill. The organization may still need to produce products or provide services, interact with customers, and meet deadlines. A pandemic may result in an increase or decrease in demand for a business' products and/or services (e.g., effect of travel restrictions, restrictions on mass gatherings, need for hygiene supplies). Organizations should consider the potential impact of a pandemic on different product lines and/or production sites. Since essential functions are important at all times, it may be more appropriate to focus on day-to-day workload management during a pandemic. Consequently, organizations may need to rearrange priorities, rather than terminating daily operations or focusing only on essential functions as defined for a COOP situation.

Unlike other potential COOP situations that occur without warning, organizations can plan for a pandemic. Under normal conditions, if employees are on annual or sick leave, alternates are normally designated to provide back-up in the staff member's absence. To supplement the current workforce for conditions of significant absenteeism associated with a pandemic, organizations may consider cross-training and preparing ancillary workforce members (e.g., contractors, employees in other job titles/descriptions, retirees) to maintain daily functionality in the presence of anticipated staffing shortages.

Essential vs. Non-critical/Non-essential Services

Services provided by personnel may be categorized as critical or essential in light of their importance to business continuity (i.e., from the perspective of a business or organization) or in light of their contribution to maintaining critical infrastructure (i.e., from a societal or national perspective). Managers must make determinations about which employees perform essential functions at the business or organization level.

Organizations should carefully assess how a company functions, both internally and externally, to determine which staff, materials, procedures and equipment are absolutely necessary to keep the business operating by location and function during a pandemic. Operations critical to survival and recovery should be identified. Organizations should identify the suppliers, shippers, resources and other businesses they must interact with on a daily basis. Professional relationships with more than one supplier may be necessary should a primary contractor be unable to provide the required service. A disaster that shuts down a key supplier could be devastating to a business. In addition, organization-related domestic and international travel may be affected by a pandemic (e.g., quarantine, border closures). The analysis required for pandemic preparedness planning is not fundamentally different from that required for all-hazard COOP planning.

Protecting Personnel during a Pandemic

All organizations, whether government or private sector, large or small, are supported by three primary assets: people, communications, and physical infrastructure. Unlike other catastrophic events, an influenza pandemic will not directly affect the communications or physical infrastructure of an organization, but an influenza pandemic *will* directly affect an organization's people. Therefore, it is critical that organizations anticipate the potential impact of an influenza pandemic on personnel, and consequently, the organization's ability to continue essential functions. As part of that planning, organizations will need to ensure that reasonable measures are in place to protect the health of personnel during a pandemic.

Characteristics of Influenza Transmission

Understanding the characteristics of influenza transmission is important in order to assess the threat pandemic influenza poses to personnel in the workplace, as well as the efficacy and practicality of potential protective measures.

Human influenza virus is transmitted from person-to-person primarily via virus-laden large droplets (particles >5 μm in diameter) that are generated when infected persons cough, sneeze, or speak. These large droplets can then be directly deposited onto the mucosal surfaces of the upper respiratory tract of susceptible persons who are near (i.e., typically within 3 feet of) the droplet source. Transmission also may occur through direct and indirect contact with infectious respiratory secretions.

Patients with influenza typically become infectious after a latent period of about 1 to 1.5 days and prior to becoming symptomatic. At about 2 days, most infected persons will develop symptoms of illness although some remain asymptomatic throughout their infection. This is important because even seemingly healthy asymptomatic individuals in early stages of influenza could be infectious to others.

Vaccine and Antiviral Medications

The primary strategies for preventing pandemic influenza are the same as those for seasonal influenza: (1) vaccination; (2) early detection and treatment with antiviral medications; and (3) the use of infection control measures to prevent transmission. However, when a pandemic begins, only a limited stockpile of partially matched pandemic vaccine may be available. A virus-specific vaccine to protect personnel will not be available until 4 to 6 months after isolation of the pandemic virus. Finally, the supply of antiviral drugs will be limited throughout a pandemic. Until sufficient stockpiles of antiviral drugs have been established, these medications may be available for treatment of only some symptomatic individuals. Therefore, the appropriate and thorough application of infection control measures remains the key to limiting transmission, delaying the spread of a pandemic, and protecting personnel.

Infection Control Measures

A pandemic may come in waves, each lasting weeks or months. Not all susceptible individuals will be infected in the first wave of a pandemic. Therefore preventing transmission by limiting exposure during the first wave may offer several advantages. First, by limiting exposure, people who are not infected during the first wave may have an increased chance of receiving virus-specific vaccine as it becomes available. Second, limiting exposure and delaying transmission can change the shape of the epidemic curve and mitigate the social and economic impact of a pandemic by reducing the number of people who become ill at any given time.

Within the workplace, the systematic application of infection control and social distancing measures during a pandemic should reduce employee-to-employee disease transmission rates, increase employee safety and confidence, and possibly reduce absenteeism.

Given the characteristics of influenza transmission, a few simple infection control measures may be effective in reducing the transmission of infection. Persons who are potentially infectious should: stay home if they are ill; cover their nose and mouth when coughing or sneezing, and use facial tissues to contain respiratory secretions and dispose of them in a waste container (respiratory hygiene/cough etiquette); and wash their hands (with soap and water, an alcohol-based hand rub, or antiseptic handwash) after having contact with respiratory secretions and contaminated objects/materials (hand hygiene). Persons who are around individuals with influenza-like symptoms should: maintain spatial separation of at least 3 feet from that individual; turn their head away from direct coughs or sneezes; and wash their hands (with soap and water, alcohol-based hand rub, or antiseptic handwash) after having contact with respiratory secretions and contaminated objects/materials.

Hand washing should be facilitated by making hand hygiene facilities and products readily available in schools and workplaces. Antibacterial handwashing products do not appear to offer an advantage over soap and water in most settings for removing influenza virus from hands, however health care facilities should continue to follow hand hygiene guidelines that recommend use of antimicrobial soaps and alcohol-based hand cleaners to protect against transmission of other microorganisms. For the duration of a pandemic, the deployment of infection control measures requires the ready availability of soap and water, hand sanitizer, tissues and waste receptacles, and environmental cleaning supplies.

Minimizing workplace exposure to pandemic influenza can be facilitated by: developing policies and strategies for isolating and excusing employees who become ill at work; allowing unscheduled and non-punitive leave for employees with ill household contacts; restricting business-related travel to affected geographic areas; and establishing guidelines for when employees who have become ill can return to work.

Social Distancing Measures

Depending on the severity of a pandemic, and its anticipated effects on health care systems and the functioning of critical infrastructure, communities may recommend general measures to promote social distancing and the disaggregation of disease transmission networks. Within the workplace, social distancing measures could take the form of: guidelines modifying the frequency and type of face-to-face encounters that occur between employees (e.g., moratoriums on hand-shaking, substitution of teleconferences for face-to-face meetings, staggered breaks, posting of infection control guidelines in prominent locations); policies establishing flexible work hours or worksite, including telecommuting; and promotion of social distancing between employees and customers.

Some social distancing measures, such as the recommendation to maintain 3 feet of spatial separation between individuals or to otherwise limit face-to-face contact, may be adaptable to certain work environments and in appropriate settings should be sustainable indefinitely at comparatively minimal cost. Other community public health interventions (e.g., closure of schools and public transit systems, implementation of "snow day" restrictions) may increase rates of absenteeism and result in disruption of workflows and productivity. Low-cost or sustainable social distancing measures should be introduced within the workplace immediately after a community outbreak begins, and businesses should prepare for the possibility of measures that have the potential to disrupt their business continuity. Decisions as to how and when to implement community measures will be made on a case-by-case basis, with the Federal Government providing support and guidance to local officials.

Use of Face Masks

The benefit of wearing disposable surgical or procedure masks at school or in the workplace has not been established. Mask use by the public should be based on risk, including the frequency of exposure and closeness of contact with potentially infectious persons. Routine mask use in public should be permitted, but not required. The Federal Government will develop policies and guidance on the use and efficacy of masks. Other, more advanced respiratory protection may be indicated in certain instances, depending on the degree of exposure risk.

During a pandemic, persons who are diagnosed with influenza or who have a febrile respiratory illness should remain at home until the fever is resolved and the cough is resolving to avoid exposing others. If such symptomatic persons cannot stay home during the acute phase of their illness, consideration should be given to having them wear a surgical or procedure mask in public places when they may have close contact with other persons.

Although the use of surgical or procedure masks by asymptomatic individuals in community settings has not been demonstrated to be a public health measure to decrease infections during a community outbreak, persons may choose to wear a mask as part of individual protection strategies that include cough etiquette, hand hygiene, and avoiding public gatherings. If persons at risk for complications of influenza decide to wear masks during periods of increased respiratory illness activity in the community, it is likely they will need to wear them any time they are in a public place and when they are around other household members.

Any mask must be disposed of if it becomes moist. Individuals should wash their hands after touching or discarding a used mask. For more detailed information related to the use of face masks, the Department of Health and Human Services (HHS) has developed interim guidance on the use of masks to control influenza transmission, including the use of face masks and respirators in health care settings.

Cleaning of Facilities and Equipment

Given the concern regarding the spread of influenza through contaminated objects and surfaces, additional measures may be required to minimize the transmission of the virus through environmental surfaces such as sinks, handles, railings, and counters. Transmission from contaminated hard surfaces is unlikely, but influenza viruses may live up to 2 days on such surfaces. Surfaces that are frequently touched with hands should be cleaned at least daily during community outbreaks. At a minimum, organizations should develop procedures for cleaning facilities during an outbreak and develop procedures for employees to follow to keep work areas clean (e.g., disinfecting phones, keyboards, personal items). There is no evidence to support the efficacy of widespread disinfection of the environment or air.

HHS has developed recommendations regarding cleaning procedures as well as the handling of waste, eating utensils, and laundry for health care settings including home care. HHS will develop additional guidance regarding cleaning procedures and handling of potentially contaminated waste in non-health care settings such as the workplace.

International Travel

If an organization's employees or students travel outside the United States for business or educational reasons, plans should include consideration of the management of these personnel in the event of an

influenza pandemic.[21] Once a pandemic emerges, international travel may be disrupted. It is also possible that containment measures may be instituted affecting airline passenger movement. Organizations should anticipate that such measures might further aggravate staffing shortages.

Risk Management in Occupational Settings

Organizations developing specific strategies to protect personnel should consider the factors that contribute to overall risk -- including the patterns of social contact entailed by specific positions, the health risk of employees for complications related to influenza, and other forms of social risk — and the feasibility of interventions designed to reduce social contacts or interrupt disease transmission. After completing such an assessment, organizations can tailor interventions to the particular needs of individuals, based on their personal health risk and the roles they play within the organization. To the extent possible, organizations should individualize the implementation of risk reduction strategies.

There are two basic categories of intervention: (1) *transmission interventions*, such as the use of facemasks and careful attention to cough etiquette and hand hygiene, which may reduce the likelihood that contacts with other people lead to disease transmission; and (2) *contact interventions*, such as substituting teleconferences for face-to-face meetings, telecommuting, the use of other social distancing techniques, and the implementation of liberal leave policies for persons with sick family members, which may eliminate or reduce the likelihood of contact with infected individuals. Interventions will have different costs and benefits, and be more or less appropriate or feasible, in different settings and for different individuals.

Social Contacts in the Workplace

The majority of Americans work in settings where social contacts occur. Some of these contacts, such as those between colleagues working on a joint project, may be regarded as voluntary or discretionary (i.e., face-to-face meetings are not absolutely necessary to maintain productivity), while others, such as those between sales clerks and customers, may be inherent to the nature of the position. Where feasible, voluntary or discretionary contacts may be reduced through contact interventions; where not, and in settings where social contacts are inherent to the nature of the position, risk reduction should be attempted through the implementation of transmission interventions. In theory, a contact intervention that reduces an individual's contacts by 30 percent is equivalent in terms of risk reduction to transmission interventions that reduce the probability of disease transmission by 30 percent.[22]

Some occupations can be classified as high risk because they will entail caring for persons with influenza (e.g., emergency medical services; police; fire and rescue; health care facility staff providers and support staff working in clinics, urgent care, and hospitals; and mortuary staff). The implementation of transmission interventions to protect personnel with such responsibilities is crucial, and organizations can additionally reduce risk by dedicating specific space and personnel for the care of patients with influenza and reducing or eliminating the connectivity of such areas and providers with the rest of the organization.

[21] All Federal Executive Branch employees abroad fall under Chief of Mission authority, regardless of their employment categories or location, except those under command of a U.S. area military commander or on the staff of an international organization. In coordination with the Department of State, each U.S. diplomatic mission abroad will prepare a mission-wide plan that will cover all mission personnel and their dependents. Individual agencies would not need to include their personnel serving abroad under Chief of Mission authority in their agency plans.

[22] In practice, the efficacy of contact interventions is easier to quantify than that of transmission interventions.

Individual Risk for Complications Related to Influenza

Risk group classifications will be modified as necessary in light of epidemiologic data collected during a pandemic. Individuals at high risk for severe and fatal infection cannot be predicted with certainty but are likely to include:

- Pregnant women;
- Persons with compromised immune systems due to cancer, AIDS, history of organ transplant, or other medical conditions;
- Persons less than age 65 with underlying chronic conditions;
- Persons age 65 or greater.

Organizations should consider providing additional protections for employees falling into categories identified as being at high risk for severe or fatal infection. Such protections could include reassignment from positions that entailed a high degree of unavoidable social contact or likely exposure to patients with influenza, and flexibility (where appropriate) in terms of worksite or work hours.

Social Risk

Some employees may be at increased personal risk during a pandemic because of limited access to health care services or other special needs not specified above. Risk reduction planning for such employees should be individualized.

Roles and Responsibilities

The responsibility for ensuring business continuity, COOP, and essential services, and providing for the health, safety, and security of employees, students, visitors, and customers is shared by the Federal, State, local, and tribal governments, private sector organizations, and academic institutions concerned. Federal, State, local, and tribal governments and the private sector have important and interdependent roles in preparing for, responding to, and recovering from a pandemic and ensuring that critical infrastructure is protected and sustained.

The Federal Government

The Federal Government will use all capabilities within its authority to support the private sector, State, local, and tribal entities, and schools and universities in preparedness and response activities. It will increase readiness to sustain critical infrastructure including essential Federal public health and medical functions during a pandemic and provide public health and medical support services under the *National Response Plan* (NRP). While HSPD-7 emphasizes protection of critical infrastructure from terrorism, it states that "all Federal departments and agencies shall work with the sectors relevant to their responsibilities to reduce the consequences of catastrophic failures not caused by terrorism." HSPD-7 assigns responsibilities for CIP as noted below. Each Sector-Specific Agency is responsible for developing, implementing, and maintaining a sector-specific plan for conducting CIP activities within the sector, which include collaborating with all relevant Federal departments and agencies, State, local, and tribal governments, and the private sector.

Department of Homeland Security: DHS's Office of National Security is the Government's Executive Lead for COOP. The Office of National Security will develop guidance, planning procedures, and exercises for

an influenza pandemic and will monitor and report to the Executive Office of the President the readiness of departments and agencies to COOP during an influenza pandemic. DHS coordinates the overall national effort to enhance the protection of the critical infrastructure of the United States, and shall lead, integrate, and coordinate implementation of efforts among Federal departments and agencies, State, local, and tribal governments, and the private sector to protect critical infrastructure. DHS has overall coordination responsibilities for the 17 critical infrastructure sectors, and Sector-Specific Agencies, including DHS, have the lead for coordinating individual sectors. DHS coordinates protection activities for the following sectors: information technology; telecommunications; chemical; transportation systems (in collaboration with Department of Transportation), including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems; emergency services; and postal and shipping. DHS coordinates with appropriate departments and agencies to ensure the protection of other key resources including dams, government facilities, and commercial facilities. DHS coordinates with the Nuclear Regulatory Commission (NRC) for the protection of nuclear power reactors, materials, and waste.

Department of Health and Human Services: HHS's primary responsibilities are those actions required to protect the health of all Americans and provide essential human services. Also, HHS in coordination with DHS will provide recommendations regarding measures Federal, State, local, and tribal agencies, private sector businesses, critical infrastructure entities, schools, and universities should employ to protect the health of personnel, customers, visitors, students, and teachers in order to aid in ensuring the continuity of essential services. HHS is the Sector-Specific Agency under HSPD-7 for public health, health care, and food (other than meat, poultry, and egg products).

Other Sector-Specific Agencies responsible under HSPD-7 for coordination with sector representatives are:

- Department of Agriculture for agriculture and food (meat, poultry, egg products);
- Environmental Protection Agency (EPA) for drinking water and water treatment systems;
- Department of Energy for energy, including the production refining, storage, and distribution of oil and gas, and electric power except for commercial nuclear power facilities (NRC);
- Department of the Treasury for banking and finance;
- Department of the Interior (DOI) for national monuments and icons; and
- Department of Defense (DOD) for the defense industrial base and defense critical infrastructure.

Other Important Federal Critical Infrastructure Responsibilities include:

- Department of State (DOS), in conjunction with DHS and other appropriate agencies, will work with foreign countries and international organizations to strengthen the protection of U.S. critical infrastructure.
- Department of Commerce (DOC), in coordination with DHS, will work with private sector, research, academic, and government organizations to promote critical infrastructure efforts, including using its authority under the Defense Production Act to ensure the timely availability of industrial products, materials, and services to meet homeland security requirements.

- Department of Education should coordinate with DHS and public and private education entities to collect and disseminate model pandemic influenza plans for adoption at the State, local, and tribal level, information on exercises and training, and monitor and share information on pandemic impacts.

- Department of Labor (DOL), in conjunction with HHS and other Sector-Specific Agencies, will work with the private sector to develop and disseminate information to promote the health and safety of personnel performing essential functions and roles.

State, Local, and Tribal Entities

State, local, and tribal entities should have credible pandemic preparedness plans that address key response issues and outline strategies to mitigate the human, social, and economic consequences of a pandemic. State and local governments have received Federal Emergency Management Agency (FEMA) guidance for COOP planning (*Introduction to State and Local EOP Planning*), and should incorporate pandemic influenza specific planning. State, local, and tribal entities should work to improve communication between public health departments and private sector partners as well among various private and public entities including schools and universities. Elements of State, local, and tribal entities should be prepared to support national efforts to ensure that critical infrastructure is sustained. State, local, and tribal entities may serve as owners or operators for specific critical infrastructure sectors. In addition, State, local, and tribal entities may play a critical role for those critical infrastructure entities located within their communities. A preparedness checklist for State and local governments is available at **www.pandemicflu.gov.**

The Private Sector

Because private industry owns and operates the vast majority of the critical infrastructure in the United States, its involvement is crucial for successful implementation of CIP and the National Infrastructure Protection Plan. The private sector will play an integral role in a community response to pandemic influenza by protecting employees' and customers' health and safety, and mitigating impact to the economy and the functioning of society. Many businesses already have continuity of business operations plans that: (1) identify and ensure continued performance of essential functions, and (2) provide for continued supply of products and services at as close to normal levels as possible. Businesses should review and update these plans as appropriate given the pandemic threat and integrate and coordinate their planning with those on whom they depend for essential services and products, and with those entities that depend on them for essential services and products. Such business continuity planning should ensure that essential functions and vital services can be performed in the setting of significant absenteeism. Businesses and corporations should be prepared for public health interventions and recommendations that may increase absenteeism. Elements of the private sector should be prepared to support Federal, State, local, and tribal efforts to ensure that critical infrastructure is sustained. A preparedness checklist for organizations and businesses is provided in Appendix A and is available at **www.pandemicflu.gov.**

Critical Infrastructure

Protecting critical infrastructure is a shared responsibility requiring cooperation among all levels of government — Federal, State, local, and tribal — and the involvement of the private sector. Over 85 percent of critical infrastructure is owned and operated by the private sector. Sector-Specific Agencies should work in coordination with critical infrastructure sectors to develop guidance for individual organ-

ization plans for maintaining continuity of essential services as part of pandemic influenza planning and preparedness. Movement of essential personnel, goods and services, and maintenance of critical infrastructure are necessary during an influenza pandemic that could span months in any given community. The critical infrastructure entities must respond in a manner that allows them to maintain the essential elements of their operations for a prolonged period of time, in order to prevent severe disruption of life in our communities. Given the interdependence among critical infrastructure entities, coordination and cooperation among critical infrastructure entities and sectors with respect to identifying essential functions and engaging in critical intra- and inter-sector and cross-border planning will be essential.

Schools and Universities

The roles and responsibilities of schools and universities in the area of continuity planning and protection of personnel are unique for several reasons. First, although there is no way to know the characteristics of a pandemic virus before it emerges, the planning assumptions suggest that in the absence of intervention influenza illness rates are likely to be highest among school-aged children (about 40 percent). Second, protecting and sustaining personnel in the workforce is of primary concern for effective continuity planning in public and private sector businesses and governmental entities. The focus in these sectors is on the workforce. In schools, the focus is primarily on protecting students. Third, universities must consider the potential impact of a pandemic on campus and dormitory closure, including the contingency plans for students who depend on student housing and campus food service. And fourth, schools and universities must also address continuity of instruction as part of continuity planning. Schools and universities (public and private) should review existing emergency response plans consistent with guidance provided by the Department of Education's Office of Safe and Drug-Free Schools, *Emergency Response and Crisis Management Guide*. Schools and universities should consider elements unique to pandemic influenza in their emergency response and crisis management plans to protect their faculty and students. Checklists for schools' and universities' actions for effective continuity planning are included in Appendix A and are available at **www.pandemicflu.gov.**

Faith-Based Organizations and Community-Based Organizations

Faith-based organizations (FBOs) and community-based organizations (CBOs) have a long tradition of helping Americans in need and together represent an integral part of our Nation's social service network. They help fill the needs of vulnerable populations and they help attend to the unmet needs that are not addressed by Federal disaster recovery programs. FBOs and CBOs have a long tradition of aiding victims of disasters. Communities should anticipate that in the event of multiple and widespread synchronous outbreaks during an influenza pandemic, the Federal Government may not possess sufficient resources or personnel to augment local capabilities. FBO/CBO and emergency management partnerships could be helpful in disaster mitigation, especially in a resource-constrained environment. FBOs and CBOs offer additional volunteer capacity; understanding of community needs and awareness of the most vulnerable populations; credibility with the community; access to social and population groups that may avoid interaction with government officials; and community influence. As locally based organizations with strong networks within communities, FBOs and CBOs are well situated to bring about grassroots involvement in mitigating the potential social and economic disruption associated with a pandemic. A preparedness checklist for FBOs and CBOs to ensure continuity of essential functions and protection of employees and volunteers is included in Appendix A and is available at **www.pandemicflu.gov.**

Individuals and Families

The critical role of individuals and families in controlling a pandemic cannot be overstated. The success or failure of infection control measures is ultimately dependent upon the acts of individuals -- practicing hand hygiene, cough etiquette, remaining home if ill or if a household member is ill, and complying with social distancing measures (see *Individual, Family, and Community Response to Pandemic Influenza* between Chapters 5 and 6). The collective response of all Americans will be crucial in mitigating the health, social, and economic impacts of a pandemic. A checklist of specific activities individuals and families can do now to prepare for a pandemic is included in Appendix A and is available at **www.pandemicflu.gov.**

Actions and Expectations

9.1. Pillar One: Preparedness and Communication

We must ensure preparedness, and the communication of roles and responsibilities for all levels of government and segments of societies including all Federal, State, local, and tribal governmental departments and agencies; private sector businesses and institutions; critical infrastructure entities; public and private schools and universities; and individuals and families.

a. Planning for a Pandemic

9.1.1. Develop Federal implementation plans to include all components of the Federal Government and to address the full range of consequences of a pandemic, including human and animal health, security, transportation, economic, trade, and infrastructure considerations.

9.1.1.1. DHS, in coordination with HHS, DOD, and DOL, shall provide pandemic influenza COOP guidance to the Federal departments and agencies within 6 months. Measure of performance: COOP planning and personnel protection guidance provided to all departments for use, as necessary, in updating departmental pandemic influenza response plans.

9.1.1.2. The Office of Personnel Management (OPM), in coordination with DHS, HHS, DOD, and DOL, shall provide guidance to the Federal departments and agencies on human capital management and COOP planning criteria related to pandemic influenza, within 3 months. Measure of performance: guidance provided to all departments for use, as necessary, in adjusting departmental COOP plans related to pandemic influenza.

9.1.1.3. OPM, in coordination with DHS, HHS, DOD, and DOL, shall update the guides *Telework: A Management Priority, A Guide for Managers, Supervisors, and Telework Coordinators; Telework 101 for Managers: Making Telework Work for You; and, Telework 101 for Employees: Making Telework Work for You*, to provide guidance to Federal departments regarding workplace options during a pandemic, within 3 months. Measure of performance: updated telework guidance provided to all departments for use, as necessary, in updating departmental COOP plans related to pandemic influenza.

9.1.2. Continue to work with States, localities, and tribal entities to integrate non-health sectors, including the private sector and critical infrastructure entities, in these planning efforts.

9.1.2.1. DHS, in coordination with Sector-Specific Agencies, critical infrastructure owners and operators, and States, localities and tribal entities, shall develop sector-specific planning guidelines focused on sector-specific requirements and cross-sector dependencies, within 6 months. Measure of performance: planning guidelines developed for each sector.

9.1.2.2. DHS, in coordination with States, localities and tribal entities, shall support private sector preparedness with education, exercise, training, and information sharing outreach programs, within 6 months. Measure of performance: preparedness exercises established with private sector partners in all States and U.S. territories.

b. Communicating Expectations and Responsibilities

9.1.3. Provide guidance to the private sector and critical infrastructure entities on their role in the pandemic response, and considerations necessary to maintain essential services and operations despite significant and sustained worker absenteeism.

9.1.3.1. DHS, in coordination with all the Sector-Specific Agencies, shall conduct forums, conferences, and exercises with key critical infrastructure private sector entities and international partners to identify essential functions and critical planning, response and mitigation needs within and across sectors, and validate planning guidelines, within 6 months. Measure of performance: planning guidelines validated by collaborative exercises that test essential functions and critical planning, response, and mitigation needs.

9.1.3.2. DHS, in coordination with all the Sector-Specific Agencies, shall develop and coordinate guidance regarding business continuity planning and preparedness with the owners/operators of critical infrastructure and develop a Critical Infrastructure Influenza Pandemic Preparedness, Response, and Recovery Guide tailored to national goals and capabilities and to the specific needs identified by the private sector, within 6 months. Measure of performance: Critical Infrastructure Influenza Pandemic Preparedness, Response, and Recovery Guide developed and published on **www.pandemicflu.gov**.

9.1.4. Provide guidance to individuals on infection control behaviors they should adopt pre-pandemic, and the specific actions they will need to take during a severe influenza season or pandemic, such as self-isolation and protection of others if they themselves contract influenza.

9.1.4.1. 9.1.4.1. HHS, in coordination with DHS, DOL, OPM, Department of Education, VA, and DOD, shall develop sector-specific infection control guidance to protect personnel, governmental and public entities, private sector businesses, and CBOs and FBOs, within 6 months. Measure of performance: sector-specific guidance and checklists developed and disseminated on **www.pandemicflu.gov.**

9.1.4.2. HHS, in coordination with DHS, DOL, EPA, Department of Education, VA, and DOD, shall develop interim guidance regarding environmental management and cleaning practices including the handling of potentially contaminated waste material, within 3 months, and revise as additional data becomes available. Measure of performance: development and publication of guidance and checklists on **www.pandemicflu.gov** and dissemination through other channels.

9.3. Pillar Three: Response and Containment

We recognize that a virus with pandemic potential anywhere represents a risk to populations everywhere. Once health authorities signal that sustained and efficient human-to-human spread of the virus has occurred, a cascade of response mechanisms will be initiated, from the site of the documented transmission to locations around the globe. This response must ensure that critical infrastructure, essential services, and the economy are sustained.

a. Sustaining Infrastructure, Essential Services, and the Economy

9.3.1. Encourage the development of coordination mechanisms across American industries to support the above activities during a pandemic.

9.3.1.1. DHS shall map and model critical infrastructure interdependencies across and within sectors to share critical information with sectors and identify national challenges during a pandemic, within 6 months. Measure of performance: critical infrastructure modeling capability established and mapping of critical infrastructure interdependencies completed.

9.3.1.2. DHS shall develop and operate a national-level monitoring and information-sharing system for core essential services to provide status updates to critical infrastructure dependent on these essential services, and aid in sharing real-time impact information, monitoring actions, and prioritizing national support efforts for preparedness, response, and recovery of critical infrastructure sectors within 12 months. Measure of performance: national-level critical infrastructure monitoring and information-sharing system established and operational.

9.3.2. Provide guidance to activate contingency plans to ensure that personnel are protected, that the delivery of essential goods and services is maintained, and that sectors remain functional despite significant and sustained worker absenteeism.

9.3.2.1. DHS shall coordinate Federal, State, local, and tribal actions/options/capability requirements (legislative and regulatory additions/changes and waivers, personnel and material resources, and financial) to develop and implement tailored support packages to address critical infrastructure systems and essential operational requirements at each phase of the pandemic: planning, preparedness, response, mitigation, and recovery. Measure of performance: support packages ensure essential functions of all critical infrastructure sectors sustained during a pandemic.

APPENDIX A

Guidance for Federal Department Planning

Federal departments and agencies are expected to develop their own pandemic plans. This guidance is intended to facilitate department and agency planning.

Relationship between the *Strategy*, the Implementation Plan, and Department Plans

The *National Strategy for Pandemic Influenza (Strategy)*: The *Strategy* articulates the high-level principles and approach of the Federal Government to the threat of an influenza pandemic.

Implementation Plan for the National Strategy (Plan): This Plan proposes actions across the Federal Government in support of the Strategy, and describes expectations of non-Federal entities, including State, local, and tribal governments, the private sector, international partners, and individuals. While the Strategy is built upon pillars (preparedness, surveillance, response), this Plan segregates action on a functional basis (international efforts, transportation and borders, human health, animal health). It also addresses crosscutting issues such as economic issues and the relevant legal authorities in each of these functional areas. Finally, it provides a "playbook" and algorithm that the Federal Government will follow in its response to a pandemic.

Department Plans: Department plans should be operational documents. They should first articulate the manner in which the Department will discharge its responsibilities as defined in this Plan. In addition to describing the manner in which the Department will support the Federal Government efforts, plans should address the operational approach to employee safety, continuity of operations, and the manner in which the Department will communicate to its stakeholders as described below.

Guidance for Department Planning

Unlike other catastrophic events, a pandemic will not be geographically or temporally bounded, and will not directly affect the physical infrastructure of an organization. These facts lead to unique planning considerations. Institutional planning efforts should build upon existing continuity of operations planning by the organization, but be expanded to address the following questions:

1. How will the Department protect the health and safety of its employees?

2. What are the Department's essential functions and services, and how will these be maintained in the event of significant and sustained absenteeism?

3. How will the Department support the Federal response to a pandemic, and States, localities, and tribal entities?

4. How and what will the Department communicate to its stakeholders during a pandemic?

Protecting the Health of Employees

This portion of the plan should build upon existing employee health and safety efforts. HHS, in coordination with the Department of Labor, and other departments and agencies, will provide recommendations on the protection of employee health to inform this planning.

Maintaining Essential Functions and Services

Maintaining essential functions and services relates to continuity of operations. While some of the guidance in Federal Preparedness Circular - 65, Federal Executive Branch Continuity of Operations (FPC-65) may not seem to be directly relevant to pandemic planning, most of the principles are relevant to the continuity considerations raised by a pandemic.

Supporting the Federal Response and States, Localities and Tribal Entities

This Plan provides high-level direction to departments and agencies for the actions that they are to take in support of the Strategy. Department plans should articulate the manner in which these actions will be executed by the Department, including the roles and responsibilities of operating divisions and more detailed descriptions of the ways the Department will support the Federal, State, local, and tribal response.

Communicating to Stakeholders

Every department and agency has connections to a unique group of stakeholders, whether private sector entities, non-governmental organizations (NGOs), or individuals. As the "face of the Federal Government" for these stakeholders, departments should identify the messages that it will communicate during a pandemic.

Guidance for Organizations and Businesses

Federal departments and agencies; State, local, and tribal governments and organizations; and public and private businesses must ensure preparedness and the communication of roles and responsibilities related to continuity planning and protection of personnel. In the event of pandemic influenza, organizations and businesses will play a key role in protecting employees' health and safety as well as limiting the negative impact to the economy and society. Planning for pandemic influenza is critical. The Department of Health and Human Services (HHS) has developed the following checklist for large organizations and businesses. It identifies important, specific activities organizations and businesses can do now to prepare. Further information can be found at **www.pandemicflu.gov.** This checklist is applicable to all organizations and businesses, public or private.

1. Plan for the impact of a pandemic on your business or organization

1.1. Identify a pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning. The planning process should include input from labor representatives.

1.2. Identify essential employees and other critical inputs (e.g., raw materials, suppliers, subcontractor services/products, logistics) required to maintain business operations by location and function during a pandemic.

1.3. Train and prepare ancillary workforce (e.g., contractors, employees in other job titles/descriptions, retirees).

1.4. Develop and plan for scenarios likely to result in an increase or decrease in demand for your products and/or services during a pandemic (e.g., effect of restrictions on mass gatherings, need for hygiene supplies).

1.5. Determine potential impact of a pandemic on organization or business financials using multiple possible scenarios that affect different product lines and/or production sites.

1.6. Determine potential impact of a pandemic on organization-related domestic and international travel (e.g., quarantine, border closures).

1.7. Find up-to-date reliable pandemic information from community public health, emergency management, and other sources and make sustainable links.

1.8. Establish an emergency communications plan and revise periodically. This plan includes identification of key contacts (with back-ups), chain of communications (including suppliers and customers), and processes for tracking and communicating business and employee status.

1.9. Implement an exercise/drill to test your plan and revise periodically.

2. Plan for the impact of a pandemic on your employees and customers

2.1. Forecast and allow for employee absence during a pandemic due to factors such as personal illness, family member illness, community containment measures and quarantines, school and/or business closures, and public transportation closures.

2.2. Implement guidelines to modify frequency and type of face-to-face contact (e.g., handshaking, seating in meetings, office layout, shared workstation) among employees and between employees and customers.

2.3. Encourage and track annual influenza vaccination for employees during regular influenza seasons.

2.4. Evaluate employee access and availability to health care services during a pandemic, and improve services as needed.

2.5. Evaluate and improve access to and availability to mental health and social services during a pandemic, including corporate, community, and faith-based resources, and improve services as needed.

2.6. Identify employees and key customers with special needs, and incorporate the requirements of such person into your preparedness plan.

3. Establish policies to be implemented during a pandemic

3.1. Establish policies for employee compensation and sick leave absences unique to a pandemic (e.g., non-punitive, liberal leave), including policies on when a previously ill person is no longer infectious and can return to work after illness.

3.2. Establish policies for flexible worksite (e.g., telecommuting) and flexible work hours (e.g., staggering shifts).

3.3. Establish policies for preventing influenza spread at the worksite (e.g., promoting respiratory hygiene/cough etiquette, increasing social distancing among employees and between employees and customers, and prompt exclusion of people with influenza symptoms).

3.4. Establish policies for personnel who have been exposed to pandemic influenza, are suspected to be ill, or become ill at the worksite (e.g., infection control response, immediate mandatory sick leave).

3.5. Establish policies for restricting travel to affected geographic areas (consider both domestic and international sites) and for evacuating employees working in or near an affected area when an outbreak begins, and establish guidance for employees returning from affected areas.

3.6. Set up authorities, triggers, and procedures for activating and terminating the organization's response plan, altering business operations (e.g., shutting down operations in affected areas), and transferring business knowledge to key employees.

4. Allocate resources to protect your employees and customers during a pandemic

4.1. Provide sufficient and available infection control supplies. The deployment of infection control measures requires the ready availability of soap and water, hand sanitizer, tissues and waste receptacles, environmental cleaning supplies, for the duration of a pandemic.

4.2. Enhance communications and information technology infrastructure as needed to support employee telecommuting and remote customer access.

4.3. Ensure availability of medical consultation and advice for emergency response.

5. Communicate to and educate your employees

5.1. Develop and disseminate programs and materials covering pandemic fundamentals (e.g., signs and symptoms of influenza, modes of transmission), personal and family protection, and response strategies (e.g., hand hygiene, cough/sneeze etiquette, contingency plans).

5.2. Anticipate employee fear and anxiety, rumors, and misinformation and plan communications accordingly.

5.3. Ensure communications are culturally and linguistically appropriate.

5.4. Disseminate information to employees about the organizational pandemic preparedness plan.

5.5. Provide information for the at-home care of ill employees and family members.

5.6. Develop platforms (e.g., hotlines, dedicated websites) for communicating pandemic status and actions to employees, vendors, suppliers, and customers inside and outside the worksite in a consistent and timely way, including redundancies in the emergency contact system.

5.7. Identify community sources for timely and accurate pandemic information (domestic and international) and resources for obtaining countermeasures (e.g., vaccines and antiviral medications).

6. Coordinate with external organizations and help your community

6.1. Collaborate with insurers, health plans, and major health care facilities to share your pandemic plans and understand their capabilities and plans.

6.2. Collaborate with Federal, State, and local public health agencies and/or emergency responders to participate in their planning processes, share your pandemic plans, and understand their capabilities and plans.

6.3. Communicate with local and/or State public health agencies and/or emergency responders about the assets and/or services your business could contribute to the community.

6.4. Share best practices with other businesses in your community, chambers of commerce, and associations to improve community response efforts.

Guidance for Schools (K-12)

Schools (K-12) must ensure preparedness, and the communication of roles and responsibilities related to ensuring continuity of instruction and protection of students and personnel. Local educational agencies (LEAs) play an integral role in protecting the health and safety of their district's staff, students, and their families. HHS, in coordination with the Department of Education, has developed the following checklist to assist LEAs in developing and/or improving plans to prepare for and respond to an influenza pandemic.

Building a strong relationship with the local health department is critical for developing a meaningful plan. The key planning activities in this checklist build upon existing contingency plans recommended for school districts by the Department of Education *(Practical Information on Crisis Planning: A Guide For Schools and Communities)*. Further information can be found at **www.pandemicflu.gov.**

1. Planning and Coordination

1.1. Identify the authority responsible for declaring a public health emergency at the State and local levels and for officially activating the district's pandemic influenza response plan.

1.2. Identify for all stakeholders the legal authorities responsible for executing the community operational plan, especially those authorities responsible for case identification, isolation, quarantine, movement restriction, health care services, emergency care, and mutual aid.

1.3. As part of the district's crisis management plan, address pandemic influenza preparedness, involving all relevant stakeholders in the district (e.g., lead emergency response agency, district administrators, local public health representatives, school health and mental health professionals, teachers, food services directors, and parent representatives). This committee is accountable for articulating strategic priorities and overseeing the development and execution of the district's operational pandemic plan.

1.4. Work with local and/or State health departments and other community partners to establish organizational structures such as the Incident Command System (ICS), to manage the execution of the district's pandemic influenza plan. An ICS is a standardized organization

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structure that establishes a line of authority and common terminology and procedures to be followed in response to an incident. Ensure compatibility between the district's established ICS and the local/State health department's and State education department's ICS.

1.5. Delineate accountability and responsibility as well as resources for key stakeholders engaged in planning and executing specific components of the operational plan. Ensure that the plan includes timelines, deliverables, and performance measures.

1.6. Work with your local and/or State health department and State education agencies to coordinate with their pandemic plans. Ensure that pandemic planning is coordinated with the community's pandemic plan as well as the State department of education's plan.

1.7. Test the linkages between the district's ICS and the local/State health department's and State education department's ICS.

1.8. Contribute to the local health department's operational plan for surge capacity of health care and other services to meet the needs of the community (e.g., schools designated as contingency hospitals, schools feeding vulnerable populations, community utilizing LEA's health care and mental health staff). In an affected community, at least two pandemic disease waves (about 6-8 weeks each) are likely over several months.

1.9. Incorporate into the pandemic influenza plan the requirements of students with special needs (e.g., low income students who rely on the school food service for daily meals), those in special facilities (e.g., juvenile justice facilities), as well as those who do not speak English as their first language.

1.10. Participate in exercises of the community's pandemic plan.

1.11. Work with the local health department to address provision of psychosocial support services for the staff, students, and their families during and after a pandemic.

1.12. Consider developing in concert with the public health department a surveillance system that would alert the public health department to a substantial increase in absenteeism among students.

1.13. Implement an exercise/drill to test your pandemic plan and revise it periodically.

1.14. Share what you have learned from developing your preparedness and response plan with other LEAs as well as private schools within the community to improve community response efforts.

2. Continuity of Student Learning and Core Operations

2.1. Develop scenarios describing the potential impact of a pandemic on student learning (e.g., student and staff absences), school closings, and extracurricular activities based on having various levels of illness among students and staff.

2.2. Develop alternative procedures to ensure continuity of instruction (e.g., web-based distance instruction, telephone trees, mailed lessons and assignments, instruction via local radio or television stations) in the event of district school closures.

2.3. Develop a continuity of operations plan for essential central office functions (including payroll, ongoing communication with students and parents).

3. Infection Control Policies and Procedures

3.1. Work with local health department to implement effective infection prevention policies and procedures that help limit the spread of influenza at schools in the district (e.g., promotion of hand hygiene, cough/sneeze etiquette). Make good hygiene a habit now in order to help protect children from many infectious diseases such as influenza.

3.2. Provide sufficient and accessible infection prevention supplies (e.g., soap, alcohol-based/waterless hand hygiene products, tissues and receptacles for their disposal).

3.3. Establish policies and procedures for students and staff sick leave absences unique to a pandemic influenza (e.g., non-punitive, liberal leave).

3.4. Establish sick leave policies for staff and students suspected to be ill or who become ill at school. Staff and students with known or suspected pandemic influenza should not remain at school and should return only after their symptoms resolve and they are physically ready to return to school.

3.5. Establish policies for transporting ill students.

3.6. Ensure that the LEA pandemic plan for school-based health facilities conform to those recommended for health care settings.

4. Communications Planning

4.1. Assess readiness to meet communications needs in preparation for an influenza pandemic, including regular review, testing, and updating of communications plans.

4.2. Develop a dissemination plan for communication with staff, students, and families, including lead spokespersons and links to other communication networks.

4.3. Ensure language, culture, and reading level appropriateness in communications by including community leaders representing different language and/or ethnic groups on the planning committee, asking for their participation in both document planning and the dissemination of public health messages within their communities.

4.4. Develop and test platforms (e.g., hotlines, telephone trees, dedicated websites, local radio or TV stations) for communicating pandemic status and actions to school district staff, students, and families.

4.5. Develop and maintain up-to-date communications contacts of key public health and education stakeholders and use the network to provide regular updates as the influenza pandemic unfolds.

4.6. Ensure the provision of redundant communication systems/channels that allow for the expedited transmission and receipt of information.

4.7. Advise district staff, students, and families where to find up-to-date and reliable pandemic information from Federal, State, and local public health sources.

4.8. Disseminate information about the LEA's pandemic influenza preparedness and response plan (e.g., continuity of instruction, community containment measures).

4.9. Disseminate information from public health sources covering routine infection control (e.g., hand hygiene, cough/sneeze etiquette), pandemic influenza fundamentals (e.g., signs and symptoms of influenza, modes of transmission), as well as personal and family protection and response strategies (e.g., guidance for the at-home care of ill students and family members).

4.10. Anticipate the potential fear and anxiety of staff, students, and families as a result of rumors and misinformation and plan communications accordingly.

Guidance for Colleges and Universities

Colleges and universities must ensure preparedness, and the communication of roles and responsibilities related to ensuring continuity of instruction and protection of students and personnel. In the event of an influenza pandemic, colleges and universities will play an integral role in protecting the health and safety of students, employees and their families. HHS, in coordination with the Department of Education, has developed the following checklist as a framework to assist colleges and universities to develop and/or improve plans to prepare for and respond to an influenza pandemic. Further information can be found at www.pandemicflu.gov.

1. Planning and Coordination

1.1. Identify a pandemic coordinator and response team (including campus health services and mental health staff, student housing personnel, security, communications staff, physical plant staff, food services director, academic staff, and student representatives) with defined roles and responsibilities for preparedness, response, and recovery planning.

1.2. Delineate accountability and responsibility as well as resources for key stakeholders engaged in planning and executing specific components of the operational plan. Ensure that the plan includes timelines, deliverables, and performance measures.

1.3. Incorporate into the pandemic plan scenarios that address college/university functioning based upon having various levels of illness in students and employees and different types of community containment interventions. Plan for different outbreak scenarios including variations in severity of illness, mode of transmission, and rates of infection in the community. Issues to consider include:

- cancellation of classes, sporting events, and/or public events;
- closure of campus, student housing, and/or public transportation;
- assessment of the suitability of student housing for quarantine of exposed and/or ill students;
- contingency plans for students who depend on student housing and food services (e.g., international students or students who live too far away to travel home);

- contingency plans for maintaining research laboratories, particularly those using animals; and
- stockpiling non-perishable food and equipment that may be needed in the case of an influenza pandemic.

1.4. Work with local public health authorities to identify legal authority, decision makers, trigger points, and thresholds to institute community containment measures such as closing (and re-opening) the college/university. Identify and review the college/university's legal responsibilities and authorities for executing infection control measures, including case identification, reporting information about ill students and employees, isolation, movement restriction, and provision of health care on campus.

1.5. Ensure that pandemic influenza planning is consistent with any existing college/university emergency operations plan, and is coordinated with the pandemic plan of the community and of the State higher education agency.

1.6. Work with the local health department to discuss an operational plan for surge capacity for health care and other mental health and social services to meet the needs of the college/university and community during and after a pandemic.

1.7. Establish an emergency communication plan and revise regularly. This plan should identify key contacts with local and State public health officials as well as the State's higher education officials (including back-ups) and the chain of communications, including alternate mechanisms.

1.8. Test the linkages between the college/university's ICS and the ICS of the local and/or State health department and the State's higher education agency.

1.9. Implement an exercise/drill to test your plan, and revise it regularly.

1.10. Participate in exercises of the community's pandemic plan.

1.11. Share what you have learned from developing your preparedness and response plan with other colleges/universities to improve community response efforts.

2. Continuity of Student Learning and Operations

2.1. Develop and disseminate alternative procedures to ensure continuity of instruction (e.g., web-based distance instruction, telephone trees, mailed lessons and assignments, instruction via local radio or television stations) in the event of college/university closures.

2.2. Develop a continuity of operations plan for maintaining the essential operations of the college/university including payroll; ongoing communication with employees, students and families; security; maintenance; as well as housekeeping and food service for student housing.

3. Infection Control Policies and Procedures

3.1. Implement infection control policies and procedures that help limit the spread of influenza on campus (e.g., promotion of hand hygiene, cough/sneeze etiquette). Make good hygiene a

habit now in order to help protect employees and students from many infectious diseases such as influenza. Encourage students and staff to get annual influenza vaccine.

3.2. Procure, store, and provide sufficient and accessible infection prevention supplies (e.g., soap, alcohol-based hand hygiene products, tissues and receptacles for their disposal).

3.3. Establish policies for employee and student sick-leave absences unique to pandemic influenza (e.g., non-punitive, liberal leave).

3.4. Establish sick leave policies for employees and students suspected to be ill or who become ill on campus. Employees and students with known or suspected pandemic influenza should not remain on campus and should return only after their symptoms resolve and they are physically ready to return to campus.

3.5. Establish a pandemic plan for campus-based health care facilities that addresses issues unique to health care settings. Ensure health services and clinics have identified critical supplies needed to support a surge in demand and take steps to have those supplies on hand.

3.6. Adopt CDC travel recommendations during an influenza pandemic, and be able to support voluntary and mandatory movement restrictions. Recommendations may include restricting travel to and from affected domestic and international areas, recalling non-essential employees working in or near an affected area when an outbreak begins, and distributing health information to persons who are returning from affected areas.

4. Communications Planning

4.1. Assess readiness to meet communications needs in preparation for an influenza pandemic, including regular review, testing, and updating of communications plans that link with public health authorities and other key stakeholders.

4.2. Develop a dissemination plan or communication with employees, students, and families, including lead spokespersons and links to other communication networks. Ensure language, culture, and reading level appropriateness in communications.

4.3. Develop and test platforms (e.g., hotlines, telephone trees, dedicated websites, local radio or television) for communicating college/university response and actions to employees, students, and families.

4.4. Ensure the provision of redundant communication systems/channels that allow for the expedited transmission and receipt of information.

4.5. Advise employees and students where to find up-to-date and reliable pandemic information from Federal, State, and local public health sources.

4.6. Disseminate information about the college/university's pandemic preparedness and response plan. This should include the potential impact of a pandemic on student housing closure, and the contingency plans for students who depend on student housing and campus food service, including how student safety will be maintained for those who remain in student housing.

4.7. Disseminate information from public health sources covering routine infection control (e.g., hand hygiene, cough/sneeze etiquette), pandemic influenza fundamentals (e.g., signs and symptoms of influenza, modes of transmission), personal and family protection and response strategies, and the at-home care of ill students or employees and their family members.

4.8. Anticipate and plan communications to address the potential fear and anxiety of employees, students, and families that may result from rumors or misinformation.

Guidance for Faith-Based and Community-Based Organizations

The collaboration of faith-based organizations (FBOs) and community-based organizations (CBOs) with public health agencies will be essential in providing the public's health and safety if and when an influenza pandemic occurs. HHS has developed the following checklist for FBOs and CBOs. This checklist identifies important, specific activities FBOs and CBOs can do now to prepare. Further information can be found at **www.pandemicflu.gov.**

1. Plan for the impact of a pandemic on your organization and its mission

1.1. Assign key staff with the authority to develop, maintain, and act upon an influenza pandemic preparedness and response plan.

1.2. Determine the potential impact of a pandemic on your organization's usual activities and services. Plan for situations likely to require increasing, decreasing, or altering the services your organization delivers.

1.3. Determine the potential impact of a pandemic on outside resources that your organization depends on to deliver its services (e.g., supplies, travel).

1.4. Outline what the organizational structure will be during an emergency and revise periodically. The outline should identify key contacts with multiple back-ups, roles and responsibilities, and who is supposed to report to whom.

1.5. Identify and train essential staff (including full-time, part-time, and unpaid or volunteer staff) needed to carry on your organization's work during a pandemic. Include back up plans, cross-train staff in other jobs so that if staff are sick, others are ready to come in to carry on the work.

1.6. Test your response and preparedness plan using an exercise or drill, and review and revise your plan as needed.

2. Communicate with and educate your staff, members, and persons in the community that you serve

2.1. Find up-to-date, reliable pandemic information and other public health advisories from State and local health departments, emergency management agencies, and HHS. Make this information available to your organization and others.

2.2. Distribute materials with basic information about pandemic influenza: signs and symptoms, how it is spread, ways to protect yourself and your family (e.g., respiratory hygiene and

cough etiquette), family preparedness plans, and how to care for ill persons at home.

2.3. When appropriate, include basic information about pandemic influenza in public meetings (e.g., sermons, classes, trainings, small group meetings, announcements).

2.4. Share information about your pandemic preparedness and response plan with staff, members, and persons in the communities that you serve.

2.5. Develop tools to communicate to staff, members, and persons in the communities that you serve information about pandemic status and your organization's actions. This might include websites, flyers, local newspaper announcements, pre-recorded widely distributed phone messages, etc.

2.6. Consider your organization's unique contribution to addressing rumors, misinformation, fear, and anxiety.

2.7. Advise staff, members, and persons in the communities you serve to follow information provided by public health authorities -- State and local health departments, emergency management agencies, and HHS.

2.8. Ensure that what you communicate is appropriate for the cultures, languages, and reading levels of your staff, members, and persons in the communities that you serve.

3. Plan for the impact of a pandemic on your staff, members, and the communities that you serve

3.1. Plan for staff absences during a pandemic due to personal and/or family illnesses, quarantines, and school, business, and public transportation closures. Staff may include full-time, part-time, and volunteer personnel.

3.2. Work with local health authorities to encourage yearly influenza vaccination for staff, members, and persons in the communities that you serve.

3.3. Evaluate access to mental health and social services during a pandemic for your staff, members, and persons in the communities that you serve; improve access to these services as needed.

3.4. Identify persons with special needs (e.g., elderly, disabled, limited English speakers) and be sure to include their needs in your response and preparedness plan. Establish relationships with them in advance so they will expect and trust your presence during a crisis.

4. Set up policies to follow during a pandemic

4.1. Set up policies for non-penalized leave for personal illness or care for sick family members during a pandemic.

4.2. Set up mandatory sick-leave policies for staff suspected to be ill, or who become ill at the worksite. Employees should remain at home until their symptoms resolve and they are physically ready to return to duty.

4.3. Set up policies for flexible work hours and working from home.

4.4. Evaluate your organization's usual activities and services (including rites and religious practices if applicable) to identify those that may facilitate virus spread from person to person. Set up policies to modify these activities to prevent the spread of pandemic influenza (e.g., guidance for respiratory hygiene and cough etiquette, and instructions for persons with influenza symptoms to stay home and phone the organization rather than visit in person).

4.5. Follow HHS travel recommendations during an influenza pandemic. Recommendations may include restricting travel to affected domestic and international sites, recalling non-essential staff working in or near an affected site when an outbreak begins, and distributing health information to persons who are returning from affected areas.

4.6. Set procedures for activating your organization's response plan when an influenza pandemic is declared by public health authorities and altering your organization's operations accordingly.

5. Allocate resources to protect your staff, members, and persons in the communities that you serve during a pandemic

5.1. Determine the amount of supplies needed to promote respiratory hygiene and cough etiquette and how they will be obtained.

5.2. Consider focusing your organization's efforts during a pandemic to providing services that are most needed during the emergency (e.g., mental/spiritual health or social services).

6. Coordinate with external organizations and help your community

6.1. Understand the roles of Federal, State, and local public health agencies and emergency responders and what to expect and what not to expect from each in the event of a pandemic.

6.2. Work with local and/or State public health agencies, emergency responders, local health care facilities, and insurers to understand their plans and what they can provide, share about your preparedness and response plan and what your organization is able to contribute, and take part in their planning. Assign a point of contact to maximize communication between your organization and your State and local public health systems.

6.3. Coordinate with emergency responders and local health care facilities to improve availability of medical advice and timely/urgent health care services for your staff, members, and persons in the communities that you serve.

6.4. Share what you've learned from developing your preparedness and response plan with other FBOs and CBOs to improve community response efforts.

6.5. Work together with other FBOs and CBOs in your local area and through networks (e.g., denominations, associations) to help your communities prepare for pandemic influenza.

Planning Guidance for Individuals and Families

Individuals and families can prepare for an influenza pandemic now. This guidance is designed to help you understand the threat of a pandemic influenza outbreak in our country and your community.

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It describes common sense actions that you can take in preparing for a pandemic. Each individual and family should know both the magnitude of what can happen during a pandemic outbreak and what actions you can take to help lessen the impact of an influenza pandemic on you and your community. Further information including a planning checklist can be found at **www.pandemicflu.gov.**

Pandemic Influenza: What Individuals Need to Know

An influenza (flu) pandemic is a widespread outbreak of disease that occurs when a new influenza virus appears that people have not been exposed to before. Pandemics are different from seasonal outbreaks of influenza. Seasonal influenza outbreaks are caused by viruses that people have already been exposed to; influenza shots are available to help prevent widespread illness, and impacts on society are less severe. Pandemic influenza spreads easily from person to person and can cause serious illness because people do not have immunity to the new virus.

Some Differences between Seasonal Flu and Pandemic Flu

Seasonal Flu	Pandemic Flu
Caused by influenza viruses that are similar to those already affecting people.	Caused by a new influenza virus that people have not been exposed to before. Likely to be more severe, affect more people, and cause more deaths than seasonal influenza because people will not have immunity to the new virus.
Symptoms include fever, cough, runny nose, and muscle pain. Deaths can be caused by complications such as pneumonia.	Symptoms similar to the common flu may be more severe and complications more serious.
Healthy adults usually not at risk for serious complications (the very young, the elderly, and those with certain underlying health conditions at increased risk for serious complications).	Healthy adults may be at increased risk for serious complications.
Generally causes modest impact on society (e.g., some school closings, encouragement of people who are sick to stay home).	A severe pandemic could change the patterns of daily life for some time. People may choose to stay home to keep away from others who are sick. Also, people may need to stay home to care for ill family and loved ones. Travel and public gatherings could be limited. Basic services and access to supplies could be disrupted.

A pandemic may come and go in waves, each of which can last for months at a time. Everyday life could be disrupted due to people in communities across the country becoming ill at the same time. These disruptions could include everything from school and business closings to interruption of basic services such as public transportation and health care. An especially severe influenza pandemic could lead to high levels of illness, death, social disruption, and economic loss.

Importance and Benefits of Being Prepared

It is difficult to predict when the next influenza pandemic will occur or how severe it will be. The effects of a pandemic can be lessened if preparations are made ahead of time. When a pandemic starts, everyone around the world could be at risk. The United States has been working closely with other countries and the World Health Organization (WHO) to strengthen systems to detect outbreaks of influenza that might cause a pandemic.

A pandemic would touch every aspect of society, and so every aspect of society must begin to prepare. State, tribal, and local governments are developing, improving, and testing their plans for an influenza pandemic. Businesses, schools, universities, and other community organizations are preparing plans as well.

As you begin your individual or family planning, you may want to review your State's planning efforts and those of your local public health and emergency preparedness officials. Many of the State plans and other planning information can be found at **www.pandemicflu.gov.**

The Department of Health and Human Services (HHS) and other Federal agencies are providing funding, advice, and other support to your State. The Federal Government will provide up-to-date information and guidance to the public if an influenza pandemic unfolds. For reliable, accurate, and timely information, visit the Federal Government's official website at **www.pandemicflu.gov.**

The benefits of preparation will be many. States and communities will be better prepared for any disaster. Preparation will bring peace of mind and the confidence that we are ready to fight an influenza pandemic.

Pandemic Influenza - Challenges and Preparation

As you plan, it is important to think about the challenges that you might face, particularly if a pandemic is severe. It may take time to find the answers to these challenges. The following are some situations that could be caused by a severe pandemic and possible ways to address them. A series of checklists have been prepared to help guide those efforts, to organize our national thinking, and bring consistency to our efforts. You will find two checklists (Pandemic Flu Planning Checklist for Individuals and Families; Family Emergency Health Information Sheet) to help you plan at **www.pandemicflu.gov.**

Social Disruption May Be Widespread

- Plan for the possibility that usual services may be disrupted. These could include services provided by hospitals and other health care facilities, banks, stores, restaurants, government offices, and post offices.
- Prepare backup plans in case public gatherings, such as volunteer meetings and worship services, are canceled.
- Consider how to care for people with special needs in case the services they rely on are not available.

Being Able to Work May Be Difficult or Impossible

- Find out if you can work from home.

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- Ask your employer about how business will continue during a pandemic. (A Business Pandemic Influenza Planning Checklist is available at **www.pandemicflu.gov.**)
- Plan for the possible reduction or loss of income if you are unable to work or your place of employment is closed.
- Check with your employer or union about leave policies.

Schools May Be Closed for an Extended Period of Time

- Help schools plan for pandemic influenza. Talk to the school nurse or the health center. Talk to your teachers, administrators, and parent-teacher organizations.
- Plan home learning activities and exercises. Have materials, such as books, on hand. Also plan recreational activities that your children can do at home.
- Consider childcare needs.

Transportation Services May Be Disrupted

- Think about how you can rely less on public transportation during a pandemic. For example, store food and other essential supplies so you can make fewer trips to the store.
- Prepare backup plans for taking care of loved ones who are far away.
- Consider other ways to get to work, or, if you can, work at home.

People Will Need Advice and Help at Work and Home

- Think about what information the people in your workplace will need if you are a manager. This may include information about insurance, leave policies, working from home, possible loss of income, and when not to come to work if sick. (A Business Pandemic Influenza Planning Checklist is available at **www.pandemicflu.gov.**)
- Meet with your colleagues and make lists of things that you will need to know and what actions can be taken.
- Find volunteers who want to help people in need, such as elderly neighbors, single parents of small children, or people without the resources to get the medical help they will need.
- Identify other information resources in your community, such as mental health hotlines, public health hotlines, or electronic bulletin boards.
- Find support systems-people who are thinking about the same issues you are thinking about. Share ideas.

Be Prepared

Stock a supply of water and food. During a pandemic you may not be able to get to a store. Even if you can get to a store, it may be out of supplies. Public waterworks services may also be interrupted. Stocking supplies can be useful in other types of emergencies, such as power outages and disasters. Store foods that:

- are nonperishable (will keep for a long time) and don't require refrigeration.
- are easy to prepare in case you are unable to cook.
- require little or no water, so you can conserve water for drinking.

Stay Healthy

Take common-sense steps to limit the spread of germs. Make good hygiene a habit.

- Wash hands frequently with soap and water.
- Cover your mouth and nose with a tissue when you cough or sneeze.
- Put used tissues in a waste basket.
- Cough or sneeze into your upper sleeve if you don't have a tissue.
- Clean your hands after coughing or sneezing. Use soap and water or an alcohol-based hand cleaner.
- Stay at home if you are sick.

It is always a good idea to practice good health habits.

- Eat a balanced diet. Be sure to eat a variety of foods, including plenty of vegetables, fruits, and whole grain products. Also include low-fat dairy products, lean meats, poultry, fish, and beans. Drink lots of water and go easy on salt, sugar, alcohol, and saturated fat.
- Exercise on a regular basis and get plenty of rest.

Will the seasonal flu shot protect me against pandemic influenza?

- No, it won't protect you against pandemic influenza. But flu shots can help you to stay healthy.
- Get a flu shot to help protect yourself from seasonal influenza.
- Get a pneumonia shot to prevent secondary infection if you are over the age of 65 or have a chronic illness such as diabetes or asthma.
- Make sure that your family's immunizations are up-to-date.

Get Informed

- Knowing the facts is the best preparation. Identify sources you can count on for reliable information. If a pandemic occurs, having accurate and reliable information will be critical.
- Reliable, accurate, and timely information is available at **www.pandemicflu.gov.**
- Another source for information on pandemic influenza is the Centers for Disease Control and Prevention (CDC) Hotline at: 1-800-CDC-INFO (1-800-232-4636). This line is available in English and Spanish, 24 hours a day, 7 days a week.
- Look for information on your local and State government websites. Links are available to each State department of public health at **www.pandemicflu.gov.**
- Listen to local and national radio, watch news reports on television, and read your newspaper and other sources of printed and web-based information.
- Talk to your local health care providers and public health officials.

Pandemic Influenza - Prevention and Treatment

You have an essential role in preparing and making sure you are informed of prevention activities in your local area. Each community must have plans, each State and each agency of the Federal Government

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must work together. The Federal Government is working to boost our international and domestic disease monitoring, rebuild our vaccine industry, build stockpiles of medicines, and support research into new treatments and medicines. Your State will be taking steps to monitor and build supplies too.

Vaccine

Influenza vaccines are designed to protect against specific influenza viruses. While there is currently no pandemic influenza in the world, the Federal Government is making vaccines for several existing bird influenza viruses that may provide some protection should one of these viruses change and cause an influenza pandemic. A specific pandemic influenza vaccine cannot be produced until a pandemic influenza virus strain emerges and is identified. Once a pandemic influenza virus has been identified, it will likely take 4-6 months to develop, test, and begin producing a vaccine.

Efforts are being made to increase vaccine-manufacturing capacity in the United States so that supplies of vaccines would be more readily available. In addition, research is underway to develop new ways to produce vaccines more quickly.

Treatment

A number of antiviral drugs are approved by the U.S. Food and Drug Administration to treat and sometimes prevent seasonal influenza. Some of these antiviral medications may be effective in treating pandemic influenza. These drugs may help prevent infection in people at risk and shorten the duration of symptoms in those infected with influenza. However, it is unlikely that antiviral medications alone would effectively contain the spread of pandemic influenza. The Federal Government is stockpiling antiviral medications that would most likely be used in the early stages of an influenza pandemic. There are efforts to find new drugs and to increase the supply of antiviral medications. Antiviral medications are available by prescription only and not over the counter.

Questions and Answers

Will bird flu cause the next influenza pandemic?

Avian influenza (bird flu) is a disease of wild and farm birds caused by influenza viruses. Bird flu viruses do not usually infect humans, but since 1997 there have been a number of confirmed cases of human infection from bird flu viruses. Most of these resulted from direct or close contact with infected birds (e.g., domesticated chickens, ducks, turkeys).

The spread of bird flu viruses from an infected person to another person has been reported very rarely and has not been reported to continue beyond one person. A worldwide pandemic could occur if a bird flu virus were to change so that it could easily be passed from person to person. Experts around the world are watching for changes in bird flu viruses that could lead to an influenza pandemic.

Is it safe to eat poultry?

Yes, it is safe to eat properly cooked poultry. Cooking destroys germs, including the bird flu virus. The United States bans imports of poultry and poultry products from countries where bird flu has been found.

Guidelines for the safe preparation of poultry include the following:

- Wash hands before and after handling food.
- Keep raw poultry and its juices away from other foods.
- Keep hands, utensils, and surfaces, such as cutting boards, clean.
- Use a food thermometer to ensure poultry has been fully cooked. More information on how to properly cook poultry can be found at www.usda.gov/birdflu.

What types of birds can carry bird flu viruses?

Wild birds can carry bird flu viruses but usually do not get sick from them. Domesticated birds (e.g., farm-raised chickens, ducks, and turkeys) can become sick with bird flu if they come into contact with an infected wild bird. Domesticated birds usually die from the disease.

What is the U.S. Government doing to prepare for pandemic influenza?

The U.S. Government has been preparing for pandemic influenza for several years. In November 2005, the President announced the *National Strategy for Pandemic Influenza*. Ongoing preparations include the following:

- Working with WHO and with other nations to help detect human cases of bird flu and contain an influenza pandemic, if one begins.
- Supporting the manufacturing and testing of influenza vaccines, including finding more reliable and quicker ways to make large quantities of vaccines.
- Developing a national stockpile of antiviral drugs to help treat and control the spread of disease.
- Supporting the efforts of Federal, State, tribal, and local health agencies to prepare for and respond to pandemic influenza.
- Working with Federal agencies to prepare and to encourage communities, businesses, and organizations to plan for pandemic influenza.

APPENDIX B

Glossary of Terms

For the purposes of the National Pandemic Influenza Implementation Plan (Plan):

Acronyms

AHPA	Animal Health Protection Act
AIDS	Acquired immunodeficiency syndrome
APEC	Asia Pacific Economic Cooperation Forum
APHIS	Animal and Plant Health Inspection Service
ASEAN	Association of Southeast Asian Nations
ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
ATSA	Aviation and Transportation Security Act
CBO	Community-based organization
CBP	Customs and Border Protection
CDC	Centers for Disease Control and Prevention
CFR	Code of Federal Regulations
CIP	Critical infrastructure protection
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CONUS	Continental United States
COOP	Continuity of operations
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Transportation
DPA	Defense Production Act
EIP	Emerging Infections Program
EIS	Epidemic Intelligence Service
EMAC	Emergency Management Assistance Compact

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EMS	Emergency Medical Services
EMTALA	Emergency Medical Treatment and Active Labor Act
EPA	Environmental Protection Agency
ESA	Endangered Species Act
ESAR-VHP	Emergency System for the Advanced Registration of Volunteer Health Professionals
ESF	Emergency Support Function
ESF #1	Emergency Support Function #1 - Transportation
ESF #8	Emergency Support Function #8 - Public Health and Medical Services
ESF #11	Emergency Support Function #11 - Agriculture and Natural Resources
ESF #13	Emergency Support Function #13 - Public Safety and Security
ESSENCE	Electronic Surveillance System for Early Notification of Community-based Epidemics
FAA	Federal Aviation Administration
FAMS	Federal Air Marshal Service
FAO	United Nations Food and Agriculture Organization
FBI	Federal Bureau of Investigation
FBO	Faith-based organization
FDA	Food and Drug Administration
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FMS	Federal medical station
FOAA	Federal Operations, Export Financing, and Related Programs Appropriations Act
FPC	Federal Preparedness Circular
FRA	Federal Railroad Administration
FWA	Fish and Wildlife Act
G-8	Group of Eight (major industrialized nations) including the United States, France, Italy, Germany, Japan, United Kingdom, Canada, Russia
GEIS	Global Emerging Infections Surveillance and Response System
GHSAG	Global Health Security Action Group
GOARN	Global Outbreak Alert and Response Network
HAvBED	National Hospital Available Beds for Emergencies and Disasters
HCA	Humanitarian and Civic Assistance
HHS	Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
HPAI	Highly pathogenic avian influenza
HSC	Homeland Security Council

HSPD-5	Homeland Security Presidential Directive 5
HSPD-7	Homeland Security Presidential Directive 7
HSPD-8	Homeland Security Presidential Directive 8
ICAO	International Civil Aviation Organization
ICLN	Integrated Consortium of Laboratory Networks
ICU	Intensive care unit
IFI	International financial institution
IHR	International Health Regulations
IMO	International Maritime Organization
IPAPI	International Partnership on Avian and Pandemic Influenza
LBMS	Live bird marketing system
LEA	Local education agencies
LRN	Laboratory Response Network
MARAD	Maritime Administration
MBTA	Migratory Bird Treaty Act
MDB	Multilateral development banks
MTF	Medical treatment facility
NAHLN	National Animal Health Laboratory Network
NAMRU	Naval Medical Research Unit
NBIS	National Biosurveillance Integration System
NDMS	National Disaster Medical System
NEC	National Economic Council
NGO	Non-governmental organization
NHTSA	National Highway Traffic Safety Administration
NIMS	National Incident Management System
NPIP	National Poultry Improvement Program
NRC	Nuclear Regulatory Commission
NRP	National Response Plan
NSC	National Security Council
NVS	National Veterinary Stockpile
NVSL	National Veterinary Services Laboratories
NVSN	New Vaccine Surveillance Network
NWHC	National Wildlife Health Center
OCONUS	Outside the continental United States
OHDCA	Overseas Humanitarian, Disaster, and Civic Aid

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OIE	World Organization for Animal Health (formerly named the "Office International des Epizooties")
OPM	Office of Personnel Management
Partnership	International Partnership on Avian and Pandemic Influenza
PHEO	Public Health Emergency Officer
PHS	U.S. Public Health Service
PHSA	Public Health Service Act
PHSBPR	Public Health Security and Bioterrorism Preparedness and Response Act
PPE	Personal protective equipment
PPIA	Poultry Products Inspection Act
PSAP	Public safety answering point
REDI	Regional Emerging Disease Intervention Center in Singapore
RT-PCR	Reverse transcriptase - polymerase chain reaction
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SARS	Severe acute respiratory syndrome
SCHIP	State Children's Health Insurance Program
SLEP	Shelf Life Extension Program
SNS	Strategic National Stockpile
SPN	Sentinel Provider Network
SPP	Security and Prosperity Partnership
STB	Surface Transportation Board
TIGR	The Institute for Genomic Research
Treasury	Department of the Treasury
TSA	Transportation Security Administration
UN	United Nations
USACE	U.S. Army Corps of Engineers
USAID	U.S. Agency for International Development
USCG	U.S. Coast Guard
USDA	Department of Agriculture
USTR	U.S. Trade Representative
VA	Department of Veterans Affairs
VHA	Veterans Health Administration
WHO	World Health Organization

Definition of Terms

Adjuvants. Substances that can be added to a vaccine to increase the effectiveness of the vaccine.

Affected country. An at-risk country experiencing endemic (widespread and recurring) or epidemic (isolated) cases in humans or domestic animals of influenza with human pandemic potential.

Antiviral medications. Medications presumed to be effective against potential pandemic influenza virus strains. These antiviral medications include the neuraminidase inhibitors oseltamivir (Tamiflu®) and zanamivir (Relenza®).

Arrival screening. Medical screening upon arrival to detect individuals who have signs of illness or who are at high risk of developing illness.

Asymptomatic. Asymptomatic means without symptoms of influenza.

At-risk country. An unaffected country with insufficient medical, public health, or veterinary capacity to prevent, detect, or contain influenza with pandemic potential.

Colleges. Educational institutions post 12th grade (post high school).

Community-based organization. A private nonprofit organization, Indian tribe or tribally sanctioned organization, or other type of group that works within a community for the improvement of some aspect of that community. Community-based organizations include non-profit organizations (501 c(3)), faith-based organizations, tribes, and their subsidiaries.

Containment. Contain an outbreak to the affected region(s) and limit of spread of the pandemic through aggressive attempts to contain.

Continuity of operations. Refers to the capability to ensure the performance of essential functions during any emergency or situation that may disrupt normal operations.

Cough etiquette. Covering ones mouth and nose while coughing or sneezing; using tissues and disposing in no-touch receptacles; and washing your hands to avoid spreading an infection to others.

Countermeasures. Refers to pre-pandemic and pandemic influenza vaccine and antiviral medications.

Critical infrastructure. Systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters. Specifically, it refers to the critical infrastructure sectors and key resources identified in Homeland Security Presidential Directive 7 (HSPD-7). As defined by HSPD-7, critical infrastructure includes the following sectors and key resources: agriculture and food; public health and health care; drinking water and water treatment systems; energy (including the production, refining, storage, and distribution of oil and gas, and electric power except for nuclear facilities); banking and finance; national monuments and icons; defense industrial base; information technology; telecommunications; chemical; transportation systems (including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems); emergency services; postal and shipping; dams; government facilities; commercial facilities; and nuclear reactors, material, and waste. Critical infrastructure in this Plan is used to refer to the 17 critical infrastructure and key resources included in the National Infrastructure Protection Plan.

Delegation of authority. Identification, by position, the authorities for making policy determinations and decisions at headquarters, field levels, and other organizational locations, as appropriate. Generally, pre-determined delegations of authority will take effect when normal channels of direction are disrupted and terminate when these channels have resumed.

Departure screening. Medical screening prior to departure from a high-risk area to identify individuals who have signs of illness (influenza) or who are at high risk of developing illness.

Devolution. The capability to transfer and sustain authority and responsibility for essential functions from an organization's primary operating staff and facilities, to other employees and facilities.

Disaggregation of disease transmission networks. The disruption of activities and social interactions that facilitate transmission of influenza (e.g., closure of schools, canceling public meetings or large social gatherings, keeping schoolchildren home, and restriction of travel).

Domestic animals. Livestock, including poultry, and other farmed birds or mammals; does not include companion animals such as dogs, cats, or pet birds.

Dose sparing strategies. Strategies to increase influenza vaccine immunogenicity and minimize the dose of vaccine necessary to confer immunity.

En route screening. Surveillance (typically by non-medical personnel) to detect individuals who develop signs of illness (influenza) while en route.

Epidemic. A pronounced clustering of cases of disease within a short period of time; more generally, a disease whose frequency of occurrence is in excess of the expected frequency in a population during a given time interval.

ESAR-VHP. Emergency System for Advance Registration of Volunteer Health Professionals.

Essential functions. Functions that are absolutely necessary to keep a business operating during an influenza pandemic, and critical to survival and recovery.

Face mask. Disposable surgical or procedure face mask (see definitions of both below).

Faith-based organization. Any organization that has a faith-inspired interest.

Geographic quarantine (cordon sanitaire). The isolation, by force if necessary, of localities with documented disease transmission from localities still free of infection.

Hand hygiene. Hand washing with either plain soap or antimicrobial soap and water and use of alcohol-based products (gels, rinses, foams) containing an emollient that do not require the use of water.

High-throughput rapid diagnostic kit. Medical technology to accurately and rapidly detect influenza strains. The technology is currently being used to rapidly detect avian influenza employing nucleic acid diagnostic primers (short strands of DNA/RNA).

High-risk country. An at-risk country that is located in proximity to an affected country, or in which a wildlife case of influenza with pandemic potential has been detected.

Highly pathogenic avian influenza (HPAI). An infection of poultry caused by any influenza A virus that meets the World Organization for Animal Health (OIE) definition for high pathogenicity based on the mortality rate of chickens exposed to the virus intravenously or on the amino acid sequence of the cleavage site of the virus' hemagglutinin molecule.

Installations. Refers to military posts, installation, bases, stations, and activities.

International financial institution. Usually refers to intergovernmental organizations dealing with financial issues, most often the International Monetary Fund and/or the World Bank.

International Partnership for Avian and Pandemic Influenza (the Partnership; IPAPI). Partnership announced by President Bush at the UN General Assembly on September 14, 2005. Over 80 countries and 8 international organizations are working in the Partnership to fight pandemic influenza nationally and globally.

Isolation. Separation of infected individuals from those who are not infected.

Key assets. Subset of key resources that are "individual targets whose destruction could cause large scale injury, death, or destruction of property, and/or profoundly damage our national prestige or confidence."

Key resources. Publicly or privately controlled resources essential to the minimal operations of the economy and government. This refers to the four key resources identified in HSPD-7 and the National Infrastructure Protection Plan. These four key resources include: dams; government facilities; commercial facilities; and nuclear reactors, material, and waste.

Laboratory Response Network. National network of local, State, and Federal public health, food testing, veterinary diagnostic, and environmental testing laboratories supported by CDC that provide the laboratory infrastructure and capacity to respond to biological and chemical terrorism, and other public health emergencies.

Layered protective measures. Rather than focusing on a single measure for mitigation, a layered approach uses an array of measures deployed in tandem, to reduce overall risk. A layered, system-wide, integrated approach to risk reduction includes redundant measures and is designed to avoid a single point of failure. Examples include, implementing pre-departure, en route, and arrival screening measures for international travel.

Live bird marketing system (LBMS). Live poultry markets in the United States and the poultry distributors and poultry production premises that supply those markets.

Local education agencies (LEAs). Local (State, county, city, district) school boards.

Localities. Refers to local (county, city, municipal) governments and agencies.

Multilateral development banks. Multilateral development banks are institutions that provide financial support and professional advice for economic and social development activities in developing countries.

National Animal Health Laboratory Network (NAHLN). Refers to a cooperative effort among the American Association of Veterinary Laboratory Diagnosticians, the USDA Animal and Plant Health Inspection Service, and the USDA Cooperative State Research, Education and Extension Service to coordinate the capabilities of Federal, State, and university veterinary diagnostic laboratories to enhance the response to animal health events.

National Poultry Improvement Plan (NPIP). Cooperative industry-State-Federal program that establishes standards for the evaluation of poultry with respect to freedom from certain diseases.

National veterinary services. The national veterinary administration, all the veterinary authorities, and all persons authorized, registered, or licensed by the veterinary statutory body of a country to prevent and/or control animal diseases.

National Veterinary Stockpile (NVS). Refers to the supply of materiel, including vaccine, that is appropriate for a response to a damaging animal disease and capable of deployment within 24 hours of an outbreak; the stockpile is maintained by USDA's Animal and Plant Health Inspection Service.

Orders of succession. Refers to the sequential order or ranking of individuals who would assume authority and responsibility if the leadership is incapacitated or unavailable.

Outbreak. An epidemic limited to localized increase in the incidence of disease, e.g., in a village, town, or closed institution; a cluster of cases of an infectious disease.

Outbreak containment. Disruption of epidemic amplification through the use of medical countermeasures and infection control techniques; "containment" also refers more generally to delaying the geospatial spread of an epidemic.

Pandemic. A worldwide epidemic when a new or novel strain of influenza virus emerges in which humans have little or no immunity, and develops the ability to infect and be passed between humans.

Pandemic vaccine. Vaccine for specific influenza virus strain that has evolved the capacity for sustained and efficient human-to-human transmission. This vaccine can only be developed once the pandemic strain emerges.

Pathogenicity. Refers to the condition or quality of being pathogenic, or the ability to cause disease.

Plan. Refers to the Implementation Plan for the National Strategy for Pandemic Influenza.

Post-exposure prophylaxis. The use of antiviral medications in individuals exposed to others with influenza to prevent disease transmission.

Pre-pandemic vaccine. Vaccine against strains of influenza virus in animals that have caused isolated infections in humans of pandemic potential. This vaccine is prepared prior to the emergence of a pandemic strain and may be a good or poor match (and hence of greater or lesser protection) for the pandemic strain that ultimately emerges.

Priority country. A priority country is a high-risk or affected country that merits special attention because of the severity of the outbreak, its strategic importance, its regional role, or foreign policy priorities.

Procedure mask. Disposable face mask that is either flat or pleated and is affixed to the head with ear loops.

Prophylaxis. Prevention of disease or of a process that can lead to disease. With respect to pandemic influenza this specifically refers to the administration of antiviral medications to healthy individuals for the prevention of influenza.

Quarantine. Separation of individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection.

Rapid diagnostic test. Medical test for rapidly confirming the presence of infection with a specific influenza strain.

Reconstitution. Refers to the process by which an organization resumes normal operations.

Respirator. Refers to a particulate respirator, commonly known as N-95 respirator, often used in hospitals to protect against infectious agents. Particulate respirators are "air-purifying respirators" because they clean particles out of the air as one breathes.

R_0. Represents the basic reproductive rate of a pathogen, i.e., the average number of secondary infections caused by an infected individual within a given social context. An $R_0 = 2$ means that infected individuals, on average, transmit infection to two other people, so that every generation of disease transmission doubles the number of people infected. R_0 will change during an epidemic as public health interventions are applied, the behavior of individuals changes, and as the pool of persons susceptible to the disease is depleted.

Schools (K-12). Refers to schools, both public and private, spanning the grades kindergarten through 12th grade (elementary through high school).

Sector. Part or division of the national economy.

Sector-Specific Agency. Federal departments and agencies identified under HSPD-7 as responsible for infrastructure protection activities in a designated critical infrastructure sector or key resources category.

Situational awareness. Situational awareness is the ability to identify, process, and comprehend the critical elements of information about what is happening during an evolving influenza pandemic.

Snow days. Refers to days which the authorities recommend that individuals and families limit social contacts by remaining within their households to reduce community disease transmission of infection.

Social distancing. Infection control strategies that reduce the duration and/or intimacy of social contacts and thereby limit the transmission of influenza. There are two basic categories of intervention: transmission interventions, such as the use of facemasks, may reduce the likelihood of casual social contacts resulting in disease transmission; contact interventions, such as closing schools or canceling large gatherings, eliminate or reduce the likelihood of contact with infected individuals.

Standard of care. The level of care that is reasonably expected under the extant circumstances.

States. Refers to State governments and State agencies.

Strategy. Refers to the *National Strategy for Pandemic Influenza*.

Surge capacity. Refers to the ability to expand provision of services beyond normal capacity to meet transient increases in demand. Surge capacity within a medical context denotes the ability of health care or laboratory facilities to provide care or services above their usual capacity, or to expand manufacturing capacity of essential medical materiel (e.g., vaccine) to meet increased demand.

Surgical mask. Refers to disposable face masks that comes in two basic types: one type is affixed to the head with two ties, conforms to the face with the aid of a flexible adjustment to the nose bridge, and may be flat/pleated or duck-billed in shape; the second type of surgical mask is pre-molded, adheres to the head with a single elastic and has a flexible adjustment for the nose bridge.

Symptomatic. Symptomatic means with symptoms of influenza.

Targeted passenger travel restrictions. Travel restrictions to the United States targeting travelers from a high-risk area or from areas unable to meet U.S. criteria for departure and en route screening.

Telecommuting. Working from home or an alternate site and avoiding coming to the workplace through telecommunication (computer access).

Telework. Refers to the activity of working away (home) from the workplace through telecommunication (computer access).

T_g. Generation time of a pathogen, or how long it takes for infected individuals to infect others. Epidemics caused by a pathogen with an $R_0 = 2$ and a $T_g = 2$ days will double in size about every 2 days, epidemics caused by a pathogen with an $R_0 = 3$ and a $T_g = 9$ days will triple in size about every 9 days, etc.

Treatment course (antiviral medications). The course of antiviral medication prescribed as treatment (not prophylaxis) for a person infected with an agent susceptible to the antiviral medication. For oseltamivir, a treatment course for seasonal influenza is 10 capsules, administered twice daily for 5 days (a prophylaxis course is much greater, typically 42 capsules taken once daily for 42 days).

Treatment course (vaccine). The course of vaccine (typically two injections) required to induce protective immunity against the target of the vaccine.

TRICARE. Department of Defense's worldwide health care program for active duty and retired uniformed services members and their families.

Universities. Refers to educational institutions post 12th grade (post high school).

U.S. travelers from affected areas. U.S. citizens traveling to the United States from countries or region where an outbreak (influenza pandemic) has occurred.

Virulence. Virulence refers to the disease-evoking severity of influenza.

Wave. The period during which an outbreak or epidemic occurs either within a community or aggregated across a larger geographical area. The disease wave includes the time during which disease occurrence increases rapidly, peaks, and declines back toward baseline.

APPENDIX C

Authorities and References

Various Federal statutes, regulations, orders, directives, and plans authorize or otherwise enable Federal departments and agencies to engage in actions to support the three pillars of the *National Strategy for Pandemic Influenza (Strategy)*: Preparedness and Communication; Surveillance and Detection; and Response and Containment. The major statutes, regulations, directives, and plans discussed in this Implementation Plan (Plan) are those summarized below.[23]

Chapter 2 - U.S. Government Planning for a Pandemic

Executive Order 12656, Assignment of Emergency Preparedness Responsibilities (November 18, 1988). This Executive Order assigns responsibilities to each Federal agency for national security and emergency preparedness.

Homeland Security Presidential Directive 5 (HSPD-5) Management of Domestic Incidents (February 28, 2003). This Presidential Directive is intended to enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system. In HSPD-5 the President designates the Secretary of Homeland Security as the Principal Federal Official for Domestic Incident Management and empowers the Secretary to coordinate Federal resources used in response to or recovery from terrorist attacks, major disasters, or other emergencies in specific cases. The directive assigns specific responsibilities to the Attorney General, Secretary of Defense, Secretary of State, and the Assistants to the President for Homeland Security and National Security Affairs, and directs the heads of all Federal departments and agencies to provide their "full and prompt cooperation, resources, and support," as appropriate and consistent with their own responsibilities for protecting national security, to the Secretary of Homeland Security, Attorney General, Secretary of Defense, and Secretary of State in the exercise of leadership responsibilities and missions assigned under HSPD-5. The directive also notes that it does not alter, or impede the abilities of Federal departments and agencies to carry out their responsibilities under law.

National Response Plan (NRP). In HSPD-5, the President directed the development of a new NRP to align Federal coordination structures, capabilities, and resources into a unified, all-discipline, and all-hazards approach to domestic incident management. The NRP, released in December 2004 and fully implemented in April 2005, is such a plan. It provides the structure and mechanisms for the coordination of Federal support to State, local, and tribal incident managers and for exercising direct Federal authorities and responsibilities. The NRP assists in the important homeland security mission of preventing terrorist attacks within the United States; reducing the vulnerability to all natural and manmade hazards; and minimizing the damage and assisting in the recovery from any type of incident that occurs.

Chapter 3 - Federal Government Response to a Pandemic

The Economy Act, 31 U.S.C. §§ 1535-1536 (2002). The Economy Act authorizes Federal agencies to provide goods or services on a reimbursable basis to other Federal agencies when more specific statutory authority to do so does not exist.

[23] Some of the authorities and references described in this appendix are applicable to actions discussed in more than one chapter but may only be set forth in the section they are primarily applicable to.

Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, codified as amended at 42 U.S.C. §§ 5121-5206, and scattered sections of 12 U.S.C., 16 U.S.C., 20 U.S.C., 26 U.S.C., 38 U.S.C. (2002). The Stafford Act establishes programs and processes for the Federal Government to provide disaster and emergency assistance to States, local governments, tribal nations, individuals, and qualified private nonprofit organizations. The provisions of the Stafford Act are broad and may cover many situations, including natural disasters and terrorist events. In a major disaster or emergency as defined in the Stafford Act, the President "may direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance efforts."

Under the Act, the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security (DHS), is authorized to coordinate the activities of Federal agencies in response to a Presidential declaration of a major disaster or emergency, if warranted, with the Department of Health and Human Services (HHS) having the lead for health and medical services. The President could declare either an emergency or a major disaster with respect to an influenza pandemic.

The National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2003), establishes procedures for Presidential declaration and termination of national emergencies. The act requires the President to identify the specific provision of law under which he or she will act in dealing with a declared national emergency and contains a sunset provision requiring the President to renew a declaration of national emergency to prevent its automatic expiration. The Presidential declaration of a national emergency under the act is a prerequisite to exercising any special or extraordinary powers authorized by statute for use in the event of national emergency.

The Defense Production Act (DPA) of 1950, codified as amended by the Defense Production Act Reauthorization of 2003 at 50 U.S.C. app.§§ 2061-2171 (2002), is the primary authority to ensure the timely availability of resources for national defense and civil emergency preparedness and response. Among other things, the DPA authorizes the President to demand that companies accept and give priority to government contracts that the President "deems necessary or appropriate to promote the national defense." The DPA defines "national defense" to include critical infrastructure protection and restoration, as well as activities authorized by the emergency preparedness sections of the Stafford Act. Consequently, DPA authorities are available for activities and measures undertaken in preparation for, during, or following a natural disaster or accidental or man-caused event. The President's authority has been delegated to various agencies, depending on the product, with the Department of Commerce (DOC) providing overall coordination of the Defense Priorities and Allocations System. The DOC has redelegated DPA authority under Executive Order 12919, National Defense Industrial Resource Preparedness (June 7, 1994), as amended, to the Secretary of Homeland Security to place and, upon application, to authorize State and local governments to place priority-rated contracts in support of Federal, State, and local emergency preparedness activities.

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (PHSBPR), Pub. L. No. 107-188, 116 Stat. 294 (2002) (codified in scattered sections of 7 U.S.C., 18 U.S.C., 21 U.S.C., 29 U.S.C., 38 U.S.C., 42 U.S.C., and 47 U.S.C. (2002)), is designed to improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies. Key provisions of the PHSBPR, 42 U.S.C. §§ 247d and 300hh among others, address the development of a national preparedness plan by HHS designed to provide effective assistance to State and local governments in the event of bioterrorism or other public health emergencies; operation of the National Disaster Medical

System (NDMS) to mobilize and address public health emergencies; grant programs for the education and training of public health professionals and improving State, local, and hospital preparedness for and response to bioterrorism and other public health emergencies; streamlining and clarifying communicable disease quarantine provisions; enhancing controls on dangerous biological agents and toxins; and protecting the safety and security of food and drug supplies.

Flood Control and Coastal Emergencies Act, 33 U.S.C § 701n (2002), authorizes the U.S. Army Corps of Engineers (USACE) to use an emergency fund for preparation for emergency response to natural disasters, flood fighting and rescue operations, rehabilitation of flood control and hurricane protection structures, temporary restoration of essential public facilities and services, advance protective measures, and provision of emergency supplies of water. The USACE receives funding for such activities under this authority from the Energy and Water Development Appropriation.

Volunteer Services. There are statutory exceptions to the general statutory prohibition against accepting voluntary services under 31 U.S.C. § 1342 (2002) that can be used to accept the assistance of volunteer workers. Such services may be accepted in "emergencies involving the safety of human life or the protection of property." Additionally, provisions of the Stafford Act, 42 U.S.C. §§ 5152(a), 5170a(2) (2002), authorize the President to, with their consent, use the personnel of private disaster relief organizations and to coordinate their activities. Under the Congressional Charter of 1905, 36 U.S.C. §§ 300101-300111 (2002), the American Red Cross and its chapters are a single national corporation. The Charter mandates that the American Red Cross maintain a system of domestic and international disaster relief. The American Red Cross qualifies as a nonprofit organization under section 501(c)(3) of the Internal Revenue Code.

Chapter 4 - International Efforts

Clearance of Proposed International Agreements. The Department of State (DOS) must ensure that all proposed international agreements of the United States are fully consistent with U.S. foreign policy objectives. The requirements for this coordination with and clearance from DOS are codified, in part, at sections 181.1-8 of Title 22 of the Code of Federal Regulations (CFR). The C-175 clearance requirements are specifically referenced in 22 C.F.R. § 181.4 (and Volume 11 of the Foreign Affairs Manual, Chapter 700).

Foreign Assistance. Relevant foreign assistance authorities for health and disasters authorize the provision of assistance "notwithstanding any other provision of law." These authorities would permit the provision of aid, such as medical goods and services, and even security details to ensure delivery of these items. Annual foreign operations appropriations acts reenact this special health authority annually, as follows:

Section 522 of the FY06 Foreign Operations, Export Financing, and Related Programs Appropriations Act (FOAA), Pub. L. No. 109-102, funds child survival and health activities and includes robust authority that would enable us to overcome any country-specific and other assistance limitations (e.g., North Korea, Iran, Burma, China). In cases of emergency to health and human welfare, there is an exceptional authority reenacted annually from the usual 15-day Congressional notification period (required for reprogramming notifications). Any assistance appropriated as economic assistance (i.e., not just funds appropriated for health) may be used pursuant to this authority to provide assistance for health.

The Foreign Assistance Act of 1961, as amended, provides relevant authorities for disaster assistance, with a full "notwithstanding" authority, and for health, with a more limited "notwithstanding" authority, as follows:

- FAA § 491 authorizes provision of assistance for natural and man-made disasters, "notwithstanding any other provision of law."

- FAA §104(c) (22 U.S.C. § 2151b-4) authorizes "[a]ssistance for [h]ealth and [d]isease [p]revention." Such assistance "may be made available notwithstanding any other provision of law that restricts assistance to foreign countries." There are some limitations on the "notwithstanding" authority (e.g., the notwithstanding clause does not trump limitations on assistance to organizations that support or participate in a program of coercive abortion or involuntary sterilization), but we do not foresee such exceptions constraining our ability to respond to a pandemic influenza.

- Title IV of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005), appropriates $656 million for emergency relief, rehabilitation, and reconstruction aid to countries affected by the Asian tsunami and earthquakes of December 2004 and March 2005, and the avian influenza virus, to remain available until September 30, 2006. Additional funding is being sought as part of the President's $7.1 billion pandemic influenza legislative request.

Foreign Assistance to Address Civil Unrest Abroad. If foreign assistance were required for police to address civil unrest abroad associated with an outbreak, such assistance could be provided for police forces under various authorities, most notably, under FAA § 481(a)(4). Assistance for military forces for such purposes could also be provided under certain authorities, e.g., section 551 of the FAA for peacekeeping and other programs in the national security interest of the United States and section 23 of the Arms Export Control Act codified in 22 U.S.C. § 2751 et seq. (2000) for military assistance.

Title 11, Emergency Supplemental Appropriation to address Pandemic Influenza of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148 (2006). This Act provides $10 million and additional authority for the Department of Defense (DOD) to assist military partner nations in pandemic influenza response preparedness.

The Public Health Service Act (PHSA), 42 U.S.C. § 201 note (2005). The PHSA authorizes HHS to engage in international biomedical research, health care technology, and specified health services research and statistical activities "to advance the status of the health sciences in the United States" and thereby the health of the American people (42 U.S.C. 242). HHS has interpreted this authority to support numerous international surveillance and research activities as well.

Military assistance. The major authorities that DOD may rely on to provide assistance outside the United States, include:

- 10 U.S.C. § 401 (Humanitarian and Civic Assistance (HCA). This section of the Code provides for HCA projects, approved in coordination with the Combatant Commanders and DOS that improve operational readiness skills of participating U.S. forces and are conducted in conjunction with military operations.

- 10 U.S.C. § 402 (Transportation). Subject to certain exceptions, DOD may transport supplies provided by non-governmental, U.S. sources without charge on a space-available basis.

- 10 U.S.C. §404 (Foreign Disaster Assistance). Under certain circumstances and subject to certain congressional notice requirements, the President may direct the Secretary of Defense to provide disaster assistance outside the United States in order to respond to manmade or natural disasters when necessary to prevent the loss of life.

- 10 U.S.C. § 2557 (Excess Nonlethal Supplies: Humanitarian Relief). This provision authorizes excess supplies to be made available to DOS for humanitarian relief. DOS will be responsible for distribution.

- 10 U.S.C. § 2561(Transportation and Other Humanitarian Support). DOD also may provide fully funded transportation (on an other-than space-available basis), if it pays such transportation costs with its operation and maintenance funds earmarked for Overseas Humanitarian, Disaster, and Civic Aid (OHDCA) purposes.

Chapter 5 - Transportation and Borders

Transportation Authorities

General Transportation Security Authorities. DHS has broad authority to protect transportation security, including authorities that could keep quarantinable diseases from reaching the United States. The Transportation Security Administration (TSA) is "responsible for security in all modes of transportation" (49 U.S.C. § 114). If the TSA Assistant Secretary "determines that a regulation or security directive must be issued immediately in order to protect transportation security the [Assistant Secretary] shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary [of Homeland Security]" (49 U.S.C. § 114(l)(2)(A)). TSA interprets these provisions on transportation security to provide authority for TSA to keep a flight destined for the United States from landing in the United States if it is determined that a flight may be transporting persons with a quarantinable disease. These TSA authorities are also sufficiently broad to allow TSA to direct an air carrier to temporarily avoid deplaning its passengers until HHS or other medical authorities can screen the passengers. Finally, pursuant to 49 U.S.C. § 114(q), the Federal Air Marshal Service (FAMS) of TSA has the authority to exercise law enforcement powers in the transportation domain.

Emergency Transportation Security Authorities. In the case of a national emergency, the Aviation and Transportation Security Act (ATSA) provides DHS with additional authorities. ATSA confers four specific national emergency responsibilities upon DHS: "(A) To coordinate domestic transportation, including aviation, rail, and other surface transportation, and maritime transportation (including port security); (B) To coordinate and oversee the transportation-related responsibilities of other departments and agencies of the Federal Government other than the DOD and the military departments; (C) To coordinate and provide notice to other departments and agencies of the Federal Government, and appropriate agencies of State and local governments, including departments and agencies for transportation, law enforcement, and border control, about threats to transportation; (D) To carry out such other duties, and exercise such other powers, related to transportation during a national emergency as the Secretary shall prescribe" (49 U.S.C. § 114(g) (1) (A)-(D)). ATSA qualifies this authority by adding: "(2) AUTHORITY OF OTHER DEPARTMENTS AND AGENCIES. The authority of the [Secretary of Homeland Security] under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency (49 U.S.C. § 114(g) (2)). ATSA also adds: "(3) CIRCUMSTANCES. The Secretary [of Homeland Security] shall prescribe the circumstances constituting a national emergency for purposes of this subsection" (49 U.S.C. § 114(g) (3)).

During a national emergency declared by the President, the Department of Transportation (DOT), through the Maritime Administration (MARAD), can enhance U.S. sealift capacity by taking control of vessels, containers, and chassis through requisitioning (46 App. U.S.C. § 1242; 50 U.S.C. §§ 196-198).

Aviation. The Federal Aviation Administration (FAA) is the lead agency for aviation safety regulation and oversight and is responsible for the operation and maintenance (to include personnel, physical, and cyber) of the Air Traffic Control System (Title 49 U.S.C., subtitle VII, Aviation Programs). Any movement in the navigable airspace of the United States can be stopped, redirected, or excluded by the FAA, regardless of the commodity involved (49 U.S.C. § 44701). Additionally, the FAA can order U.S.-flag air carriers not to enter designated airspace of a foreign country (e.g., to keep airspace clear for rescue operations). If the FAA determines that an emergency exists related to safety in air commerce that requires immediate action, the FAA may prescribe regulations and issue orders immediately to meet that emergency (49 U.S.C. § 46105(c)). FAA interprets these provisions on aviation security or safety to provide authority for FAA to close airspace to, or redirect, a flight if it is determined that a flight may be transporting persons with a quarantinable disease.

Subject to the direction and control of the Secretary of Homeland Security, the TSA has the authority to cancel a flight or series of flights if a decision is made that a particular security threat cannot be addressed in a way adequate to ensure, to the extent feasible, the safety of passengers and crew (49 U.S.C. § 44905(b)). TSA is required to work in conjunction with the FAA with respect to any actions or activities that may affect aviation safety or air carrier operations (49 U.S.C. § 114(f)(13); 6 U.S.C. § 233(a)). TSA interprets these provisions to authorize TSA to cancel flights in the case of a pandemic influenza.

Chicago Convention. The Chicago Convention, a multilateral treaty establishing the framework for the operation of international civil aviation, provides authority to deny entry to flights that do not comply with U.S. laws and regulations, including those relating to entry, clearance, customs, and quarantine. The Chicago Convention articles that may be relevant include 11, 13, 14, 16, 29, and 89.

Rail. Any movement in the United States by rail carrier (including commuter rail but excluding urban rapid transit not connected to the general system of rail transportation) may be stopped, redirected, or limited by the authority of the Surface Transportation Board (STB) or the Federal Railroad Administration (FRA), or both, irrespective of commodity involved. The FRA may issue an emergency order imposing any restrictions or prohibitions necessary to abate what the FRA determines is an emergency situation involving a hazard of death or personal injury caused by unsafe conditions or practices (49 U.S.C. § 20104). For a period of 270 days, the STB may direct the movement and prioritization of freight traffic necessary to alleviate an emergency situation involving the failure of traffic movement having substantial adverse impacts on shippers or on rail service in any region of the United States (49 U.S.C. § 11123), and may also order that preference be given to certain traffic, when the President so directs in time of war or threatened war (49 U.S.C. § 11124).

Mass Transit. In general, DOT is forbidden from regulating the operation, routes, schedules, rates, fares, tolls, rentals, or other charges of public transportation system grantees of the Federal Transit Administration. However, the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (SAFETEA_LU), amended section 5334 of title 49 of the United States Code to create an express exception to the above prohibition when needed for national defense or in the event of a national or regional emergency.

Highways. The Federal Highway Administration (FHWA) possesses no authority to operate the Nation's highway system during times of emergency. States, local governments, and other Federal agencies own,

control, and operate the Nation's roads and bridges. The Federal Motor Carrier Safety Administration (FMCSA) can order a vehicle to cease operation and relocate to a safe place if there is reason to believe it would constitute a security threat because it carries a hazardous material (49 U.S.C. § 521(b)(5); 49 U.S.C. § 5103(b), Section 1711, Homeland Security Act of 2002, Pub. L. 107-296).

Pipelines. The operation of any pipeline facility used to transport gas or hazardous liquid can be stopped by the Pipeline and Hazardous Materials Safety Administration if continued operation of the facility is or would become hazardous (49 U.S.C. § 60112).

Hazardous Materials. Any aspect of hazardous materials transportation that presents an "imminent hazard" may be halted by court order (49 U.S.C. § 5122(b)). An "imminent hazard" is a condition that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonable foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment (49 U.S.C. § 5102). DOT is also authorized to issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate an imminent hazard (49 U.S.C. §5121(d)).

Transportation Authorities Relating Specifically to Vessels. In the case of vessels, if there is evidence that a vessel is carrying a person or persons with a quarantinable disease that would present a public health threat to the port if the ship or the person were allowed to enter, the U.S. Coast Guard (USCG) has authority to prevent the vessel from entering a U.S. port or place until the infected person(s) can be dealt with by HHS/CDC personnel so as to prevent the spread of the disease in the United States (50 U.S.C. §§ 191–195; 33 U.S.C. §§ 1221–1232; 33 C.F.R. part 6; 33 C.F.R. § 160.111).

The Saint Lawrence Seaway Development Corporation may halt traffic through those portions of the Saint Lawrence Seaway subject to the jurisdiction of the United States, if required for safety or security of the seaway or for national security (e.g., deepwater vessels could be barred from entering or leaving the Seaway) (33 U.S.C. §§ 984, 1226).

Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2171 (2002). The DPA is the primary authority to ensure the timely availability of resources for national defense and civil emergency preparedness and response. Under the DPA, the Secretary of Transportation has been delegated the authority to marshal civil transportation in a defined area if national defense or domestic emergency conditions require civil transportation materials, services, or facilities that are not being provided by the marketplace. However, formal findings must be made by DOD, Department of Energy (DOE), or DHS, before DOT can exercise its DPA authority.

Border Authorities

General Border Authorities. DHS has broad authority to protect U.S. borders, including specific statutory provisions designating USCG and the United States Customs and Border Protection (CBP) to assist in the enforcement of State health laws and Federal quarantine regulations (42 U.S.C. §§ 97, 268). CBP has general authority pursuant to the customs and immigration laws (e.g., 19 U.S.C. §§ 482, 1461, 1496, 1589a, 1499, 1581, 1582, 1595a, and 8 U.S.C. §§ 1157, 1357) to examine merchandise, cargo, conveyances and persons upon their entry to, and exit from, the United States to ensure compliance with U.S. law, and to seize and forfeit conveyances, animals, or other things imported contrary to law or used in the unlawful importation, exportation, or subsequent transportation of articles imported contrary to U.S. law (18 U.S.C. § 545, 19 U.S.C. § 1595a). Section 421 of the Homeland Security Act transferred to the

Secretary of Homeland Security certain agricultural import and entry inspection functions originally assigned to the Secretary of Agriculture under the Animal Health Protection Act. This transfer included the authority to enforce prohibitions or restrictions on the entry of livestock diseases into the United States. Finally, the Secretary of Homeland Security and the Commissioner of CBP may temporarily close ports of entry "when necessary to respond to a national emergency or to [respond to] a specific threat to human life or national interests" (19 U.S.C. § 1318(b)). Such closings would effectively stop the legal entry of persons and conveyances and the legal importation and exportation of articles at those places.

Border Authorities Relating to Travelers. DHS has authority to find inadmissible any alien "who is determined (in accordance with the regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance" (8 U.S.C. § 1182(a)(1)). Under 8 U.S.C. § 1222(a), DHS could detain aliens for the purpose of determining whether they have a communicable disease listed in section 1182(a). The list of communicable diseases of public health significance as defined in HHS regulations is, however, limited, and does not generally include quarantinable diseases, including pandemic influenza, listed in Executive Order 13295.

Aliens with pandemic influenza could be excluded pursuant to 8 U.S.C. § 1182(f), which provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." The President may not delegate the authority to issue such a proclamation. Accordingly, if the President determined that the entry of any aliens or class of aliens was detrimental to the interests of the United States, for reasons that may include the threatened spread of a pandemic into the United States, he may issue a proclamation suspending such entry and directing enforcement by all Federal agencies.

Control of Communicable Diseases. The Public Health Service Act (PHSA), 42 U.S.C. § 264, authorizes the Secretary of Health and Human Services to make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States, or from one State or possession into any other State or possession. Under section 362 of the PHSA, 42 U.S.C. § 265, the Secretary of Health and Human Services may prohibit, in whole or in part, the introduction of persons and property from such countries or places as he/she shall designate for the purpose of averting a serious danger of the introduction of a communicable disease into the United States if he determines that such a prohibition is in the interest of the public health.

Vessels en route to the United States. Section 366 of the PHSA (42 U.S.C. § 269) requires vessels at foreign ports clearing or departing for the United States to obtain a bill of health from a U.S. consular officer, U.S. Public Health Service officer, or other U.S. medical officer, unless otherwise prescribed in regulations. Historically, a bill of health was a document required from ships in international traffic that set forth the sanitary history and condition of the vessel and, in some cases, the condition of the port during the time of departure. Foreign quarantine regulations in part 71 currently state that a bill of health is not required. Under the CDC's proposed rule, the CDC Director, to the extent permitted by law and in consultation with such other Federal agencies as the Director may deem necessary, would be authorized to require a foreign carrier clearing or departing for a U.S. port to obtain a bill of health from a U.S. consular officer or a medical officer designated for such purpose.

Animals, Poultry, and Wildlife

The Animal Health Protection Act (AHPA) of 2002, 7 U.S.C. 8301 et seq. The AHPA, described in detail

in Authorities Chapter 7, gives the Secretary of Agriculture a broad range of authorities to use in the event of an outbreak of avian influenza in the United States and to prevent the introduction of such a disease into the United States.

The Poultry Products Inspection Act, 21 U.S.C. 451 et seq. This Act requires the inspection of poultry products and provides for criminal penalties for adulteration and misbranding of poultry products.

Importation of wild bird species parts and products. The importation of these items must comply with conservation laws and treaties enforced by the Department of the Interior (DOI), including the Wild Bird Conservation Act, the Migratory Bird Treaty Act of 1918, 16 U.S.C. 703-712, the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531-1544, which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), T.I.A.S. 8249; the Lacey Act Amendments of 1981, 16 U.S.C. 3371-3378; and the Bald Eagle Protection Act of 1940, 16 U.S.C.668-668d. The DOI has the authority to take measures to restrict trade in wild birds based on threats to wildlife populations. In the event of an outbreak of highly pathogenic avian influenza (HPAI) in domestic or wild exotic birds in the United States, DOI has the authority (under 50 C.F.R. Part 13) to suspend the issuance of export and re-export permits under CITES and the ESA if such action is deemed necessary after coordination with USDA.

Chapter 6 - Protecting Human Health

The Public Health Service Act (PHSA), 42 U.S.C. §§ 201 et seq. (1994). The Secretary of Health and Human Services is authorized to develop and take such action as may be necessary to implement a plan under which the personnel, equipment, medical supplies, and other resources of the Department may be effectively used to control epidemics of any disease or condition and to meet other health emergencies and problems, (see 42 U.S.C. § 243). During an emergency proclaimed by the President, the President has broad authority to direct the services of the Public Health Service, (42 U.S.C. § 217). Under that section, the President is authorized to "utilize the [Public Health] Service to such extent and in such manner as shall in his judgment promote the public interest."

- **Research.** Section 301 of the PHSA, 42 U.S.C. § 241, authorizes the Secretary to conduct and encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, and promote the coordination of, research, investigations, experiments, demonstrations and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental impairments of man. The Secretary is also authorized to collect and make available through publications and other appropriate means, information as to, and the practical application of, such research and other activities.

- **Public Health Emergency.** Section 319(a) of the PHSA, 42 U.S.C. 247d, authorizes the Secretary of Health and Human Services to declare a public health emergency and "take such action as may be appropriate to respond" to that emergency consistent with his authorities. Appropriate action may include making grants, entering into contracts, and conducting and supporting investigation into the cause, treatment, or prevention of the disease or disorder that presents the emergency. The Secretary's declaration also can be the first step in authorizing emergency use of unapproved products or approved products for unapproved uses under section 564 of the Food, Drug, and Cosmetic Act (21 U.S.C. 360bbb-3), or waiving certain regulatory requirements of the Department, such as select agents requirements, or -- when the President also declares an emergency -- waiving certain Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) provisions.

- **Vaccines and therapeutics.** The PHSA provides additional authorities for core activities of HHS that will be needed to plan and implement an emergency response. For example, sections 301, 319F-1, 402, and 405 of the PHSA authorize the Secretary of Health and Human Services to conduct and support research and development of vaccines and therapeutics. Section 351 of the PHSA and provisions of the Federal Food, Drug, and Cosmetics Act authorize the Secretary and the Food and Drug Administration (FDA) to regulate vaccine development and production. Infrastructure support for preventive health services such as immunization activities, including vaccine purchase assistance, is provided under section 317 of the PHSA.

- **Liability protection.** Section 319F-3 of the PHSA provides immunity to manufacturers, distributors, program planners, "qualified persons," and their employees for claims for loss caused by, arising out of, relating to, or resulting from the administration or use of any "covered countermeasure" that is the subject of a declaration made by the Secretary. A covered countermeasure is a drug, device, or biological that is (1) subject to an emergency use authorization under section 564 of the Federal Food Drug and Cosmetic Act, (2) used against an epidemic or pandemic and either approved or subject to an IND, or (3) a security countermeasure as defined under the Project BioShield Act. Section 319F-4 allows the Secretary to, by declaration, establish an emergency fund in the Treasury which will be used to provide compensation for injuries directly caused by administration of a covered countermeasure.

- **Strategic National Stockpile.** Section 319F-2 of the PHSA authorizes the Secretary, in coordination with the Secretary of Homeland Security, to maintain the Strategic National Stockpile to provide for the emergency health security of the United States.

- **Quarantine.** Section 361 of the PHSA (42 U.S.C. § 264), authorizes the Secretary of Health and Human Services to make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States, or from one State or possession into any other State or possession. Implementing regulations are found at 42 C.F.R. Parts 70 and 71. The HHS Centers for Disease Control and Prevention (CDC) administers these regulations as they relate to quarantine of humans. Diseases for which individuals may be quarantined are specified by Executive Order; the most recent change to the list of quarantinable diseases was Executive Order 13375 of April 1, 2005, which amended Executive Order 13295 by adding "influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic" to the list. CDC issued a new proposed rule updating these regulations on November 30, 2005. 70 Fed. Reg. 71892 (www.cdc.gov/ncidod/dq/nprm/index.htm). Other provisions in Title III of the PHSA permit HHS to establish quarantine stations, provide care and treatment for persons under quarantine, and provide for quarantine enforcement by specified components of DHS and cooperating State and local entities.

- **Vaccine Development.** Further, HHS has broad authority to coordinate vaccine development, distribution, and use activities under section 2102 of the PHSA, describing the functions of the National Vaccine Program. The Secretary has authority for health information and promotion activities under title XVII and other sections of the PHSA. HHS can provide support to States and localities for emergency health planning under title III of the PHSA.

- **National Goals.** Under section 1701 of the PHSA, 42 U.S.C. § 300u, the Secretary is authorized to formulate national goals for health information, promotion, health services, and education

and to undertake activities, including training, support, planning, and technical assistance, to carry out those goals.

- **Mobilizing the Commissioned Corps.** Section 203 of the PHSA, 42 U.S.C. § 204, authorizes the Federal Government to mobilize officers of the United States Public Health Service Regular Commissioned Corps and the Reserve Commissioned Corps, including commissioned corps officers who are veterinarians, in times of emergencies.

Department of Veterans Affairs (VA) Authorities. The primary function of the Veterans Health Administration (VHA) is to provide a complete medical and hospital service for the medical care and treatment of veterans. Section 8111A of title 38 of the U.S. Code authorizes the Secretary to provide care to members of the Armed Forces during a time of war or national emergency. Section 1784 of title 38 authorizes the Secretary to furnish hospital care or medical services as a humanitarian service to non-VA beneficiaries in emergency cases. Section 1785 of title 38 authorizes the Secretary to provide hospital care and medical services to non-VA beneficiaries responding to, involved in, or otherwise affected by a disaster or emergency. This provision codifies VA's existing obligations under the Federal Response Plan (now National Response Plan). These include VA's obligations under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et seq., and during activation of the National Disaster Medical System (NDMS), 42 U.S.C. § 300hh-11.

- The explicit language in section 8111A and the legislative history of section 1785 indicate that during declared major disasters and emergencies and activation of NDMS, the highest priority for receiving VA care and services goes to service-connected veterans, followed by members of the Armed Forces receiving care under section 8111A and then by individuals affected by a disaster or emergency described in section 1785 (i.e., individuals requiring care during a declared disaster or emergency, or during activation of the NDMS). As a practical matter, when faced with individuals who require emergency medical treatment (e.g., during a disaster or emergency situation), VHA practitioners must prioritize based on medical need. This may require deferring routine or elective care for veterans in order to treat medical emergencies. Life-threatening conditions are treated prior to less severe or routine conditions, regardless of priority. Such prioritization is not dictated by statute or regulation. Rather, it is derived from the general authority granted to the Secretary (and through delegation to the Under Secretary for Health and to health care providers) to provide "needed care" to veterans. Thus, during a disaster or an emergency, VA has flexibility and discretion in providing needed care.

Exemption of Certain International Persons from Quarantine or other Restrictions. There are certain legal bases pursuant to which Federal authorities could insist that certain people on an aircraft be released from quarantine (e.g., diplomats and their families are "inviolable" under the Vienna Convention on Diplomatic Relations; United Nations (UN) diplomats are "inviolable" under the UN General Convention on Privileges and Immunities and the HQ Agreement; diplomats attending UN conferences are "inviolable" under the General Convention; consular officers (not families) are potentially "inviolable" under Articles 40 and 41 of the Vienna Convention on Consular Relations; and heads of States are generally subject to immunity).

ENHANCE 911 Act of 2004. Pub. L. No. 108-494. This Act requires officials of the Department of Transportation and the Department of Commerce to establish a joint program to facilitate coordination and communication between Federal, State, and local communications systems, emergency personnel, public safety organizations, telecommunications carriers, and telecommunications equipment manufac-

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turers and vendors. The Act also requires those agencies to create an E-911 Implementation Coordination Office to implement that program. The Office will be housed at the Department of Transportation, National Highway Traffic Safety Administration (NHTSA) and is required to: develop, collect, and disseminate information concerning practices, procedures, and technology used in the implementation of E-911 services.

Other Authorities

The Defense Production Act, 50 U.S.C. p. §§ 2601-2171 (2002). Under the DPA, agencies can: (1) issue rated orders to manufacturers to give Government orders priority over all other orders, (2) issue rated orders to non-influenza countermeasure manufacturing facilities to manufacture influenza vaccine or antiviral medications, or (3) pursuant to DHS/FEMA regulations, and in consultation with Department of Justice (DOJ) and the Federal Trade Commission, convene industry and execute voluntary agreements as to how industry might meet the Government's vaccine and antiviral requirements.

Chapter 7 - Protecting Animal Health

The Animal Health Protection Act (AHPA) of 2002, 7 U.S.C. 8301 et seq. The AHPA enables the Secretary of Agriculture to prevent, detect, control, and eradicate diseases and pests of animals, such as avian influenza, in order to protect animal health, the health and welfare of people, economic interests of livestock and related industries, the environment, and interstate and foreign commerce in animals and other articles. The AHPA provides a broad range of authorities to use in the event of an outbreak of avian influenza in the United States and to prevent the introduction of such a disease into the United States. The Secretary is specifically authorized to carry out operations and measures to detect, control, or eradicate any pest or disease of livestock, which includes poultry, 7 U.S.C. 8308, and to promulgate regulations and issue orders to carry out the AHPA (see 7 U.S.C. 8315). The Secretary may also prohibit or restrict the importation, entry, or interstate movement of any animal, article, or means of conveyance to prevent the introduction into or dissemination within the United States of any pest or disease of livestock (7 U.S.C. 8303 8305). Section 421 of the Homeland Security Act, 6 U.S.C. 231, transferred to the Secretary of Homeland Security certain agricultural import and entry inspection functions under the AHPA, including the authority to enforce the prohibitions or restrictions imposed by USDA. Under certain specified circumstances, the Secretary of Agriculture may declare an extraordinary emergency to regulate intrastate activities or commerce (7 U.S.C. 8306). The Secretary also has authority to cooperate with other Federal agencies, States, or political subdivisions of States, national or local governments of foreign countries, domestic or international organizations or associations, Indian tribes, and other persons to prevent, detect, control, or eradicate avian influenza (7 U.S.C. 8310).

The Poultry Products Inspection Act (PPIA) of 1957, 21 U.S.C. 452. The PPIA provides for the inspection of poultry and poultry products and otherwise regulates the processing and distribution of such articles to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded. It is essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded poultry products impair the effective regulation of poultry products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged poultry products, and result in sundry losses to poultry producers and processors of poultry and poultry products, as well as injury to consumers. All articles and poultry which are regulated under the PPIA are either in interstate or foreign commerce or substantially affect

such commerce, and that regulation by the Secretary of Agriculture and cooperation by the States and other jurisdictions are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers. USDA statutory authorities to inspect and condemn animal carcasses and parts that may become adulterated or otherwise unfit may be relied upon for government action in appropriate situations.

The Virus-Serum-Toxin Act, 21 U.S.C. 151 et seq. The Secretary of Agriculture is authorized under this act to regulate veterinary biological products. These products generally act through a specific immune process and are intended for use in the treatment, including prevention, diagnosis, or cure, of diseases in animals. They include, but are not limited to, vaccines, bacterins, sera, antisera, antitoxins, toxoids, allergens, diagnostic antigens prepared from, derived from, or prepared with microorganisms, animal tissues, animal fluids, or other substances of natural or synthetic origin.

Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188, 116 Stat. 594 (2002). Title II of this act, "Enhancing Controls on Dangerous Biological Agents and Toxins" (sections 201-231), provides for the regulation of certain biological agents and toxins by HHS (subtitle A, sections 201-204) and USDA (subtitle B, sections 211-213, also known as the Agricultural Bioterrorism Protection Act of 2002). The Act also provides for interagency coordination between the two departments regarding certain agents and toxins that present a threat to both human and animal health. The regulations governing HHS's select agent program are found at part 73 of title 42 of the CFR; the regulations governing USDA's select agent program are found at part 331 of title 7 of the CFR (plants) and part 121 of title 9 of the CFR (animals). For HHS, the CDC is designated as the agency with primary responsibility for the select agent program. The Animal and Plant Health Inspection Service (APHIS) is the USDA agency fulfilling that role for the provisions applicable to animals and plants. These statutes and their implementing regulations require entities, such as private, State, and Federal research laboratories, universities, and vaccine companies, that possess, use, or transfer biological agents or toxins which are determined to pose a severe threat to public health and safety, to animal or plant health, or to animal or plant products register these agents with APHIS or CDC. USDA's select agent regulations may be applicable in the event of an outbreak of avian influenza, as HPAI is listed as select agent under USDA regulations. For example, the USDA regulations will govern the possession, use, or movement of an HPAI virus in connection with any research attendant to a response to the outbreak. At the same time, it should be noted that the Agricultural Bioterrorism Protection Act provides that the Secretary may grant exemptions from the applicability of provisions of the regulations, in the case of listed agents or toxins, if the Secretary determines that such exemptions are consistent with protecting animal and plant health, and animal and plant products.

Animal Damage Control Act of 1931, 46 Stat. 1468, codified as amended at 7 U.S.C. §§ 426-426b (2000), and the **Rural Development, Agriculture, and Related Agencies Appropriations Act of 1988,** Pub. L. No. 100-202, 101 Stat. 1329-133 (codified at 7 U.S.C. § 426c (2000). Under these acts, USDA has authority to cooperate with other Federal agencies, States, local jurisdictions, individuals, public and private agencies, organizations, and institutions while conducting a program involving animal species that are injurious and/or a nuisance to, among other things, agriculture, horticulture, forestry, animal husbandry, wildlife, and human health and safety, as well as conducting a program involving mammal and bird species that are reservoirs for zoonotic diseases.

The Fish and Wildlife Act (FWA) of 1956, 16 U.S.C. § 742a et seq. The FWA establishes a comprehensive national fish and wildlife policy and authorizes the Secretary of the Interior to take steps required for the development, management, conservation, and protection of fish and wildlife resources through research,

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land acquisition, facilities development, and other means. The FWA authorizes the Secretary to direct a program of continuing research, extension, and information services on fish and wildlife matters, both domestically and internationally.

The Migratory Bird Treaty Act (MBTA) of 1918, 16 U.S.C. §§ 703-712. The MBTA places with the Secretary of the Interior Federal responsibility for protection and management of migratory birds and implements four international treaties that affect migratory birds common to the United States, Canada, Mexico, Japan, and the former Soviet Union. The MBTA makes it unlawful to hunt, kill, capture, possess, or otherwise take migratory birds, including their feathers, other parts, nests, or eggs, except as allowed by the Secretary through permit or regulation.

The Fish and Wildlife Coordination Act of 1934, 16 U.S.C. 661-667e. This act authorizes the Secretary of the Interior to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the conservation of wildlife and in controlling losses of wildlife from disease and other causes. It also authorizes the Secretary to make surveys and investigations of wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States.

Commissioned Corps. Section 203 of the PHSA, 42 U.S.C. § 204, authorizes the Federal Government to mobilize officers of the United States Public Health Service Regular Commissioned Corps and the Reserve Commissioned Corps, including commissioned corps officers who are veterinarians, in times of emergencies. Under section 361 of the PHSA, 42 U.S.C. § 264, HHS may make and enforce regulations to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into States or possessions or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Secretary may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures as in his judgment may be necessary.

Chapter 8 - Law Enforcement, Public Safety, and Security

Protecting Federal Facilities and Property. DHS is charged with protecting the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government (including any agency, instrumentality, or wholly-owned or mixed-ownership corporation thereof) and the persons on the property (40 U.S.C. 1315). DHS may designate employees of the Department of Homeland Security, including employees transferred to the Department from the Office of the Federal Protective Service of the General Services Administration pursuant to the Homeland Security Act of 2002, as officers and agents for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property. While engaged in the performance of official duties, an officer or agent designated under this section may enforce Federal laws and regulations for the protection of persons and property, and carry out such other activities for the promotion of homeland security as the Secretary may prescribe.

Strategic National Stockpile. In accordance with Public Law 108-276 (Project BioShield Act of 2004) and Emergency Support Function #8 - Public Health and Medical Services (ESF #8), DHS will coordinate with HHS and DOJ in ensuring the adequate physical security of the stockpile. ESF #8 instructs DOJ to provide stockpile security and quarantine enforcement upon request of HHS.

Assistance to States in Maintaining Order

Emergency Federal Law Enforcement Assistance Act. Upon written request by a Governor, the Attorney General can coordinate and deploy emergency Federal law enforcement assistance to State and local law enforcement authorities (42 U.S.C. § 10501). Federal law enforcement agencies that are authorized to provide assistance to State and local government officials by enforcing State and local law should be duly deputized to do so under State and local statutes.

Robert T. Stafford Disaster Relief and Emergency Assistance Act. In disaster and emergency situations, this Act authorizes Federal agencies to assist in the provision of State and local public health measures, including by providing logistical or materials support to State and local law enforcement (42 U.S.C. §§ 5170, 5192-5193, 5195a). The Act also authorizes DHS/FEMA to "*procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate, or distribute* materials and facilities for emergency preparedness," (emphasis added). The term "materials" includes "raw materials, supplies, medicines, equipment, component parts, and technical information and processes necessary for emergency preparedness," (*id.* § 5195a(5)); the term "facilities" includes "buildings, shelters, utilities, and land," (*id.* § 5195(a)(6)). The term "emergency preparedness" includes measures to be undertaken in preparation for anticipated hazards, during a hazard, or following a hazard. An influenza pandemic would fit within the broad definition of "hazard" (see, *id.* § 5195a(a)(1), 5195a(a)(3)).

The Insurrection Act, 10 U.S.C. §§ 331-335. The President may, upon request of a State legislature, or the Governor when the legislature cannot be convened, send the Armed Forces as necessary to suppress an insurrection against State authority (*id.* at § 331). Ordinarily requests under this provision specify that the violence cannot be brought under control by State and local law enforcement agencies and the State National Guard troops. In addition, the President may use the Armed Forces or the federalized National Guard as he considers it necessary to suppress any insurrection, domestic violence, unlawful combination, or conspiracy if it (1) so hinders the execution of State and Federal law that people are deprived of their rights secured by the Constitution and laws, or (2) opposes or obstructs the execution of Federal law (*id.* at § 333). The President may also use the Armed Forces of the federalized National Guard to enforce Federal law (*id.* at 332). This statutory authority is an exception to the Posse Comitatus Act, 18 U.S.C. § 1385 (2002), authorizing the military to make arrests, conduct searches, and perform other traditional law enforcement functions.

Under the Insurrection Act, the President may use the National Guard (when called into Federal service), reserves (when called to active duty), and members of the Armed Forces to enforce Federal laws or to suppress the insurrection. DOD has an established protocol, the Commander, U.S. Joint Forces Command Civil Disturbance Plan ("Garden Plot"). Under this plan, the Attorney General is responsible for receiving and coordinating requests for military assistance. The military on-scene commander acts in coordination with the Senior Civilian Representative of the Attorney General, most likely the U.S. Attorney in the given area.

Military Support for Civilian Law Enforcement Agencies. The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the DOD to any Federal, State, or local civilian law enforcement official for law enforcement purposes (10 U.S.C. § 372(a)). Training and personnel to maintain and operate equipment may also be provided (10 U.S.C. §§ 373-4).

Enforcement of Quarantines

State and local Quarantines. State and local officials draw their authority to enforce State and local quarantines from State and local law. Under section 311 of the PHSA, 42 U.S.C. § 243(a), the Secretary of Health and Human Services is authorized to accept State and local authorities' assistance in the enforcement of Federal quarantine rules and regulations, and is required to assist State and local authorities in the enforcement of their quarantines and other health regulations.

The U.S. Coast Guard, and "military officers commanding in any fort or station upon the seacoast," as well as Customs officers, which may include Customs and Border Protection officers and Immigration and Customs Enforcement special agents, must, at the direction of the Secretary of Health and Human Services, aid in the execution of such State quarantines and other health laws "according to their respective powers and within their respective precincts" (42 U.S.C. § 97).

The President also could use the Insurrection Act (see above) and use the Armed Forces or federalized National Guard to help suppress violence arising out of a State quarantine, as for any other law enforcement activity permitted under the Insurrection Act, 10 U.S.C. §§ 331-335, provided the requirements for using the Act described above are met (e.g., if the President is asked by a State to assist and if the defiance to the State quarantine orders amounts to an insurrection against State authority that the State cannot handle (see 10 U.S.C. § 331), or there is widespread unlawful activity that has the effect of depriving people of rights secured by the Constitution and laws) (see 10 U.S.C. § 333).

Federal Quarantines. Customs officers, which may include Customs and Border Protection officers and Immigration and Customs Enforcement special agents, and the U.S. Coast Guard have specific authority and responsibility to assist with the enforcement of quarantines at ports of entry (42 U.S.C. § 268). With regard to other Federal law enforcement officers, the United States Marshals Service has the broadest of Federal law enforcement missions, 28 U.S.C. § 565; and, along with other Department of Justice agencies (FBI, DEA, ATF) can be directed by the Attorney General to enforce quarantines. The U.S. Marshals Service can also deputize other Federal law enforcement officers throughout the executive branch to give them law enforcement powers in circumstances that extend beyond those for which they are otherwise statutorily authorized to exercise them, as was done during Hurricane Katrina.

Under the Insurrection Act the President may direct the military to enforce quarantines, or conduct security functions such as guarding stockpiles and pharmaceuticals, when he finds it necessary to enforce Federal law (see 10 U.S.C. §§ 332-334), or other prerequisites for use of the Act described above are met.

Criminal Sanctions. The violation of Federal quarantine regulations is a crime punishable by a fine of not more $1,000 or by imprisonment for not more than 1 year, or both (42 U.S.C. § 271). Additionally, individuals may be fined up to $250,000 if a violation of the regulation results in death, or up to $100,000 if a violation of the regulation does not result in death (18 U.S.C. §§ 3559, 3571(c)).

Chapter 9 - Institutions: Protecting Personnel and Ensuring Continuity of Operations

The Occupational Safety and Health Act of 1970 authorizes the Secretary of Labor to promote the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; and establishing partnerships. The Occupational Safety and Health Administration has promulgated several standards to protect workers that would be particularly important in the event of a pandemic influenza outbreak. These standards include, but are not limited to: 29 CFR 1910.120 (Hazardous Waste Operations and Emergency Response), 29 CFR 1910.132 (Personal Protective Equipment), 29 CFR 1910.134 (Respiratory Protection), and 29 CFR 1910.1030 (Bloodborne Pathogens).


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PRESIDENT'S IDENTITY THEFT TASK FORCE
SUMMARY OF INTERIM RECOMMENDATIONS

PREVENTION

Improving Government Handling of Sensitive Personal Data

Recommendation 1: The Task Force recommends that the Office of Management and Budget (OMB) issue to all federal agencies the attached Task Force guidance that covers (a) the factors that should govern whether and how to give notice to affected individuals in the event of a government agency data breach that poses a risk of identity theft, and (b) the factors that should be considered in deciding whether to offer services such as free credit monitoring.

Recommendation 2: To ensure that government agencies improve their data security programs, the Task Force recommends that OMB and the Department of Homeland Security (DHS), through the interagency effort already underway to identify ways to strengthen the ability of all agencies to identify and defend against threats, correct vulnerabilities, and manage risks: (a) outline best practices in the areas of automated tools, training, processes, and standards that would enable agencies to improve their security and privacy programs, and (b) develop a list of the top 10 or 20 "mistakes" to avoid in order to protect government information.

Recommendation 3: To limit the unnecessary use in the public sector of Social Security numbers (SSNs), the most valuable consumer information for identity thieves, the Task Force recommends the following:

- The Office of Personnel Management (OPM), in conjunction with other agencies, should accelerate its review of the use of SSNs in its collection of human resource data from agencies and on OPM-issued papers and electronic forms, and take steps to eliminate, restrict, or conceal their use (including the assignment of employee identification numbers, where practicable).

- OPM should develop and issue policy guidance to the federal human capital management community on the appropriate and inappropriate use of an employee's SSN in employee records, including the proper way to restrict, conceal, or mask SSNs in employee records and human resource management information systems.

- OMB should require all federal agencies to review their use of SSNs to determine where such use can be eliminated, restricted, or concealed in agency business processes, systems, and paper and electronic forms.

Recommendation 4: To allow agencies to respond quickly to data breaches, including by sharing information about potentially affected individuals with other agencies and entities that can assist in the response, the Task Force recommends that all federal agencies, to the extent consistent with applicable law, publish a new "routine use" for their systems of records under the Privacy Act,

modeled after the attached "routine use" recently drafted by the Department of Justice, that would facilitate the disclosure of information in the course of responding to a breach of federal data.

Improved Authentication Methods

Recommendation 5: Because developing reliable methods of authenticating the identities of individuals would make it harder for identity thieves to access existing accounts and open new accounts using other individuals' information, the Task Force should hold a workshop or series of workshops, involving academics, industry, and entrepreneurs, focused on developing and promoting improved means of authenticating the identities of individuals.

VICTIM ASSISTANCE

Recommendation 6: To allow identity theft victims to recover for the value of time they spend in attempting to remediate the harms suffered, the Task Force recommends that Congress amend the criminal restitution statutes to allow for restitution from a criminal defendant to an identity theft victim, in an amount equal to the value of time reasonably spent by the victim attempting to remediate the intended or actual harm incurred from the identity theft offense.

LAW ENFORCEMENT

Recommendation 7: To ensure that victims can readily obtain the police reports that they need to take steps to prevent the misuse of their personal information by identity thieves, and to ensure that their complaint data is entered in a standardized format that will allow complaints to flow into a central complaint database and that thereby would assist law enforcement officers in responding to such complaints, the FTC, with support from the Task Force, will develop a universal police report, which an identity theft victim can complete, print, and take to any local law enforcement agency for verification and incorporation into the police department's report system.

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PRESIDENT'S IDENTITY THEFT TASK FORCE
INTERIM RECOMMENDATIONS

PREVENTION

Improving Government Handling of Sensitive Personal Data

1. Establishing a Data Breach Policy for the Public Sector

Identity theft and related harms are a consequence of sensitive information about consumers that criminals obtain through theft or other improper means. In many cases, providing notice to the affected individuals can help prevent or mitigate the harms to consumers. Notice permits consumers to take protective actions, while also allowing relevant private sector entities to assist the consumers. Appropriate notice can also enable law enforcement to investigate, punish, and deter crime. At the same time, however, unnecessary or excessive breach notification can overwhelm the public and impose undue burdens and costs on consumers, as well as on government agencies.

Several federal government agencies have suffered high-profile security breaches involving sensitive consumer data over the past several months. These and other agencies have faced difficult decisions about when and how to notify the public of such incidents, and whether the agencies should offer free credit monitoring or other services to those who may be affected. Federal agencies need guidance in how to make these important decisions.

Recommendation 1: The Task Force recommends that the Office of Management and Budget (OMB) issue the attached guidance memorandum, advising federal agencies on steps to take in the event of a compromise of data. The Task Force has developed and formally approved a set of guidelines, produced in Attachment A, that provides the factors that should be considered in deciding whether, how, and when to inform affected individuals of the loss of personal data that can contribute to identity theft, and whether to offer services such as free credit monitoring to the persons affected.

2. Improving Data Security in the Public Sector

The high-profile data breaches suffered by several federal agencies have focused attention on whether the government is doing enough to secure the massive amounts of data held by federal agencies as part of their core missions. The President's Management Agenda (PMA) Scorecard, OMB reports to Congress, Congress' annual security report card, Government Accountability Office reports, and many agency Inspector General (IG) reports show that agency performance in both information privacy and security is uneven. Common findings are that agencies would benefit from increased sharing of best practices, group purchases of automated tools and training courses, and development of a more effective common curriculum for training. OMB and the Department of Homeland Security (DHS) are already leading an interagency Information Systems Security Line of Business (ISS LOB) effort to explore ways to address these issues, including to identify and defend against threats, correct vulnerabilities, and manage risks. The ISS LOB can be a useful forum for

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developing best practices and a list of practices that should be avoided in order to protect government information.

Recommendation 2: To ensure that government agencies improve their data security programs, the Task Force recommends that OMB and DHS enhance the activities of the ISS LOB. Specifically, the Task Force recommends that the ISS LOB should (a) outline best practices in the area of automated tools, training, processes, and standards that would enable agencies to improve their security and privacy programs, and (b) develop a list of the top 10 or 20 "mistakes" to avoid in order to protect information held by the government.

3. Decreasing the Use of Social Security Numbers by the Public Sector

One way to reduce the incidence of identity theft is to make it more difficult for criminals to obtain consumer information. Currently, the most valuable consumer information identity thieves can find is the Social Security Number (SSN). SSNs are key to assuming another's identity because they are used to match consumers with their credit histories and many government benefits. Consequently, if federal agencies were to eliminate unnecessary uses of SSNs, they could reduce the opportunities for unauthorized use by identity thieves. The Office of Personnel Management (OPM), which issues or approves many of the federal forms and procedures using the SSN, and OMB, which oversees the management and administrative practices of federal agencies, can play pivotal roles in restricting the unnecessary use of SSNs, offering guidance on potential substitutes that would be of equal use to the agencies but of no use to identity thieves, and establishing greater consistency when the use of SSNs is unavoidable.

Recommendation 3: To limit the unnecessary use in the public sector of SSNs, the most valuable consumer information for identity thieves, the Task Force recommends the following:

Recommendation 3a: OPM should accelerate its review of the use of SSNs in its collection of human resource data from agencies and on OPM-based papers and electronic forms, and take steps to eliminate, restrict, or conceal their use (including the assignment of employee identification numbers, where practicable). If necessary to implement this recommendation, Executive Order 9397, effective 11/23/1943, which requires federal agencies to use SSNs in "any system of permanent account numbers pertaining to individuals," should be partially rescinded.

It should also be noted that steps are already being taken to facilitate implementation of this recommendation. This month, each OPM program office designated staff to review the use of SSNs in that office, and OPM is prepared to complete its inventory of forms, procedures, and systems that currently display SSNs by October 13, 2006. This new inventory will be the basis for OPM's actions to change, eliminate, or mask the use of SSNs on OPM approved/authorized forms.

Recommendation 3b: OPM should develop and issue policy guidance to the federal human capital management community on the appropriate and inappropriate use of an employee's SSN in

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employee records, including the appropriate way to restrict, conceal, or mask SSNs in employee records and human resource management information systems.

OPM already has begun work to implement this recommendation, such as by working to establish a unique employee identifier that can be used in human resource and payroll systems rather than SSNs. Pursuant to the Task Force's recommendation, OPM is also prepared in September 2006 to begin consulting with a working group of agencies to develop a new OPM policy regarding the use of a unique employee identifier and limitations on the use of SSNs. The policy would include instructions on when SSNs can be displayed, when SSNs must be masked in employee records, and when SSNs must be masked on human resource and payroll system computer screens. The policy could be drafted by November 1, 2006 and would be issued by May 2007, following internal coordination and comment by agencies. OPM would then be prepared to work with the various human resource and payroll systems to implement the changes required by any new policy, with a phased-in implementation expected to take up to 18 months to complete.

Recommendation 3c: OMB should require all federal agencies to review their use of SSNs to determine the circumstances under which such use can be eliminated, restricted, or concealed in agency business processes, systems, and paper and electronic forms, other than those authorized or approved by OPM.

Already, OMB has developed a survey instrument to be in a position to implement this recommendation, which OMB could issue to all agencies this year. To add to this effort, and to ensure consistency, the Task Force will identify factors that agencies should take into consideration in determining whether the use of the SSN is essential to the agency's mission and necessary to ensure program integrity or to maintain national security. The Task Force will also evaluate the availability of practical alternatives to use of the SSN.

4. Publication of a "Routine Use" for Disclosure of Information Following a Breach

A federal agency's ability to respond quickly and effectively in the event of a breach of sensitive personal data is critical to its efforts to prevent or minimize any consequent harms. An effective response may include disclosure of information regarding the breach to those individuals affected by it. Similarly, expeditiously notifying persons and entities in a position to cooperate (either by assisting in informing affected individuals or by actively preventing or minimizing harms from the breach) will help mitigate consequences of a breach. However, the very information that may be most necessary to disclose to such persons and entities will often be information maintained by federal agencies that is subject to the Privacy Act of 1974, 5 U.S.C. § 552a. Critically, the Privacy Act prohibits the disclosure of any record in a system of records, by any means of communication to any person or agency, unless the subject individual has given written consent or unless the disclosure falls within one of twelve statutory exceptions. See 5 U.S.C. §§ 552a(b)(1)-(12).

To address this issue, federal agencies could, in accordance with the Privacy Act exception set forth in subsection § 552a(b)(3), publish a "routine use" that specifically permits the disclosure of information in connection with response and remedial efforts in the event of a data breach. Such

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a "routine use" would serve to protect the interests of the people whose information is at risk by allowing agencies to take appropriate steps to facilitate a timely and effective response, thereby improving their ability to prevent, minimize, or remedy any harms that may result from a compromise of data maintained in their systems of records. For example, such a routine use would permit an agency that has lost data such as bank account numbers to quickly share that information with the appropriate financial institutions, which could assist in monitoring for bank fraud and in identifying the account holders, thereby facilitating the agency's ability promptly to notify the affected individuals. The Department of Justice recently drafted such a "routine use," which is reproduced in Attachment B, and which the Task Force offers as a model for other federal agencies to use in developing and publishing their own "routine uses" as soon as practicable.

Recommendation 4: To allow agencies to respond quickly to data breaches, including by sharing information about potentially affected individuals with other agencies and entities that can assist in the response, the Task Force recommends that all federal agencies, to the extent consistent with applicable law, publish a new "routine use" for their systems of records under the Privacy Act, modeled after the attached "routine use" recently drafted by the Department of Justice, that would facilitate the disclosure of information to other agencies, entities, and persons in the course of responding to a breach of federal data.[1]

Improved Authentication Methods

5. Developing Alternate Means of Authenticating Identities

In addition to its widespread use by government, the SSN is used throughout the private sector. In particular, the SSN often is used for the dual purposes of identification (to match individuals to records of their information) and authentication (to prove that individuals are who they say they are).[2] Two factors combine to heighten the risk of identity theft: the ready availability of SSNs to identity thieves as a result of their ubiquitous use, and the SSN's use as a sole or primary means of authenticating individuals to open new accounts or obtain other benefits.

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[1]The Task Force is aware that for a limited number of agencies, the publication of this routine use will not eliminate all barriers to information sharing. For example, some of the information maintained by the federal banking agencies is bank customer information from financial records. Federal agencies and departments are subject to the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq., which imposes additional requirements on any federal agency or department wishing to share financial records with another agency or department.

[2] Identification or verification is the process of determining the identity of an individual at the onset of the relationship between the individual and the verifying entity. Authentication is the process of ensuring that the individual is the same as the individual whose identity was initially verified. Thus, verification occurs once with respect to the verifying entity, but authentication can be recurrent, depending on the nature of the relationship between the individual and the authenticating entity.

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Both the private and public sectors have made strides in developing improved means of verification and authentication. For example, the Customer Identification Program already requires financial institutions regulated by the federal banking agencies and the SEC to develop and implement procedures for verifying customers' identities when opening new accounts. Technology also can substantially improve the authentication process by, for example, the use of biometrics to authenticate the consumer's identity, making it less likely that a criminal can gain access to another's account. However, many questions remain about emerging technologies, consumer acceptance, and system implementation.

One way to sharpen the focus on improving the means for authenticating the identities of individuals would be to hold public workshops that bring together academics, industry, and entrepreneurs who are developing better authentication systems. These experts can discuss the existing problem, examine the limitations of current processes of authentication, and probe viable solutions that will reduce identity fraud. As an initial step, the FTC and other Task Force member agencies are prepared to announce in the fall of 2006 that they will host such a workshop in the early part of 2007.

Recommendation 5: Because developing reliable methods of authenticating the identities of individuals would make it harder for identity thieves to open new accounts or access existing accounts using other individuals' information, the Task Force should hold a workshop or series of workshops, involving academics, industry, and entrepreneurs, focused on developing and promoting improved means of authenticating the identities of individuals.

VICTIM ASSISTANCE

6. Restitution for Identity Theft Victims

One reason that identity theft can be so destructive to its victims is the sheer amount of time and energy often required to remediate the consequences of the offense. This may be time spent clearing credit reports with credit-reporting agencies, disputing charges with individual creditors, or monitoring credit reports for additional impacts of the theft. The FTC estimated in 2003, based on the results of its Identity Theft Survey Report, that the average identity theft victim spends 30 hours resolving the problems created by identity theft. Those individuals who were victimized most seriously (from both the false opening of new accounts in their names *and* the unauthorized use of their validly-issued credit cards) spent an average of 60 hours resolving the problems. Overall, according to the survey, approximately 297 million hours were expended in one year by consumers attempting to resolve identity theft-related problems.[3]

[3] The FTC recently commissioned a new national survey. Although the analysis of the results has not yet been completed and there were some methodological differences from the 2003 survey, it appears that both the number of hours that individual victims spent in recovering from identity theft, and the aggregate hours across the population, have decreased. We note that, in the intervening years, Congress passed the Fair and Accurate Credit Transactions Act,

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While restitution is available for direct pecuniary costs of identity theft offenses, the federal restitution statutes, 18 U.S.C. § § 3663(b) and 3663A(b), do not provide for compensation for this time spent by consumers rectifying accounts and avoiding more harm. Moreover, courts have interpreted the restitution statutes in such a way that would likely preclude the recovery of such amounts from criminal defendants, absent explicit statutory authorization.

In order to better remediate the harm caused by identity theft, the Department of Justice has drafted amendments to the restitution statutes, reproduced in Attachment C, that would allow a victim to obtain restitution from a criminal defendant for the time reasonably spent trying to rectify the consequences of the offense. Under these proposed amendments, the district court judge would determine the amount of time reasonably spent and the value of the victim's time. The Department of Justice can propose that Congress adopt these amendments immediately.

Recommendation 6: The Task Force recommends that Congress amend the criminal restitution statutes, 18 U.S.C. §§ 3663(b) and 3663A(b), based on the attached proposal developed by the Department of Justice, to allow for restitution from a criminal defendant to an identity theft victim, in an amount equal to the value of time reasonably spent by the victim attempting to remediate the intended or actual harm incurred from the identity theft offense.

LAW ENFORCEMENT

7. Development of a Universal Police Report

Victims of identity theft often need police reports documenting the misuse of their information in order to recover fully from the effects of the crime. For example, identity theft victims can use a detailed police report as an "identity theft report" under the Fair and Accurate Credit Transactions Act to request that fraudulent information on their credit report be blocked, or to obtain a seven-year fraud alert on their credit file. Further, identity theft victims also must have a police report to obtain documents relating to fraudulent applications and transactions, and creditors may require a police report before establishing the victim's *bona fides* in challenging a fraudulent account or purchase. Filing a police report also makes it more likely that law enforcement will pursue an investigation of the identity theft.

Some victims report, however, that they are unable to get a police report. FTC complaint data show that during the last three years, about 25% of victims of new-account fraud who sought police reports were not able to obtain them, in part because of overtaxed local police departments and the time involved in preparing what often can be a highly detailed document. Simplifying the process of writing and receiving a police report would both relieve the burden on local law enforcement and allow victims to more easily repair the damage to their credit from the crime. A universal law enforcement report that the victim could complete online and take to the local police department would help achieve this goal. Additionally, the data from such standardized reports would be in a

granting consumers new rights and tools for remediating the consequences of identity theft.

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format that is used by the FTC's Identity Theft Data Clearinghouse, increasing the ability of law enforcement to effectively spot significant patterns of criminal activity.

At present, the FTC has an online complaint form that is used to enter data into its Identity Theft Data Clearinghouse, which is in turn made available to law enforcement nationwide through Consumer Sentinel. The FTC is also prepared to develop a revised online complaint form at www.ftc.gov/idtheft that victims can complete, print, and take to a local law enforcement agency for verification and incorporation into the police department's report system. The victim will then have a valid, detailed police report; the police department will have a record of the crime; and the victim's complaint information will have been entered into the FTC's Identity Theft Data Clearinghouse. The Public Sector Liaison Committee of the International Association of Chiefs of Police supports and has been involved in this effort.

Recommendation 7: To ensure that victims can readily file the police reports necessary to allow them to prevent the continued misuse of their personal information, and to assist law enforcement in analyzing significant patterns of criminal activity in investigating identity theft complaints, the FTC, with support from Task Force members, should develop a universal police report, which an identity theft victim can complete, print, and take to any local law enforcement agency for verification and incorporation into the police department's report system.

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ATTACHMENT A

MEMORANDUM FROM THE IDENTITY THEFT TASK FORCE

Chair, Attorney General Alberto R. Gonzales
Co-Chair, Federal Trade Commission Chairman Deborah Platt Majoras

SUBJECT: Identity Theft Related Data Security Breach Notification Guidance

The Identity Theft Task Force ("Task Force") has considered the steps that a Department or agency should take in responding to a theft, loss, or unauthorized acquisition of personal information that poses a risk of subsequent identity theft. This memorandum reports the Task Force's recommended approach to such situations, without addressing other notification issues that may arise under the Privacy Act or other federal statutes when the data loss involves sensitive information that does not pose an identity theft risk.

I. Background

Identity theft, a pernicious crime that harms consumers and our economy, occurs when individuals' identifying information is used without authorization in an attempt to commit fraud or other crimes.[1] There are two primary forms of identity theft. First, identity thieves can use financial account identifiers, such as credit card or bank account numbers, to commandeer an individual's existing accounts to make unauthorized charges or withdraw money. Second, thieves can use accepted identifiers like social security numbers ("SSNs") to open new financial accounts and incur charges and credit in an individual's name, but without that person's knowledge.

This memorandum describes three related recommendations: (1) Agencies should immediately identify a core response group that can be convened in the event of a breach; (2) If an incident occurs, the core response group should engage in a risk analysis to determine whether the incident poses problems related to identity theft; (3) If it is determined that an identity theft risk is present, the agency should tailor its response (which may include advice to those potentially affected, services the agency may provide to those affected, and public notice) to the nature and scope of the risk presented. The memorandum provides a menu of steps for an agency to consider, so that it may pursue such a risk-based, tailored response. Ultimately, the precise steps to take must be decided in light of the particular facts presented, as there is no single response for all breaches. This memorandum is intended simply to assist those confronting such issues in developing an appropriate response.

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[1]Federal laws define "identifying information" broadly. *See, e.g.,* The 1998 Identity Theft Assumption and Deterrence Act (Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. § 1028)) and the Fair and Accurate Credit Transactions Act (15 U.S.C. §§ 1681-1681x, as amended). This memorandum focuses on the type of identifying information generally used to commit identity theft.

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II. Data Breach Planning

Given the volume of personal information appropriately collected to carry out myriad government functions, it is almost inevitable that some agencies will, on occasion, lose control of such information. Thus, an important first step in responding to a breach is for agencies to engage in advance planning for this contingency. We therefore recommend that each agency identify in advance a core management group that will be convened upon the identification of a potential loss of personal information. This core group would initially evaluate the situation to help guide any further response. Our experience suggests that such a core group should include, at minimum, an agency's chief information officer, chief legal officer, chief privacy officer (or their designees), a senior management official from the agency, and the agency's inspector general (or equivalent or designee). Such a group should ensure that the agency has brought together many of the basic competencies needed to respond, including expertise in information technology, legal authorities, the Privacy Act, and law enforcement. We recommend that this core group convene at least annually to review this memorandum and discuss likely actions should an incident occur.

III. Identifying an Incident That Presents Identity Theft Risk and the Level of Risk Involved

A loss of control over personal information, may, but need not necessarily, present a risk of identity theft. For example, a data report showing the name "John Smith," with little or no further identifying information related to John Smith, presents little or no risk of identity theft. Thus, the first steps in considering whether there is a risk of identity theft, and hence whether an "identity theft response" is necessary, are understanding the kind of information most typically used to commit identity theft and then determining whether that kind of information has been potentially compromised in the incident being examined. Because circumstances will differ from case to case, agencies should draw upon law enforcement expertise, including that of the agency Inspector General, in assessing the risk of identity theft from a data compromise and the likelihood that the incident is the result of or could lead to criminal activity.

An SSN standing alone can generate identity theft. Combinations of information can have the same effect. With a name, address, or telephone number, identity theft becomes possible, for instance, with any of the following: (1) any government-issued identification number (such as a driver's license number if the thief cannot obtain the SSN); (2) a biometric record; (3) a financial account number, together with a PIN or security code, if a PIN or security code is necessary to access the account; or (4) any additional, specific factor that adds to the personally identifying profile of a specific individual, such as a relationship with a specific financial institution or membership in a club. For further purposes of this memorandum, information posing a risk of identity theft will be described as "covered information." If a particular data loss or breach does not involve this type of

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information, the identity theft risk is minimal, and it is unlikely that further steps designed to address identity theft risks are necessary.[2]

Even where covered information has been compromised, various other factors should be considered in determining whether the information accessed could result in identity theft. Our experience suggests that in determining the level of risk of identity theft, the agency should consider not simply the data that was compromised, but all of the circumstances of the data loss, including

- how easy or difficult it would be for an unauthorized person to access the covered information in light of the manner in which the covered information was protected;[3]
- the means by which the loss occurred, including whether the incident might be the result of a criminal act or is likely to result in criminal activity;[4]
- the ability of the agency to mitigate the identity theft;[5] and
- evidence that the compromised information is actually being used to commit identity theft.

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[2]OMB has promulgated guidance requiring certain notifications within the government, most notably to the United States Computer Emergency Readiness Team (US-CERT), whenever personal information is compromised, and which applies even where there is no identity theft risk. That reporting guidance remains in full effect.

[3]For example, information on a computer laptop that is adequately protected by encryption is less likely to be accessed, while "hard copies" of printed-out data are essentially unprotected.

[4]For example, as a general matter, the risk of identity theft is greater if the covered information was stolen by a thief who was targeting the data (such as a computer hacker) than if the information was inadvertently left unprotected in a public location, such as in a briefcase in a hotel lobby. Similarly, in some cases of theft, the circumstances might indicate that the data-storage device, such as a computer left in a car, rather than the information itself, was the target of the theft. An opportunistic criminal, of course, may exploit information once it comes into his possession, and this possibility must be considered when fashioning an agency response, along with the recognition that risks vary with the circumstances under which incidents occur. In making this assessment, it is crucial that federal law enforcement (which may include the agency's Inspector General) be consulted.

[5]The ability of an agency or other affected entities to monitor for and prevent attempts to misuse the covered information can be a factor in determining the risk of identity theft. For example, if the compromised information relates to disability beneficiaries, the agency can monitor its beneficiary database for requests for change of address, which may signal attempts to misuse the information, and take steps to prevent the fraud. Likewise, alerting financial institutions in cases of a data breach involving financial account information can allow them to monitor for fraud or close the compromised accounts.

Considering these factors together should permit the agency to develop an overall sense of where along the continuum of identity-theft risk the risk created by the particular incident falls. That assessment, in turn, should guide the agency's further actions.

IV. Reducing Risk After Disclosure

While assessing the level of risk in a given situation, the agency should simultaneously consider options for attenuating that risk. It is important in this regard for the agency to understand certain standard options available to agencies and individuals to help protect potential victims:

A. Actions that Individuals Can Routinely Take

The steps that individuals can take to protect themselves will depend on the type of information that is compromised. In notifying the potentially affected individuals about steps they can take following a data breach, agencies should focus on the steps that are relevant to those individuals' particular circumstances, which may include the following:

- Contact their financial institution to determine whether their account(s) should be closed. This option is relevant only when financial account information is part of the breach.
- Monitor their financial account statements and immediately report any suspicious or unusual activity to their financial institution.
- Request a free credit report at www.AnnualCreditReport.com or by calling 1-877-322-8228. It might take a few months for most signs of fraudulent accounts to appear on the credit report, and this option is most useful when the data breach involves information that can be used to open new accounts. Consumers are entitled by law to obtain one free credit report per year from each of the three major credit bureaus – Equifax, Experian, and TransUnion – for a total of three reports every year. The annual free credit report can be used by individuals, along with the free report provided when placing a fraud alert (which is discussed below), to self-monitor for identity theft. The annual report also can be used as an alternative for those individuals who want to check their credit report, but do not want to place a fraud alert. Contact information for the credit bureaus should be provided, which can be found on the FTC's website.
- Place an initial fraud alert[6] on credit reports maintained by the three major credit bureaus noted above. This option is most useful when the breach includes information that can be used to open a new account, such as SSNs. After placing an

[6]A fraud alert is a mechanism that signals to credit issuers who obtain credit reports on a consumer that they must take reasonable steps to verify the consumer's identity before issuing credit, making it harder for identity thieves to secure new credit lines. It should be noted that, although fraud alerts can help prevent fraudulent credit accounts from being opened in an individual's name, they also can delay that individual's own legitimate attempts to secure credit.

initial fraud alert, individuals are entitled to a free credit report, which they should obtain beginning a few months after the breach and review for signs of suspicious activity.

- For residents of states in which state law authorizes a credit freeze, consider placing a credit freeze on their credit file.[7] This option is most useful when the breach includes information that can be used to open a new account, such as SSNs. A credit freeze cuts off third party access to a consumer's credit report, thereby effectively preventing the issuance of new credit in the consumer's name.
- For deployed members of the military, consider placing an active duty alert on their credit file.[8] This option is most useful when the breach includes information that can be used to open a new account, such as SSNs. Such active duty alerts serve a similar function as initial fraud alerts, causing creditors to be more cautious in extending new credit. However, unlike initial fraud alerts, they last for one year instead of 90 days. In addition, active duty alerts do not entitle the individual to a free credit report. Therefore, those placing an active duty alert should combine this option with a request for obtaining the annual free credit reports to which all individuals are entitled.
- Review resources provided on the FTC identity theft website, www.ftc.gov/idtheft. The FTC maintains a variety of consumer publications providing comprehensive information on breaches and identity theft.
- Be aware that the public announcement of the breach could itself cause criminals engaged in fraud, under the guise of providing legitimate assistance, to use various techniques, including email or the telephone, to deceive individuals affected by the breach into disclosing their credit card numbers, bank account information, SSNs, passwords, or other sensitive personal information. One common such technique is "phishing," a scam involving an email that appears to come from a bank or other organization that asks the individual to verify account information, and then directs him to a fake website whose only purpose is to trick the victim into divulging his personal information. Advice on avoiding such frauds is available on the FTC's web site http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt166.htm.

B. Actions that Agencies Can Take

If the breach involves government-authorized credit cards, the agency should notify the issuing bank promptly. If the breach involves individuals' bank account numbers to be used for the direct deposit of credit card reimbursements, government employee salaries, or any benefit payment,

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[7]State laws vary with respect to usability and cost issues, which individuals will need to consider before deciding to place a credit freeze.

[8]A variety of factors may influence a service member's decision to place an active duty alert–for example, if there are stateside family members who need easy credit access, the alert would likely be counterproductive.

the agency should notify the bank or other entity that handles that particular transaction for the agency.

Agencies may take two other significant steps that can offer additional measures of protection – especially for incidents where the compromised information presents a risk of new accounts being opened – but which will involve additional agency expense. First, in recent years, some companies have developed technologies to analyze whether a particular data loss appears to be resulting in identity theft. This data breach analysis may be a useful intermediate protective action, especially where the agency is uncertain about whether the identity-theft risk warrants implementing more costly additional steps such as credit monitoring (see below) or where the risk is such that agencies wish to do more than rely on the individual action(s) identified above.

For two reasons, such technology may be useful for incidents involving data for large numbers of individuals. First, the cost of implementing credit monitoring (and the potential to have spent large sums unnecessarily if no identity theft materializes) can be substantial for large incidents because the cost of credit monitoring generally is a function of the number of individuals for whom credit monitoring is being provided. Second, subsequent to any large data breach that is reported publicly, it is likely that an agency will get reports of identity theft directly from individuals in the affected class. Yet, agencies should be aware that approximately 3.6% of the adult population reports itself annually as the victim of some form of identity theft. Thus, for any large breach, it is statistically predictable that a certain number of the potential victim class will be victims of identity theft through events *other than* the data security breach in question. Data-breach monitoring of the type described here can assist an agency in determining whether the particular incident it has suffered is truly a source of identity theft, or whether, instead, any such reports are the normal by-product of the routine incidence of identity theft.

Second, and typically at great expense, agencies may wish to provide credit-monitoring services. Credit monitoring is a commercial service that can assist individuals in early detection of instances of identity theft, thereby allowing them to take steps to minimize the harm (although credit monitoring cannot guarantee that identity theft will not occur). A credit-monitoring service typically notifies individuals of changes that appear in their credit report, such as creation of a new account or new inquiries to the file.[9]

In deciding whether to offer credit monitoring services and of what type and length, agencies should consider the seriousness of the risk of identity theft arising from the data breach. Particularly important are whether incidents have already been detected and the cost of providing the service. Such costs can be substantial, although rates are often subject to negotiation; bulk purchase discounts

[9]Various credit-monitoring services provide different features and their offerings are constantly evolving. Therefore, agencies may wish to consult with OMB or the FTC concerning the most current, available options.

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have been offered in many cases of large data breaches.[10] The length of time for which the service is provided may have an impact on cost as well. In addition, the agency should consider the characteristics of the affected individuals. Some affected populations may have more difficulty in taking the self-protective steps described earlier. For example, there may be groups who, because of their duties or their location, may warrant special protection from the distraction or effort of self-monitoring for identity theft.

Agencies should also be aware that, to assist the timely implementation of either data breach analysis or credit monitoring, the General Services Administration (GSA) is putting in place several government-wide contracting methods to provide these services if needed. Thus, an agency's contract officer, working with GSA, should be able promptly to secure such services and to develop cost estimates associated with such services.

Finally, it is important to note that notification to law enforcement is an important way for an agency to mitigate the risks faced by the potentially affected individuals. Because an agency data breach may be related to other breaches or other criminal activity, the agency's Inspector General should coordinate with appropriate federal law enforcement agencies to enable the government to look for potential links and to effectively investigate and punish criminal activity that may result from, or be connected to, the breach.

V. Implementing a Response Plan: Notice to Those Affected

Having identified the level of risk and bearing in mind the steps that can be taken by the agency or individual to limit that risk, the agency should then move to implement a response plan that incorporates elements of the above. Agencies should bear in mind that notice and the response it can generate from individuals is not "costless," a consideration that can be especially important where the risk of identity theft is low. The costs can include the financial expense and inconvenience that can arise from canceling credit cards, closing bank accounts, placing fraud alerts on credit files, and/or obtaining new identity documents. The private sector and other government agencies also incur costs in servicing these consumer actions. Moreover, frequent public notices of such incidents may be counterproductive, running the risk of injuring the public and, by making it more difficult to distinguish between serious and minor threats, causing citizens to ignore all notices, even of incidents that truly warrant heightened vigilance. Thus, weighing all the facts available, the risks to consumers caused by the data security breach warrant notice when notice would facilitate appropriate remedial action that is likely to be justified given the risk.

Assuming that an agency has made the decision to provide notice to those put at risk, agencies should incorporate the following elements into that notification process:

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[10]In some instances, monitoring services may even be provided at no cost. Agencies should check the GSA contract schedule.

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1. ***Timing***: The notice should be provided in a timely manner, but without compounding the harm from the initial incident through premature announcement based on incomplete facts or in a manner likely to make identity theft more likely to occur as a result of the announcement. While it is important to notify promptly those who may be affected so that they can take protective steps quickly, false alarms or inaccurate alarms are counterproductive. In addition, sometimes an investigation of the incident (such as a theft) can be impeded if information is made public prematurely. For example, an individual who has stolen a password-protected laptop in order to resell it may be completely unaware of the nature and value of the information the laptop contains. In such a case, public announcement may actually alert the thief to what he possesses, increasing risk that the information will be misused. Thus, officials should consult with those law enforcement officials investigating the incident (which could include the agency's Inspector General) regarding the timing and content of any announcement, before making any public disclosures about the incident. Indeed, even when the decision has been made to notify affected individuals, under certain circumstances, law enforcement may need a temporary delay before such notice is given to ensure that a criminal investigation can be conducted effectively or for national security reasons. Similarly, if the data breach resulted from a failure in a security or information system, that system should be repaired and tested before disclosing details related to the incident.[11]

2. ***Source***: Given the serious security and privacy concerns raised by data breaches, notification to individuals affected by the data loss should be issued by a responsible official of the agency, or, in those instances in which the breach involves a publicly known component of an agency, a responsible official of the component.

There may be some instances in which notice of a breach may appropriately come from an entity other than the actual agency that suffered the loss. For example, when the data security breach involves a federal contractor operating a system of records on behalf of the agency or a public-private partnership (for example, a federal agency/private-sector agreement to operate a program that requires the collection of covered information on members of the public), the responsibility for complying with these notification procedures should be established with the contractor or partner prior to entering the business relationship. Additionally, a federal agency that suffers a breach involving personal information may wish to determine, in conjunction with the regulated entity from which it obtained the information, whether notice is more appropriately given by the agency or by the regulated entity. Whenever possible, to avoid creating confusion and anxiety, the actual notice should come from the entity which the affected individuals are reasonably likely to perceive as the entity with which they have a relationship. In all instances, the agency is responsible for ensuring that its contractor or partner promptly notifies the agency of any data loss it suffers.

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[11] There may be other reasons related to law enforcement or national security that dictate that notice not be given to those who are affected. For example, if an agency suffers a breach of a database containing law enforcement sensitive data, immediate notification to potentially affected individuals may be inappropriate – even if the risk of identity theft resulting from that breach is significant – as such notification may result in the disclosure of law enforcement-sensitive or counter-terrorism data.

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3. ***Contents***: The substance of the notice should be reduced to a stand-alone document and written in clear, concise, and easy-to-understand language, capable of individual distribution and/or posting on the agency's website and other information sites. The notice should include the following elements:

- a brief description of what happened;
- to the extent possible, a description of the types of personal information that were involved in the data security breach (e.g., full name, SSN, date of birth, home address, account number, disability code, etc.);
- a brief description of what the agency is doing to investigate the breach, to mitigate losses, and to protect against any further breaches;
- contact procedures for those wishing to ask questions or learn additional information, including a toll-free telephone number, website, and/or postal address;
- steps individuals should take to protect themselves from the risk of identity theft (see above for the steps available), including steps to take advantage of any credit monitoring or other service the agency intends to offer and contact information for the FTC website, including specific publications.

Given the amount of information needed to give meaningful notice, an agency may want to consider providing the most important information up front, with the additional details in a Frequently Asked Questions (FAQ) format or on its website. If an agency has knowledge that the affected individuals are not English speaking, notice should also be provided in the appropriate language(s).

4. ***Method of Notification***: Notification should occur in a manner calibrated to ensure that the individuals affected receive actual notice of the incident and the steps they should take. First-class mail notification to the last known mailing address of the individual should be the primary means by which the agency provides notification. Even when an agency has reason to doubt the continued accuracy of such an address or lacks an address, mailed notice may still be effective. The United States Postal Service (USPS) will forward mail to a new address for up to one year, or will provide an updated address via established processes.[12] Moreover, certain agencies, such as the Social Security Administration and the Internal Revenue Service, may sometimes possess address information that can be used to facilitate effective mailing. The notice should be sent separately from any other mailing so that it stands out to the recipient. If using another agency to facilitate mailing as referenced above, agencies should take care that the agency that suffered the loss is identified as the sender, not the facilitating agency.

[12]Agencies may receive updated addresses as a mailer by becoming a direct licensee of the Postal Service or by using a USPS licensed NCOA Link service provider. A current list of service providers is available at http://ribbs.usps.gov/files/ncoalink/CERTIFIED%5FLICENSEES/. For information on address-update and delivery-validation services, contact the USPS at 1-800-589-5766.

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Substitute means of notice such as broad public announcement through the media, website announcements, and distribution to public service and other membership organizations likely to have access to the affected individual class, should be employed to supplement direct mail notification or if the agency cannot obtain a valid mailing address. Email notification is discouraged, as the affected individuals could encounter difficulties in distinguishing the agency's email from a "phishing" email.

The agency also should give special consideration in providing notice to individuals who are visually or hearing impaired consistent with Section 504 of the Rehabilitation Act of 1973. Accommodations may include establishing a Telecommunications Device for the Deaf (TDD) or posting a large-type notice on the agency's web site.

5. ***Preparing for follow-on inquiries***: Those notified can experience considerable frustration if, in the wake of an initial public announcement, they are unable to find sources of additional accurate information. Agencies should be aware that the GSA has a stand-by capability through its "USA Services" operation to quickly put in place a 1-800-FedInfo call center staffed by trained personnel and capable of handling individual inquiries for circumstances in which the number of inquiries is likely to exceed the agency's native capacity. Thus, agencies may wish to consider briefly delaying a public announcement to allow them to implement a consolidated announcement strategy, as opposed to a hasty public announcement without any detailed guidance on steps to take. Such a strategy will permit public statements, website postings, and a call center staffed with individuals prepared to answer the most frequently asked questions all to be made simultaneously available.

6. ***Prepare counterpart entities that may receive a surge in inquiries***: Depending on the nature of the incident, certain entities, such as the credit-reporting agencies or the FTC, may experience a surge in inquiries also. For example, in incidents involving a substantial number of SSNs (e.g., more than 10,000), notifying the three major credit bureaus allows them to prepare to respond to requests from the affected individuals for fraud alerts and/or their credit reports. Thus, especially for large incidents, an agency should inform the credit bureaus and the FTC of the timing and distribution of any notices, as well as the number of affected individuals, in order to prepare.

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ATTACHMENT B

Proposed Routine Use Language

Subsection (b)(3) of the Privacy Act provides that information from an agency's system of records may be disclosed without a subject individual's consent if the disclosure is "for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section." 5 U.S.C. § 552a(b)(3). Subsection (a)(7) of the Act states that "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7). A routine use to provide for disclosure in connection with response and remedial efforts in the event of a breach of federal data would certainly qualify as such a necessary and proper use of information – a use that is in the best interest of both the individual and the public.

Subsection (e)(4)(D) of the Privacy Act requires that agencies publish notification in the Federal Register of "each routine use of the records contained in the system, including the categories of users and the purpose of such use." 5 U.S.C. § 552a(e)(4)(D). The Department of Justice has developed the following routine use that it plans to apply to its Privacy Act systems of records, and which allows for disclosure to appropriate agencies, entities, and persons under the following circumstances:[13]

> when (1) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (3) the disclosure is made to such agencies, entities, and persons who are reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

Agencies should already have a published system of records notice for each of their Privacy Act systems of records. To add a new routine use to an agency's existing systems of records, an agency must simply publish a notice in the Federal Register amending its existing systems of records to include the new routine use.

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[13] As this Task Force has been charged with considering the federal response to identity theft, this routine use notice does not include all possible triggers, particularly those associated with the Privacy Act, such as embarrassment or harm to reputation. However, after consideration of the Strategic Plan and the work of other groups charged with assessing Privacy Act considerations, OMB may determine that a combined identity theft/Privacy Act routine use may be preferable.

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Subsection (e)(11) of the Privacy Act requires that agencies publish a Federal Register notice of any new routine use at least 30 days prior to its use and "provide an opportunity for interested persons to submit written data, views, or arguments to the agency." 5 U.S.C. § 552a(e)(11). Additionally, subsection (r) of the Act requires that an agency provide Congress and OMB with "adequate advance notice" of any proposal to make a "significant change in a system of records." 5 U.S.C. § 552a(r). OMB has stated that the addition of a routine use qualifies as a significant change that must be reported to Congress and OMB and that such notice is to be provided at least 40 days prior to the alteration. See Appendix I to OMB Circular No. A-130 – Federal Agency Responsibilities for Maintaining Records About Individuals, 61 Fed. Reg. 6435, 6437 (Feb. 20, 1996). Once a notice is prepared for publication, the agency would send it to the Federal Register, OMB, and Congress, usually simultaneously, and the proposed change to the system (i.e., the new routine use) would become effective 40 days thereafter. See id. at 6438 (regarding timing of systems of records reports and noting that notice and comment period for routine uses and period for OMB and congressional review may run concurrently). Recognizing that each agency likely will receive different types of comments in response to its notice, the Task Force recommends that OMB work to ensure accuracy and consistency across the range of agency responses to public comments.

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ATTACHMENT C

Text of Amendments to 18 U.S.C. §§ 3663(b) and 3663A(b)

(a) Section 3663 of Title 18, United States Code, is amended by:

(1) Deleting "and" at the end of paragraph (4) of subsection (b);

(2) Deleting the period at the end of paragraph (5) of subsection (b) and inserting in lieu thereof "; and"; and

(3) Adding the following after paragraph (5) of subsection (b):

> "(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the victim's time reasonably spent in an attempt to remediate intended or actual harm incurred from the offense.".

Make conforming changes to the following:

(b) Section 3663A of Title 18, United States Code, is amended by:

(1) Adding the following after Section 3663A(b)(4)

> "(5) in the case of an offense under this title, section 1028(a)(7) or 1028A(a), pay an amount equal to the value of the victim's time reasonably spent in an attempt to remediate intended or actual harm incurred from the offense.".

PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY



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PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY

JUNE 2006

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Preface



Attorney General Alberto R. Gonzales with the 2004 Report of the Department of Justice's Task Force on Intellectual Property. The Attorney General charged the Task Force with fully implementing all of the recommendations contained in the 2004 Report. Photo by Monica Goodling.

Intellectual property theft is a rising threat against our Nation's economic security. In response to this rising threat, on March 31, 2004, then-Attorney General John Ashcroft established the Department of Justice's Task Force on Intellectual Property (the "Task Force"). The Attorney General directed the Task Force to examine all of the Department of Justice's intellectual property enforcement efforts and to explore ways for the Department of Justice to increase its protection of valuable intellectual property resources. The Attorney General formed a team of legal experts with a diverse range of experience and expertise to examine this important area of the law.

The Task Force undertook this effort and, after a comprehensive examination, issued the Report of the Department of Justice's Task Force on Intellectual Property (the "2004 Report") in October 2004 with extensive recommendations for the Department of Justice's intellectual property enforcement, protection, and education programs. The Task Force analyzed existing resources and proposed significant improvements in the following areas: Criminal Enforcement; International Cooperation; Civil Enforcement; Antitrust Enforcement; Legislation; and Prevention. The 2004 Report contained numerous short- and long-term recommendations in these areas, designed to provide a sustained commitment to protecting intellectual property rights.

In February 2005, Attorney General Alberto R. Gonzales renewed the Department of Justice's commitment to protecting intellectual property rights. He appointed new members to the Task Force and directed the Task Force to fully implement the recommendations in the 2004 Report. Since that time, the Task Force and its Executive Staff have worked diligently to meet the Attorney General's challenge and implement all of the 2004 Report's recommendations. The Task Force now submits to the Attorney General this Progress Report on the status of each recommendation and on the Department of Justice's accomplishments in protecting intellectual property rights.

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Message from the Chairman

"Theft of intellectual property threatens America's economic prosperity and the health, safety, and security of its citizens."

- D. Kyle Sampson, Chairman, Intellectual Property Task Force



Intellectual Property Task Force Chairman, D. Kyle Sampson

Intellectual property is America's competitive advantage in the global economy of the 21st century. From music and movies to pharmaceuticals and software, intellectual property touches every aspect of our lives. Theft of intellectual property threatens America's economic prosperity and the health, safety, and security of its citizens. Accordingly, the Bush Administration has launched the most aggressive, ambitious, and far-reaching law enforcement effort ever taken against intellectual property crimes and related civil misconduct.

This Progress Report of the Department of Justice's Task Force on Intellectual Property sets forth the significant accomplishments of the Department of Justice in this unprecedented law enforcement effort. The accomplishments were made possible by the support of President Bush and Attorney General Gonzales, both of whom recognize the importance of intellectual property and have committed new resources to its protection. And these achievements are also the result of the dedicated efforts of career investigators, civil enforcers, and criminal prosecutors who combat misappropriation and intellectual property offenses every day.

I express thanks to the members and executive staff of the Task Force, as well as to the other contributors, for their work in preparing this Progress Report. They are leading the charge to protect intellectual property and keep our Nation safe and prosperous.

D. Kyle Sampson
Chairman

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I. Introduction

Counterfeit products and the theft of intellectual property have real-world consequences. Not only is intellectual property theft a threat to our economy, but it also can be a serious threat to our health and safety. Counterfeit batteries can explode, counterfeit car parts can fail to perform, and counterfeit pharmaceuticals can lack the ingredients necessary to cure deadly diseases.

The Department of Justice takes the problem of intellectual property theft very seriously. The Attorney General has made protecting and enforcing intellectual property rights one of the Department of Justice's highest priorities, and implementing the recommendations in the 2004 Report has been an urgent mission. (A listing of all of the recommendations can be found in *Appendix A*). The Department of Justice is proud to announce that it has implemented all of the recommendations contained in the 2004 Report, including:

- Increasing the number of prosecutors in the field by creating five additional Computer Hacking and Intellectual Property ("CHIP") Units in:
    - the District of Columbia
    - Nashville, Tennessee
    - Orlando, Florida
    - Pittsburgh, Pennsylvania
    - Sacramento, California
- Deploying an experienced federal prosecutor as an Intellectual Property Law Enforcement Coordinator ("IPLEC") to southeast Asia and obtaining funding for an IPLEC in Eastern Europe to handle regional efforts to enforce and protect intellectual property;
- Dismantling international criminal organizations that commit intellectual property offenses;
- Expanding international training and technical assistance efforts;
- Increasing the number of extradition and mutual legal assistance treaties that include intellectual property offenses;
- Prosecuting intellectual property cases involving a threat to public health and safety;
- Carefully monitoring and vigorously protecting the right of victims to pursue intellectual property cases in civil courts;
- Organizing victims' conferences on intellectual property awareness; and
- Creating innovative intellectual property educational programs for America's youth.

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The Department of Justice did not stop at simply implementing the recommendations of the Task Force. Instead, the Department of Justice went well beyond the recommendations by taking these additional steps:

- Creating seven additional CHIP Units in:
  - Austin, Texas
  - Baltimore, Maryland
  - Denver, Colorado
  - Detroit, Michigan
  - Newark, New Jersey
  - New Haven, Connecticut
  - Philadelphia, Pennsylvania
- Increasing the number of defendants prosecuted for intellectual property offenses by 98 percent;
- Transmitting to Congress the President's Intellectual Property Protection Act of 2005;
- Providing training and technical assistance to over 2,000 foreign prosecutors, investigators, and judges regarding intellectual property investigations and prosecutions;
- Working with the United States Trade Representative to improve language regarding intellectual property protections in Free Trade Agreements and other international treaties;
- Publishing a nearly 400-page comprehensive resource manual on prosecuting intellectual property crimes;
- Filing 13 *amicus*, or "friend of the court," briefs in the Supreme Court in cases involving intellectual property disputes; and
- Partnering with the United States Patent & Trademark Office to dedicate $900,000 over three years for piracy prevention efforts with non-profit educational institutions.

As can be seen from these achievements, the Department of Justice has made intellectual property enforcement and protection a high priority. The following Progress Report chronicles these achievements and important goals.



Attorney General Alberto R. Gonzales at the United States Capitol in Washington, DC. Photo by Craig Crawford.

"[W]e recognize our responsibility to vigorously enforce IP laws–and develop a culture of respect for IP rights–in order to harness America's creative energy and ingenuity for the future of our economy."

- Attorney General Alberto R. Gonzales, March 22, 2006

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II. What is Intellectual Property?

America is built upon human innovation and creativity. People, inspired by artistic visions or new ideas, create movies for us to watch, music for us to hear, and books for us to read. Inventors and creators develop products that improve our lives. Whether they produce music, design fashion, or develop chemical compounds, inventors and creators contribute their intellect and ideas for our Nation's benefit.

Just as the law grants ownership rights over our material possessions, such as a home or an automobile, it also grants individuals ownership rights over intangible property, such as an idea or an invention. When a person creates something novel and unique, our laws recognize its value and grant the creator the respect and integrity of ownership.

The Constitution itself recognizes that intellectual property protection is an important factor in fostering innovation and creativity. Article I, Section 8 states that Congress shall have the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. Const. Art. I, § 8. Reflecting the diversity of intellectual property, there are distinct areas of the law that protect it: copyrights; trademarks, service marks, and certification marks; trade secrets; and patents.

Copyrights

Books, music, movies, artwork, and plays, among other creative works, can all be protected by copyrights. With certain exceptions, the owner of a copyright holds exclusive control over various rights associated with his or her works, such as the rights to reproduce, publicly distribute, publicly display, publicly perform, rent, record, or adapt the work. The protection lasts for a limited period of time, usually 70 years after the author's death.

Copyrights protect any creative work that is original and tangibly expressed. Although the physical expression of an idea is protected, the actual idea is not. Thus, facts presented in a work are freely available to the public, so long as the exact manner of expression is not copied. This allows society to benefit from the accessibility of facts and ideas themselves, while still protecting the original creative works that present those facts and ideas.

Copyright protection applies as soon as the work is expressed in a concrete form, without any need for the creator to apply for a copyright. A copyright owner, however, can register the work with the United States Copyright Office to create a public record of the creation.

Trademarks, Service Marks, and Certification Marks

In addition to protecting creative works, intellectual property law protects trademarks, service marks, and certification marks. A trademark is any trait used to identify and distinguish a product or its producer. A serv-

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ice mark is any trait used to identify and distinguish a service. For example, McDonald's golden arches design is a commonly recognized service mark and the Nike "swoosh" is a well-known trademark; both immediately identify the companies they represent. A certification mark is a mark used to certify regional or other origin, material, mode of manufacturer, quality, accuracy or other characteristics of goods or services. An example of a certification mark includes Underwriters Laboratories' "UL" mark, which certifies the safety standards of electrical equipment.

Trademarks and service marks convey the integrity and uniqueness of a product or service by allowing a consumer to distinguish one product or service from another. The mark may be part of the item or its packaging, and may include a distinctive symbol, word, name, sign, shape, or color. Even sounds and smells may be part of a mark. Generic terms like "soap," however, do not qualify as marks.



Manufacturers that have developed a good brand image and a reputation of high quality should be able to rely on their marks to prevent others from capitalizing on their success, and to ensure that customers can easily identify and purchase their products or services. Trademarks and service marks, therefore, contribute to fair competition in the marketplace. Consumers, in turn, rely on trademarks and service marks to differentiate between products and services, and select those associated with reputations they trust.

Registering a mark with the United States Patent and Trademark Office ("USPTO") confers important advantages on the mark owner. For example, the owner can obtain the exclusive right to use the mark in the United States and can exclude others from using the mark, or a comparable mark, in a way that would confuse consumers. Marks also are protected by anti-dilution laws, which ensure that a famous mark's distinctiveness cannot be blurred by the commercial actions of others, even if those actions fall just short of causing confusion. Federal trademark and service mark registration is necessary for federal criminal prosecutions for trafficking in counterfeit goods or services.

In order to register a trademark with the USPTO, the applicant must demonstrate that (1) the mark is distinctive, and (2) the mark will be used, or is intended for use, in interstate or foreign commerce. A trademark, service mark, or certification mark generally does not expire as long as it continues to be used.

Trade Secrets

A trade secret is any confidential information used by a business that has some independent economic value and that is kept secret by those who possess it. The recipes for Coca-Cola and Pepsi, for example, are protected trade secrets. Trade secrets include scientific, technological, or business information, such as marketing strategies, and even information on "what-not-to-do," such as failed or defective inventions. When the once-secret information is obtained through legitimate means, however, it can be freely used. For example, trade secret protection does not prevent a scientist who reverse-engineers a product and discovers how it is assembled from legally using that information to re-create the product. Furthermore, trade secret protection

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applies only while secrecy is maintained. After the trade secret is publicly disclosed, it loses its legal protection against future disclosure.

Patents

The final major category of protected intellectual property is patents. From the composition of a new drug to the latest time-saving gadget, patents protect the world of inventions. They provide an exclusive right to the fruits of an invention for 20 years from the date the patent application is filed. In return, the patent applicant must agree to publicly disclose the basis for the invention, so that other members of the public may use the information freely to develop new products or ideas. The patent statutes do not necessarily permit all inventions to be patented; for instance, a patent will not be awarded for discoveries that are not novel or that are obvious. Laws of nature and natural phenomena, such as gravity and acceleration, also are not eligible for patent protection because they are not human creations. The United States has numerous international agreements with foreign countries to protect patents and, although there are no federal criminal laws prohibiting the infringement of patents, federal civil laws allow owners of patents to file lawsuits in United States courts.

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III. What Laws Protect Intellectual Property?

Since Congress enacted the first criminal law protecting copyright in 1897, the federal government's role in enforcing intellectual property rights has evolved to reflect the changing technologies and media of expression and distribution. The Internet and other technologies have revolutionized the ability to misappropriate information and have made intellectual property infringement a global problem affecting all nations.

At the same time as intellectual property has become increasingly more critical for the economic security of the United States, misappropriating intellectual property has become easier. Unfortunately, the consequences have become more devastating: people are deceived, property is stolen, and businesses are harmed. Federal laws that criminalize violations of intellectual property rights, just like other criminal laws that aim to protect property, deter fraud, and encourage market stability, are important to the safety and prosperity of America and its citizens.

As noted above, federal law protects four categories of intellectual property: copyrighted works; trademarks, service marks, and certification marks; trade secrets; and patents. A summary of the federal laws protecting these types of intellectual property follows.

Protection of Copyrighted Works

Federal criminal copyright law protects against the unauthorized use of copyrighted works. Prohibited uses include the unauthorized copying and distribution of copyrighted works, such as books, films, musical compositions, sound recordings, software programs, and artistic works. A business that willfully makes and sells unauthorized copies of copyrighted motion pictures, for example, is committing a federal crime.

Many copyrighted works contain technology intended to hinder the copying of the work by persons not authorized to do so. Federal criminal copyright law prohibits willfully creating or selling technology to circumvent such protections. Disabling embedded codes that protect computer software from unauthorized copying, for example, may violate federal law. In certain circumstances, it is also a violation of federal criminal law to willfully distribute goods or services, for commercial purposes, that disable those defenses.

Federal law provides additional protection for copyrighted works that falls outside criminal copyright law. For example, trafficking in counterfeit labels that are, or are designed to be, attached to copyrighted works is prohibited. Additionally, copyright owners may sue copyright infringers under federal copyright law.

"Our effort to combat the growing trend of high-tech crimes includes a robust enforcement of the laws protecting intellectual property."

- Attorney General Alberto R. Gonzales, March 22, 2006

Protection of Trademarks, Service Marks, and Certification Marks

Federal criminal law protects trademarks, service marks, and certification marks against infringement. For instance, it is a federal crime to knowingly traffic in goods or services that bear a counterfeit mark if the actual mark has been properly registered. This law protects not only mark owners, but also consumers, who

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might otherwise be led to pay a premium for goods or services they think are from a reputable mark owner only to receive imitations of lesser quality. Some counterfeit goods can create serious risks to consumer health and safety, such as counterfeit pharmaceuticals that have a chemical composition or purity different than the genuine drug. In addition, an electrical cord bearing a counterfeit UL certification mark may be substandard and catch fire.

Mark owners may also bring private lawsuits under federal law for infringement, even if the Department of Justice does not file criminal charges.

Protection of Trade Secrets

Federal criminal laws also protect trade secrets. It is thus a federal crime to misappropriate intentionally a trade secret for the purpose of benefitting a foreign government or for economic gain. For example, federal law may prohibit an employee of a soft drink company from providing to a competitor the secret recipe for his employer's product. Likewise, an engineer might commit a federal offense if he were to provide his company's confidential research results to a competitor or foreign power.

Patents

Federal law protects patents by providing for their exclusive registration by the USPTO and by providing patent owners with a civil cause of action to enjoin future infringement and to recover damages for past infringement. Federal law also provides for the plaintiff in a patent case to recover three times the damages suffered for past infringement in some circumstances.

A developer of intellectual property often has a choice of whether to protect an invention by patenting it or by deeming it a trade secret. Each of these forms of intellectual property has advantages and disadvantages. For instance, although patents convey a range of benefits, patents require that the applicant disclose to the public the elements of the patented invention, and a patent lasts for only 20 years. By contrast, a trade secret, by definition, is not disclosed and may last indefinitely. In addition, while stealing a trade secret may violate federal criminal statutes, there are no criminal laws regarding patent infringement.

Other Laws

Various other laws protect intellectual property in particular situations. For instance, federal criminal law prohibits knowingly recording live musical performances and copying and distributing those recordings for profit. In addition, it is a federal offense to willfully infringe a copyright by distributing without authorization, over publicly-available computer networks, certain copyrighted works–including movies, software, and music–before their release date. Federal laws can also be violated when devices are manufactured or distributed that permit the interception of cable or satellite television signals or the descrambling of satellite television signals. Moreover, several international agreements exist to coordinate copyright and other intellectual property protections.

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FEDERAL CRIMINAL LAWS PROTECTING INTELLECTUAL PROPERTY

Copyright

17 U.S.C. § 506(a)(1)(A) [(formerly § 506(a)(1))] & 18 U.S.C. § 2319(b)

Copyright Infringement for Profit (Felony)

Statutory maximum penalty of 5 years in prison and a $250,000 fine or twice the gain/loss for an individual first-time offender (10 years for second offense); $500,000 fine or twice the gain/loss for a corporate offender. Civil and criminal forfeiture available.

17 U.S.C. § 506(a)(1)(B) [(formerly § 506(a)(2))] & 18 U.S.C. § 2319(c)

Large-Scale Copyright Infringement Without Profit Motive (Felony)

Statutory maximum penalty of 3 years in prison and $250,000 fine or twice the gain/loss for an individual first-time offender (6 years for second offense); $500,000 fine or twice gain/loss for corporate offender. Civil and criminal forfeiture available.

17 U.S.C. § 506(a)(1)(C) & 18 U.S.C. § 2319(d)

Distribution of Pre-Release Copyrighted Works or Material over Publicly-Accessible Computer Network

If infringement is effected for commercial purpose: Statutory maximum penalty of 5 years in prison and a $250,000 fine or twice the gross gain/loss for an individual first-time offender (10 years for second offense); $500,000 fine or twice the gain/loss for a corporate offender. Civil and criminal forfeiture available.

If infringement is not effected for commercial purpose: Statutory maximum penalty of 3 years in prison and $250,000 fine or twice the gain/loss for an individual first-time offender (6 years for second offense); $500,000 fine or twice the gain/loss for a corporate offender. Civil and criminal forfeiture available.

17 U.S.C. § 1204

Technology to Circumvent Anti-Piracy Protections Digital Millennium Copyright Act ("DMCA")

Statutory maximum penalty of 5 years in prison and a $500,000 fine or twice the gain/loss for an individual and corporate first-time offender. Statutory maximum penalty of 10 years in prison for a second offense and a $1 million dollars fine or twice the gain/loss. No forfeiture available.

18 U.S.C. § 2318

Counterfeit/Illicit Labels and Counterfeit Documentation and Packaging for Copyrighted Works

Statutory maximum penalty of 5 years in prison and a $250,000 fine or twice the gross gain/loss for an individual; $500,000 fine or twice the gain/loss for a corporate offender. Criminal and civil forfeiture available.

18 U.S.C. § 2319A

Bootleg Recordings of Live Musical Performances

Statutory maximum penalty of 5 years in prison and a $250,000 fine or twice the gain/loss for an individual first-time offender (10 years for second offense); $500,000 or twice the gain/loss for a corporate offender. Civil and criminal forfeiture available.

18 U.S.C. § 2319B

Camcording

Statutory maximum penalty of 3 years in prison and $250,000 fine or twice the gain/loss for an individual first-time offender (6 years for second offense); $500,000 fine or twice the gain/loss for a corporate offender. Criminal forfeiture available.

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FEDERAL CRIMINAL LAWS PROTECTING INTELLECTUAL PROPERTY cont.

Trademarks, Service Marks, and Certification Marks

18 U.S.C. § 2320

Counterfeit Trademarks, Service Marks, and Certification Marks

Statutory maximum penalty of 10 years in prison and a $2 million fine or twice the gain/loss for an individual first-time offender; $5 million fine or twice the gain/loss for corporate offender. For second-time offenders statutory maximum penalty of 20 years in prison and a $5 million fine or twice the gain/loss for an individual; $15 million fine or twice the gain/loss for corporate offender. Civil and criminal forfeiture available.

Trade Secrets

18 U.S.C. § 1831

Economic Espionage to Benefit a Foreign Government

Statutory maximum of 15 years in prison and a $500,000 fine or twice the gain/loss for an individual offender, $10 million fine or twice the gain/loss for a corporate offender. Criminal forfeiture is available.

18 U.S.C. § 1832

Commercial Theft of Trade Secrets

Statutory maximum penalty of 10 years in prison and a $250,000 fine or twice the gain/loss for an individual first-time offender (10 years for second offense); $5 million fine or twice the gain/loss for a corporate offender. Criminal forfeiture available.

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IV. Why is Protecting Intellectual Property Rights Important?

In our 21st century economy, intellectual property is one of the most valuable forms of property that exists. Whether it is the copyright of a blockbuster film, a patent on a breakthrough drug, a trade secret relating to an innovative product, or a trademark on one of the world's most valuable brands, intellectual property is a significant source of the growth of the American economy and a key driver of global economic activity. As America and more countries around the world move from an industrial to an information-based economy, the importance of protecting intellectual property will only continue to increase.

"[T]he strength of the American economy is dependent on the creative and entrepreneurial spirit of our citizens. At the heart of that spirit is the dedicated protection of intellectual property – and the innovations, jobs, and productivity that flow from it."

- Attorney General Alberto R. Gonzales, March 22, 2006

The negative effects of Intellectual property theft make clear the need to protect intellectual property. First, to the extent that piracy diminishes incentives to create new forms of intellectual property, fewer new products will be created, and businesses and consumers will enjoy fewer options in the marketplace. Second, intellectual property theft hits the Nation's most innovative economic sectors the hardest, and it is those sectors that are increasingly responsible for ensuring America's continuing prosperity and competitiveness. Third, theft of intellectual property can threaten public health and safety by introducing dangerous counterfeit products into the marketplace. Finally, the sizeable profits that can be generated at relatively low risk through intellectual property theft can invite additional criminal activity.

The economic impact of intellectual property theft is enormous. According to the Office of the United States Trade Representative ("USTR"), intellectual property theft costs American corporations $250 billion every year. Among those affected are manufacturers, distributors, retailers, employees, artists, consumers, and governments. These crimes also harm the economy through lost profits, taxes, and wages, and the loss of hundreds of thousands of jobs.

According to Business Week, counterfeit airplane parts played a role in at least 166 U.S.-based accidents or mishaps during a recent 20-year period.

The costs of intellectual property theft are not solely economic. Intellectual property theft also affects the public's health and safety in costly ways. For instance, intellectual property thieves can make enormous profits from selling cheap counterfeit versions of products whose safety and reliability are essential–including pharmaceuticals, automotive parts, and electrical equipment.

The United States Customs and Border Protection estimates that 750,000 American jobs have been lost due to counterfeiting.

In addition to serious consequences for the economy and public health and safety, intellectual property theft is a concern because it can fund other criminal activities. Modern technology has increased the innovativeness of companies and the amount of new intellectual property being created, but it has also made intellectual property theft easier and more anonymous. Computer technology and the Internet generate inexpensive and far-flung opportunities for piracy and distribution. Such ease and profitability attract organized criminal enterprises to these offenses, and some of those enterprises may even have ties to terrorist organizations.

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Because of the serious consequences of intellectual property theft, combating these crimes is an important priority of the Department of Justice. In order to ensure a vibrant, innovative, and safe marketplace for all, the Department of Justice will continue to prosecute individuals and organizations that criminally infringe on intellectual property rights and vigorously protect the right of victims to pursue intellectual property cases in civil courts.

"Our ability to promote and secure an effective and predictable environment for intellectual property rights in America will have a significant impact on our future economic growth, global competitiveness, and economic national security."

- Attorney General Alberto R. Gonzales, November 10, 2005



Attorney General Alberto R. Gonzales addresses victims of intellectual property theft at the U.S. Chamber of Commerce's Anti-Counterfeiting and Piracy Summit. Photo by Ian Wagreich.

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V. What Principles Should Apply to Intellectual Property Enforcement?

The Department of Justice has developed a comprehensive, multi-dimensional strategy to fight intellectual property crime. This strategy addresses the many different, yet essential, aspects of intellectual property enforcement: criminal enforcement; international cooperation; civil and antitrust enforcement; and prevention. While the perspective and focus of each of these areas differ, they nonetheless are all united by underlying values that form the foundation of the Department of Justice's intellectual property efforts. The Task Force continues to adhere to these key principles that drive and shape the Department of Justice's intellectual property enforcement efforts, and provide a basis for recommending further actions. These principles are set forth below:

- The laws protecting intellectual property rights must be enforced.

  The Nation's economic security depends on the protection of valuable intellectual resources. The Department of Justice has a responsibility to enforce the criminal laws of the Nation that are designed to protect its economic security and the creativity and innovation of entrepreneurs.

- The federal Government and intellectual property owners have a collective responsibility to take action against violations of federal intellectual property laws.

  The federal Government has the primary responsibility for prosecuting violations of federal criminal laws involving intellectual property. The owners of intellectual property have the primary responsibility of protecting their creative works, marks, and trade secrets, and of pursuing civil enforcement actions.

- The Department of Justice should take a leading role in the prosecution of the most serious violations of the laws protecting copyrights, marks, and trade secrets.

  The Department of Justice has historically placed–and should continue to place–the highest priority on the prosecution of intellectual property crimes that are complex and large in scale, and that undermine our economic national security or threaten public health and welfare. The Department of Justice should continue to focus on these areas and enforce federal intellectual property laws as vigorously as resources will allow.

- The federal Government should punish the misappropriation of innovative technologies rather than innovation itself.

  The Department of Justice should enforce federal intellectual property laws in a manner that respects the rights of consumers, technological innovators, and content providers. The Department of Justice should prosecute those who misappropriate innovative technology or use technology to commit crimes, while ensuring that such enforcement efforts do not chill legitimate innovation.

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- Intellectual property enforcement must include the coordinated and cooperative efforts of foreign governments.

  Violations of intellectual property laws are increasingly global in scope and involve offenders in many nations. Enforcement measures must therefore confront and deter foreign as well as domestic criminal enterprises. This requires the informal assistance of foreign governments and their law enforcement agencies, active enforcement of their own intellectual property laws, and formal international cooperation through treaties and international agreements.

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VI. How Has the Department of Justice Enforced and Protected Intellectual Property Rights?

The Department of Justice comprehensively enforces and protects intellectual property rights through a number of divisions, sections, and agencies. Each of these important components has highly-trained attorneys, law enforcement agents, and staff who specifically address intellectual property issues, ranging from criminal prosecutions to antitrust concerns. In addition, the Bush Administration has developed a comprehensive, interagency initiative to combat intellectual property theft and address international enforcement issues. The Bush Administration's interagency campaigns and the Department of Justice's specific efforts are explained below.

A. Interagency Efforts – STOP Initiative and NIPLECC

The Department of Justice has the lead criminal enforcement role in the United States Government's protection of intellectual property rights here and abroad. The Department of Justice also coordinates with other government agencies on numerous domestic and international policy matters relating to intellectual property protection. It does so through a variety of means, including daily contact with other government agencies responsible for the many facets of intellectual property protection in the United States, as well as formal mechanisms such as the Bush Administration's Strategy Targeting Organized Piracy ("STOP") initiative and the National Intellectual Property Law Enforcement Coordination Council ("NIPLECC").

The Department of Justice has participated in the STOP initiative since its inception in 2004. STOP is a Bush Administration initiative that includes, among others, the Departments of Justice, Commerce, and Homeland Security, the Office of the United States Trade Representative, the USPTO, and the Food and Drug Administration. Through this initiative, the Bush Administration has sought to implement a government-wide plan to reduce counterfeiting and piracy throughout the world. The Department of Justice has made important contributions to this broad mission through the work of the Task Force and, more specifically, through implementation of the Task Force's detailed recommendations set forth in 2004 Report. The Department of Justice also has coordinated closely with other STOP agencies on numerous international and domestic policy issues; joined STOP agencies in visits to the European Commission, France, Germany, Hong Kong, Korea, and the United Kingdom in April and June of 2005; participated in a series of round table discussions, seminars, and other business outreach efforts; and helped develop greater public awareness of how federal criminal laws protect the owners of intellectual property.



President George W. Bush speaks about the STOP Initiative and the importance of protecting intellectual property during ceremonies at the Eisenhower Executive Office Building, March 16, 2006. Looking on are, from the left: Attorney General Alberto R. Gonzales; U.S. Rep. Jim Sensenbrenner (R-Wis); and U.S. Rep. Bobby Scott (D-Va.). Photo by Arif Alikhan.

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"The Administration is leading an initiative called STOP–Strategy Targeting Organized Piracy. Nine federal agencies are coming together in this initiative, including the Department of Justice, which has launched the most aggressive effort in American history to prevent intellectual property violations."

- President George W. Bush, March 16, 2006

The Department of Justice has also co-chaired NIPLECC since its creation by Congress in 1999. NIPLECC's mission is "to coordinate domestic and international intellectual property law enforcement among federal and foreign entities." Joining the Assistant Attorney General for the Criminal Division as co-chair of NIPLECC is the Under Secretary of Commerce for Intellectual Property and Director of the USPTO. Other NIPLECC members include the Under Secretary of State for Economic, Business, and Agricultural Affairs; a Deputy United States Trade Representative; the Commissioner of Customs; the Under Secretary of Commerce for International Trade; and, in a consulting capacity, a representative from the United States Copyright Office. In July 2005, President Bush named Commerce Department official Chris Israel to the newly-created post of Coordinator of International Intellectual Property Enforcement, with responsibility for coordinating NIPLECC activities. Arif Alikhan, Senior Counsel to the Deputy Attorney General at the Department of Justice, serves as Deputy Coordinator. Together, Israel and Alikhan coordinate NIPLECC's international work and the overall implementation of the Bush Administration's STOP initiative.

NIPLECC helps ensure that the Bush Administration's intellectual property priorities are clear to Congress and the American public. In its annual report to Congress, NIPLECC describes the activities and actions taken by all NIPLECC members to improve the protection of intellectual property rights. NIPLECC also details the Department of Justice's enforcement strategy and priorities and highlights many of its most significant intellectual property prosecutions for that year. In addition, the Department of Justice works through NIPLECC to coordinate its international training and outreach efforts with other federal agencies.

B. Criminal Enforcement Efforts

1. Computer Crime and Intellectual Property Section

The Department of Justice has developed an effective nationwide anti-piracy and anti-counterfeiting effort anchored by the Criminal Division's Computer Crime and Intellectual Property Section ("CCIPS"). CCIPS is a highly specialized team of 35 attorneys focused on computer crime and intellectual property offenses. With the support of Congress, CCIPS has nearly doubled in size over the past six years, and it now has 14 attorneys devoted exclusively to prosecuting intellectual property crimes and implementing the Department of Justice's intellectual property enforcement program. These attorneys prosecute intellectual property cases, assist prosecutors in the field, and help develop and implement the Department of Justice's overall anti-piracy strategy and legislative priorities. In addition to prosecuting their own cases, which have increased more than eight-fold in the last four years, CCIPS attorneys are available to agents and Assistant United States Attorneys ("AUSAs") on a 24-hour basis to provide advice and guidance.

CCIPS also places a high priority on fostering international cooperation and coordination in its intellectual property enforcement efforts. Building relationships between American law enforcement and our counterparts overseas is the most effective method of ensuring success in multi-national cases. These relationships are built through international casework as well as through training and outreach. Last year, CCIPS attorneys

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met with more than 2,000 prosecutors, investigators, judges, and intellectual property experts from 94 countries to provide training and technical assistance on intellectual property enforcement.

2. Computer Hacking and Intellectual Property Program

As with all federal crime, primary responsibility for the prosecution of federal intellectual property offenses falls to the 94 United States Attorneys' Offices across America. Under the CHIP Program, created by then-Attorney General Ashcroft in 2001, experienced and highly-trained federal prosecutors in the field aggressively address computer crime and intellectual property matters.

a. CHIP Coordinators

Prior to the creation of the CHIP Program, in 1995 the Department of Justice created the Computer & Telecommunications Coordinator ("CTC") program to address concerns about the rising tide of computer crime. The United States Attorneys' Offices designated at least one AUSA in each district as a CTC; depending on the needs of the particular region, some districts designated more than one prosecutor. In addition, a number of components and divisions within the Department of Justice, such as the Tax Division, also designated CTCs for their respective organizations.

> ***"The CHIP Program is a vital part of the Department of Justice's efforts to address the growing threat of cyber crime and intellectual property theft."***
>
> ***-Attorney General Alberto R. Gonzales, December 2, 2005***

In October 2004, the Task Force recommended that the Department of Justice change the CTC designation to "CHIP Coordinator" to clarify that intellectual property offenses were included within the responsibilities of these AUSAs and to align all 94 United States Attorneys' Offices with the Attorney General's CHIP Program. Identifying a CHIP Coordinator in each United States Attorney's Office ensures that a prosecutor with training and experience in intellectual property crimes is available wherever and whenever an offense occurs.

Under the CHIP Program, prosecutors are assigned four areas of responsibility: (1) prosecuting computer crime and intellectual property offenses; (2) serving as a technical advisor for other prosecutors and law enforcement agents; (3) assisting other CHIP Coordinators in multi-district investigations; and (4) providing training and community outreach regarding computer-related issues.

b. CHIP Units

In July 2001, the Department of Justice created ten CHIP Units to address the increasing threat of cyber crime and intellectual property offenses in specific regions of the country. CHIP Units are teams of specially-trained AUSAs concentrated in a particular region. The CHIP Program was created to augment the number of prosecutors designated as CHIP Coordinators. The Department of Justice provided districts with additional funding to hire prosecutors and support personnel to form CHIP Units and to focus on fighting intellectual property and cyber offenses. The program was expanded in 2002 and 2004, including the effort in 2004 to align the CTC program with the CHIP Program described above. There are currently more than 230 CHIP Coordinators and CHIP Unit AUSAs within the Department of Justice.

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CHIP Unit AUSAs focus on prosecuting intellectual property offenses such as trademark violations, copyright infringement, and thefts of trade secrets. In addition, they prosecute high-technology offenses, including computer hacking, virus and worm proliferation, Internet fraud, and other attacks on computer systems.

In addition to prosecuting cases, CHIP Unit AUSAs are also involved actively in training other prosecutors and federal agents on high-tech investigations, and they work closely with potential victims of intellectual property theft and cyber crime on prevention efforts.

The first CHIP Unit was created in February 2000, in the United States Attorney's Office in San Jose, California, to address cyber crime and intellectual property cases in the Silicon Valley area. Based on the success of the CHIP Unit in San Jose, in 2001 and 2002, then-Attorney General Ashcroft expanded the program to include the following 11 additional cities:

- Alexandria, Virginia
- Atlanta, Georgia
- Boston, Massachusetts
- Chicago, Illinois
- Dallas, Texas
- Kansas City, Missouri
- Los Angeles, California
- Miami, Florida
- New York, New York (Brooklyn and Manhattan)
- San Diego, California
- Seattle, Washington

In October 2004, the Task Force recommended that the Department of Justice create five more CHIP Units in:

- Nashville, Tennessee
- Orlando, Florida
- Pittsburgh, Pennsylvania
- Sacramento, California
- Washington, D.C.

In response, the Department of Justice subsequently provided additional funding to the United States Attorneys' Offices in these cities to hire additional prosecutors to create the CHIP Units.

In January 2005, the Department of Justice provided additional, full-time funding for three AUSAs to serve as CHIP Unit AUSAs in San Jose and Los Angeles, California. The creation of these three additional CHIP positions, as well as the creation of five additional CHIP Units in October 2004, implemented two of the recommendations of the 2004 Report.

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c. Additional Accomplishment – Creation of Seven New CHIP Units in 2006

The Task Force has recognized the success of the CHIP Program and determined that the Department of Justice should increase the number of CHIP Units and place them in additional regions. Accordingly, the Task Force recommended to the Attorney General that the Department of Justice create seven new CHIP Units in the following cities where cyber crime and intellectual property offenses are significant problems:

- Austin, Texas
- Baltimore, Maryland
- Denver, Colorado
- Detroit, Michigan
- Newark, New Jersey
- New Haven, Connecticut
- Philadelphia, Pennsylvania

The Attorney General has adopted this recommendation and initiated the creation of these seven new units. With the addition of these new CHIP Units the total number of CHIP Units will soon be 25.

3. Office of Consumer Litigation

The Civil Division's Office of Consumer Litigation ("OCL") is a team of specialized attorneys who handle criminal and civil cases involving intellectual property laws that protect public health and safety. For example, OCL attorneys enforce and defend the consumer protection programs of the Food and Drug Administration ("FDA"), the Federal Trade Commission, the Consumer Product Safety Commission, and the Department of Transportation's National Highway Traffic Safety Administration.

One particular area of concern to the protection of intellectual property rights and consumer safety is the regulation of drugs by the FDA. FDA officials have testified before Congress that the quality of drugs in this country is high and that the public can continue to have confidence that the drugs sold in the United States are authentic. To maintain this level of confidence, however, any allegations or information regarding the counterfeiting or adulteration of drug products must be taken very seriously. The use of counterfeit drugs can pose a direct threat to human health. Counterfeit drugs frequently contain less active material ingredient than claimed, wrong ingredients, or no active ingredient at all, which makes them less effective and possibly toxic. Even when the product in question contains the represented amount of the drug's active ingredient, the situation can be dangerous because of factors such as quality control, distribution, and inventory control, all of which endanger the effectiveness of the drug. When the counterfeit product is relied upon to sustain life, a lack of effectiveness may result in deaths. In addition, increased drug resistance also can arise when counterfeit antibiotics lead doctors to increase dosages or otherwise misunderstand the nature of the drug they are administering. The potential dangers posed by counterfeit drugs may multiply in a health emergency; for example, in a flu pandemic, the opportunity for criminal counterfeiting may be significant. The demand for flu vaccine could vastly exceed legitimate supply and counterfeit flu vaccine could be sold over the Internet to unwary consumers in the United States.

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"The World Health Organization estimates that 10% of all available pharmaceuticals worldwide are counterfeit."

For more than 30 years, OCL attorneys have been involved in prosecuting purveyors of counterfeit drugs and medical devices. The Department of Justice's recent efforts are reflected in prosecutions involving unlawful diversion of prescription drugs and the importation of counterfeit pharmaceuticals and drugs that are not manufactured according to approved standards. United States Attorneys' Offices that receive these counterfeit cases often contact OCL to obtain advice and assistance, and OCL serves valuable functions in such matters. First, OCL helps ensure that federal prosecutors do not overlook important policy or factual concerns that frequently affect litigation under federal statutes. Second, OCL ensures that those prosecutors do not have to "reinvent the wheel" in conducting litigation, because OCL has jury instructions, briefs, and other pleadings to share.

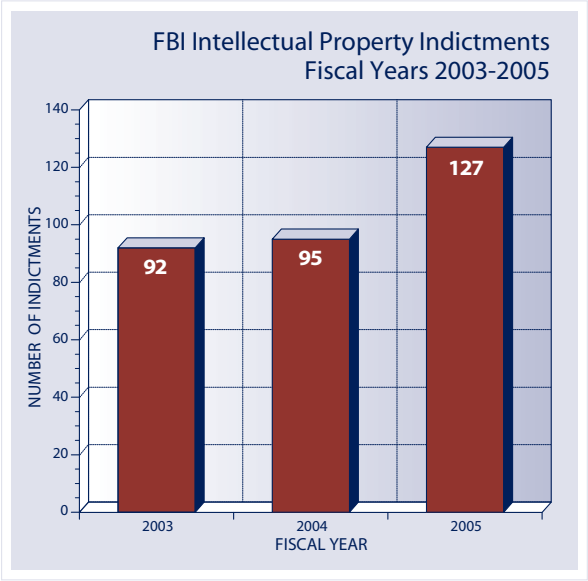
4. Federal Law Enforcement Agencies

A number of federal law enforcement agencies work to safeguard intellectual property rights in the United States. The Federal Bureau of Investigation's ("FBI") intellectual property enforcement program is implemented and overseen by the Cyber Crime Fraud Unit ("FBI-CCFU") in its Cyber Division in Washington, D.C. The FBI-CCFU focuses on intellectual property crimes having the most impact on national and economic security–including theft of trade secrets, Internet piracy, and trafficking in counterfeit goods. The FBI-CCFU's goals include:

- Increasing the number of intellectual property undercover operations and use of other sophisticated investigative techniques;
- Developing new investigations through relationships with industry contacts and foreign law enforcement agencies;
- Encouraging FBI field offices to utilize task forces with state and local law enforcement agencies to enhance cyber crime and intellectual property investigations; and
- Continuing to educate and train domestic and foreign law enforcement agencies on intellectual property enforcement.

In addition to overseeing implementation of the intellectual property program in the 56 FBI field offices nationwide, the FBI-CCFU also plays a central and coordinating role in intellectual property undercover operations that have multi-district and international targets. In these operations, FBI-CCFU provides administrative oversight and additional resources to ensure the coordination of international and domestic enforcement actions. Examples of such enforcement initiatives were Operations Fast Link and Site Down, referenced below. The FBI-CCFU also provides guidance and assistance to field agents and foreign legal attachés' offices on intellectual property investigations generally, especially those targeting organized groups engaged in the large-scale manufacture and distribution of pirated software and other copyrighted materials over the Internet.

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The FBI's intellectual property enforcement program has resulted in more investigations and more indictments in recent years. For instance, between Fiscal Year 2003 and Fiscal Year 2005, the number of open intellectual property investigations increased 22 percent, from 304 to 372 investigations per year, while the number of undercover investigations increased 87 percent. In addition, during the same time period, the number of indictments filed from intellectual property investigations increased 38 percent, from 92 to 127.

Apart from the FBI, other government agencies have jurisdiction to investigate certain intellectual property offenses, including the Department of Homeland Security's United States Immigration and Customs Enforcement ("ICE") and United States Customs and Border Protection ("CBP"). ICE and CBP, in conjunction with the National Intellectual Property Rights Coordination Center, work to identify and address growing intellectual property rights issues and criminal trends, particularly in shipments through ports of entry into the United States. ICE distributes that information to federal and state law enforcement through outreach and training as well as to foreign government and international law enforcement officials and prosecutors. Over the past few years, ICE investigators have seen an increase in the level of sophistication associated with the laundering and movement of money derived from the sale of counterfeit merchandise. In direct response to this growing problem, since 2001, ICE and CBP have initiated more than 31,000 seizures of counterfeit products with an estimated retail value in excess of $482 million. In addition, during that same five-year period, ICE has initiated more than 870 arrests for trafficking in counterfeit goods and related crimes that resulted in more than 455 federal criminal indictments and more than 495 convictions.

Finally, in addition to the FBI, ICE, and CBP, a number of other federal agencies investigate intellectual property offenses, whether on their own or as part of task forces, including the United States Postal Service and the United States Secret Service. The FDA's Office of Criminal Investigations has primary responsibility for all criminal investigations conducted by the FDA, which include investigations of suspected tampering incidents and suspected counterfeit products. For instance, its agents investigate cases involving counterfeit, misbranded, and adulterated pharmaceuticals in violation of federal drug laws.

5. Victim-Industry Partnerships

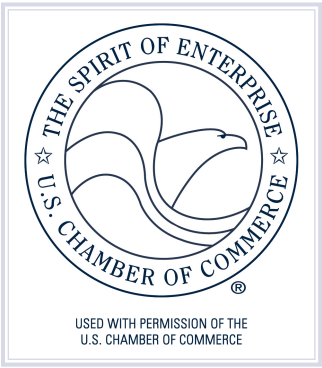
The Department of Justice recognizes that a successful and comprehensive plan of attack against intellectual property theft requires the formation of partnerships with the victims and potential victims of intellectual

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"Without the assistance of victims, it is difficult, if not impossible, for the Department of Justice to enforce the law and apprehend offenders."

- Intellectual Property Task Force Vice Chairman Arif Alikhan, April 27, 2006

property theft. Without the assistance of victims, it is difficult, if not impossible, for the Department of Justice to enforce the law and apprehend offenders. Consequently, the Department of Justice has formed important partnerships with various organizations that have joined the fight against intellectual property theft. The Chamber of Commerce has formed a broad-based "Coalition Against Counterfeiting and Piracy" ("CACP"), which works with Congress and the Bush Administration to raise awareness about the negative impact of counterfeiting. The Department of Justice has formed a constructive partnership with the CACP to address intellectual property concerns and sponsor awareness events.



The Department of Justice has also formed important partnerships with other groups that represent victims and potential victims of intellectual property theft, including the Motion Picture Association, the Recording Industry Association of America, the Business Software Alliance, the Electronic Software Association, pharmaceutical industry associations, and many other organizations. In addition, the Department of Justice has formed a close partnership with Court TV, which has filmed and broadcast several Department of Justice events regarding intellectual property. These organizations provide important insight into the problems of intellectual property theft and have joined the Department of Justice in sponsoring prevention and awareness events throughout the Nation.

To assist these victims and others in reporting intellectual property crimes, the Department of Justice developed "A Guide for Victims of Counterfeiting, Copyright Infringement, and Theft of Trade Secrets," which is set forth in *Appendix B*.

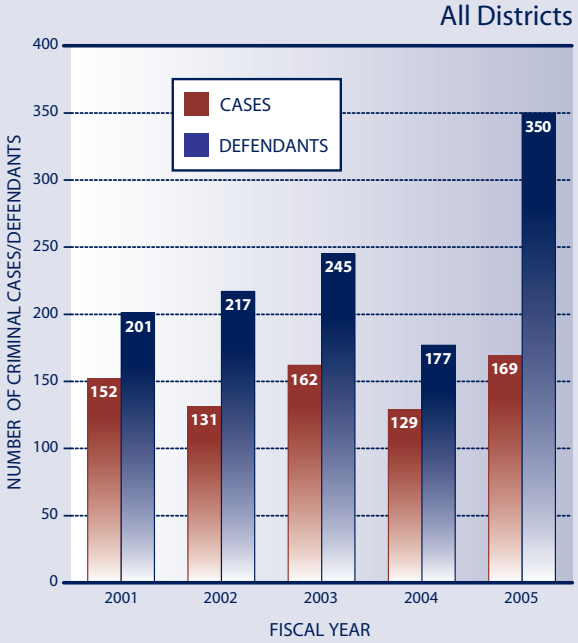
6. Statistical Accomplishments

The impact of the increased efforts by the Department of Justice to protect intellectual property rights can be seen not only by the breadth of its programs and by the aggressive focus on this issue, but also by the impressive results in Department of Justice prosecutions. The Department of Justice has prosecuted significantly more defendants for intellectual property offenses since the issuance of the Task Force's Report in October 2004. During Fiscal Year 2005, 350 defendants were charged with intellectual property offenses, nearly double the 177 defendants charged in Fiscal Year 2004–representing a 98 percent increase. A similar increase occurred in districts with CHIP Units, where the number of charged defendants climbed from 109 in Fiscal Year 2004 to 180 in Fiscal Year 2005–a 65 percent increase. In addition, the number of cases filed and defendants charged in all districts between Fiscal Years 2001 and 2005 has steadily risen over time, as depicted in the accompanying graph on the following page. These results reflect, in a meaningful way, that the Department of Justice is committed to protecting intellectual property rights.

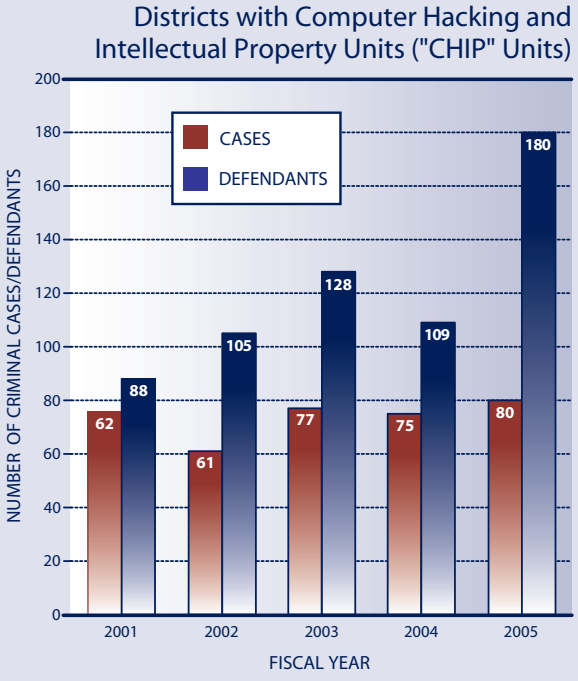
7. Intellectual Property Prosecution Highlights

As the preceding statistical analysis demonstrates, the Department of Justice has brought many significant prosecutions against intellectual property thieves since the Task Force issued its report in October 2004. The cases

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Source: Executive Office for United States Attorneys



Source: Executive Office for United States Attorneys

These graphs include data on any and all criminal cases/defendants where the following charges were brought as any charge against a defendant: 17 U.S.C. 1201 to 1205 (circumvention of copyright protection systems); 18 U.S.C. 1831 (economic espionage); 18 U.S.C. 1832 (theft of trade secrets); 18 U.S.C. 2318 (counterfeit labeling); 18 U.S.C. 2319 (criminal copyright infringement); 18 U.S.C. 2319A (live musical performance infringement); 18 U.S.C. 2320 (trafficking in counterfeit goods); or 47 U.S.C. 553 and 605 (signal piracy). However, the statutes were run together to eliminate any double counting of cases/defendants where more than one of the statutes was charged against the same defendant. This chart may not include criminal cases/defendants involving these offenses where the charges filed included only a conspiracy to violate any of the identified offenses. In addition, the data does not include month of September 2005 information for the Eastern District of Louisiana due to Hurricane Katrina.

include prosecutions of defendants trafficking in counterfeit pharmaceuticals, of unauthorized distribution of copyrighted material, and of violations of the federal trademark laws. Some of the more notable cases include:

Counterfeit Pharmaceuticals

Cholesterol Medication – The Department of Justice obtained convictions against eight people for selling counterfeit Lipitor tablets, a drug widely used to reduce cholesterol, and 13 people are awaiting trial in Kansas City, Missouri, for their alleged participation in a $42 million conspiracy to sell counterfeit, illegally imported, and misbranded Lipitor and other drugs. More than $2.2 million has been forfeited.

Antibiotics – In May 2005, the Department of Justice obtained the conviction of a former president of an Italian drug firm for violating the Federal Food, Drug, and Cosmetic Act by introducing an unapproved copy of the antibiotic Cefaclor. The defendant was sentenced to a year in confinement, fined $16,481,000, and required to forfeit $300,000. The corporate defendant pleaded guilty and paid criminal and civil penalties of more than $33 million.

The Center for Medicines in the Public Interest projects that counterfeit pharmaceutical revenues could grow from $35 billion in 2004 to $75 billion worldwide by 2010.

Viagra and Cialis – In February 2006, the Department of Justice obtained a conviction in Houston against a United States citizen for importing from China counterfeit pharmaceuticals bearing the Viagra and Cialis trademarks. ICE Special Agents conducted an undercover operation in Beijing, China, involving the Internet site *bestonlineviagra.com*. The Internet site was owned and used by the defendant to distribute bulk quantities of counterfeit Viagra and Cialis manufactured in China. Chinese officials cooperated in the investigation, and 11 additional individuals in China were arrested by Chinese authorities for manufacturing and distributing counterfeit drugs. Chinese officials seized 600,000 counterfeit Viagra labels and packaging, 440,000 counterfeit Viagra and

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"Our message to criminals who seek to profit from the intellectual property of honest and hard-working American citizens and businesses is clear: There is nothing fake about our commitment to prosecute counterfeiters and pirates."

- Attorney General Alberto R. Gonzales, November 10, 2005

Cialis tablets, and 260 kilograms of raw materials used to manufacture counterfeit pharmaceuticals.

Viagra – In January 2005, the Department of Justice obtained the conviction of a Los Angeles man for manufacturing, importing, and distributing over 700,000 counterfeit Viagra tablets, valued at more than $5.5 million, over a four-year period.

Terrorism and Organized Crime

Terrorist Financing – In March 2006, a federal indictment was unsealed in Detroit charging 19 individuals with operating a racketeering enterprise that supported the terrorist organization Hizballah. The defendants are alleged to have financed their criminal enterprise by trafficking in counterfeit Viagra, by trafficking in counterfeit Zig-Zag papers and contraband cigarettes, and by producing counterfeit cigarette tax stamps.

Organized Crime – Yi Ging Organization – In April 2006, the Department of Justice obtained convictions against two Chinese nationals as part of a crackdown against a violent criminal group in New York known as the Yi Ging Organization. These defendants had been included, along with 39 others, in a September 2005 indictment charging racketeering offenses, including extortion, witness tampering, trafficking in counterfeit DVDs and CDs, money laundering, operating a large-scale illegal gambling business, and drug trafficking. The Yi Ging Organization allegedly generated millions of dollars in profits from their counterfeit DVD and CD business. Gang members traveled to China to obtain illegal copies of American and Chinese DVDs, which they then smuggled into the United States, copied, and sold along with pirated music CDs at stores the gang controlled in Manhattan and other parts of New York City.

Organized Crime – Operation Smoking Dragon – In Los Angeles, the Department of Justice obtained indictments against 30 defendants in August 2005 for allegedly, among other things, trafficking in counterfeit cigarettes and pharmaceuticals as part of Operation Smoking Dragon.

Software, Movie, and Music Piracy

International Enforcement Operations – The Department of Justice led the largest ever international enforcement efforts against organized online piracy in Operation FastLink and Operation Site Down. Each of these undercover operations by the FBI, involved coordinated law enforcement action among 12 countries and targeted elite, criminal organizations, known as "warez release groups," which are the first to provide pirated works on the Internet. Law enforcement agents conducted more than 200 searches and arrested numerous people worldwide, seized hundreds of thousands of pirated works conservatively valued at more than $100 million,

"We will not be stopped by international borders in our vigorous pursuit of the technological pirates who steal products and profits from hard-working Americans."

- Assistant Attorney General for the Criminal Division, Alice S. Fisher, October 25, 2005

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and eliminated more than 20 major online distribution centers. To date, the Department of Justice has obtained convictions against 60 people in the United States on criminal copyright infringement charges.

Illegal Manufacturing of DVDs in China – In the first joint criminal intellectual property investigation by the United States and China, known as Operation Spring, the Department of Justice obtained a conviction against the ringleader in a conspiracy to import 2,000 counterfeit DVDs of motion pictures. The defendant was convicted in China, along with three other co-conspirators, for selling more than 133,000 pirated DVDs to customers in more than 20 countries. After returning to the United States, the defendant was convicted again in Mississippi, sentenced to 45 months in prison, and ordered to forfeit more than $800,000.

Optical Disc Piracy – Operation Remaster – On April 3, 2006, the Department of Justice obtained convictions against two California men who pleaded guilty to conspiracy to mass-produce pirated music and software CDs. The two men were among five arrested as part of an undercover investigation targeting large-scale suppliers of pirated music and software. Agents seized nearly half a million pirated CDs and 5,500 high-speed, high-quality stampers used to make bootleg products. The recording industry called Operation Remaster the largest music manufacturing piracy seizure in United States history.

Online Music Piracy – On May 19, 2006, the Department of Justice obtained sentences of up to 15 months for three members of pre-release music piracy groups. Two of the defendants belonged to the Internet piracy group Apocalypse Crew, also known as "APC," and the third to the group Chromance, also known as "CHR." Both groups sought to acquire digital copies of songs and albums before their commercial release in the United States, which they would then prepare for distribution to secure computer servers throughout the world. The stolen songs were then distributed globally and, within hours, filtered down to peer-to-peer and other public file-sharing networks.

Peer-to-Peer Piracy – Operation Gridlock – In January 2005, the Department of Justice obtained the first-ever criminal convictions for piracy through peer-to-peer networks when two operators of Direct Connect distribution centers pleaded guilty in Washington, D.C., to charges of conspiracy to commit criminal copyright infringement. Four defendants were convicted as a result of this FBI undercover investigation, code-named Operation Gridlock.

In 2004, the Business Software Alliance estimates that the United States lost over $6.5 billion due to software piracy.

Counterfeit Software – In December 2005, the Department of Justice obtained convictions against a California man in Alexandria, Virginia, for selling copies of copyrighted software through his website, *www.ibackups.net*, and through the United States mail. The man sold, at prices substantially below the suggested retail price, more than $25 million in software products that were manufactured by Adobe Systems Inc., Macro-media, Inc., Microsoft Corporation, Sonic Solutions, and Symantec Corporation. He is believed to be the most prolific online commercial distributor of pirated software ever convicted in the United States.

First Federal Camcording Conviction – In June 2005, a jury convicted a former Hollywood, California, resident of eight federal criminal charges, including three counts of copyright infringement, related to his use of a video camcorder to covertly film the motion pictures "The Core," "8 Mile," and "Anger Manage-

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ment" at private screenings for the purpose of making money. The defendant fled from the custody of his attorney on the evening of his last scheduled trial in 2003 and remained a fugitive for 16 months until the United States Marshals Service apprehended him in Florida.

Movie Piracy – Operation Copycat – On April 6, 2006, the Department of Justice obtained charges against five individuals who were "first-providers" of stolen movies on the Internet. Operation Copycat, a San Jose-based FBI undercover investigation, was one of three investigations contributing to Operation Site Down. The Department of Justice has obtained charges against 36 individuals and convicted 28, including the first convictions under the newly enacted Family Entertainment and Copyright Act for camcording movies and distributing pre-release works on the Internet.

Trafficking in Pirated Movies – Operation Western Pirates – On November 23, 2005, two men were convicted by a Puerto Rico jury for copyright infringement and trafficking in pirated motion pictures. The convictions resulted from Operation Western Pirates, an FBI movie piracy investigation in which approximately 50,000 pirated motion pictures in DVD and VHS format were seized from more than 25 locations in western Puerto Rico, including 23 video rental stores and three laboratories where employees manufactured the pirated movies. Agents also seized more than $125,000 in currency and approximately 450 pieces of computer and other electronic equipment.

> ***"By stealing the creative product of talented people, this form of piracy deprives artists of the rewards they deserve. If left unchecked, such crime would drain the incentive to create that enriches our lives."***
>
> ***- Deputy Attorney General Paul J. McNulty, February 28, 2006***

Satellite Signal Theft

DMCA Prosecution – In June 2005, the Department of Justice obtained the conviction of a New York man who violated the Digital Millennium Copyright Act ("DMCA") and mail fraud statutes by reprogramming Smart Cards to steal satellite programming from DISH Network. DISH Network electronically "scrambles" its satellite transmissions to prevent unauthorized viewing of its programming and, in order to receive services, its customers must purchase or lease satellite equipment that include Smart Cards inserted into the satellite receiver. The defendant sold approximately $308,000 of reprogrammed Smart Cards to others across the United States.

Luxury Goods

Trafficking in Counterfeit Hard Goods – In November 2005, the Department of Justice obtained indictments against four Massachusetts residents for laundering money and trafficking in more than 30,000 counterfeit luxury handbags and wallets, as well as the materials needed to make the counterfeits, worth more than $1.4 million. The defendants were alleged to have used 13 self-storage units in Massachusetts as the home base for one of New England's largest counterfeit goods operations, and they allegedly sold the counterfeit wallets and handbags at flea markets and to smaller gatherings at approximately 230 "purse parties" throughout the state.

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Trade Secrets

Ohio Theft of Trade Secrets: The Department of Justice obtained convictions against an executive of an Ohio hydraulic pump manufacturer and a subsidiary of a South African competitor who stole the Ohio company's trade secrets. While still an employee of the Ohio company, the executive secretly assisted the South African subsidiary company by sharing financial and other confidential information in order to assist the competitor in establishing United States operations. The executive held clandestine meetings with representatives of the competitor in South Africa and elsewhere, and gave them surreptitious and unauthorized tours of the victim company's manufacturing facility.

Kentucky Theft of Trade Secrets: In April 2006, the Department of Justice obtained a 48-month prison sentence against a Kentucky man for conspiring to steal and sell trade secrets belonging to Corning, Inc. The defendant, while a Corning employee, stole drawings of Corning's Thin Filter Translator Liquid Crystal Display ("LCD") glass and sold the drawings to a corporation based in Taiwan that intended to compete with Corning in the production of LCD glass.

C. Legislative Efforts

Since the Task Force issued its report in October 2004, the Department of Justice has worked diligently with the Congress to enact legislation to further protect intellectual property rights. The 2004 Report listed several principles regarding legislation and, in several instances, Congress adopted those principles in drafting legislation. In addition, the Department of Justice developed a legislative package that was sent by the Administration to the Congress to further enhance intellectual property enforcement and protection. Set forth below are the three new laws passed since October 2004, and details of the legislative package proposed by the Administration.

Intellectual Property Protection and Courts Amendments Act of 2004 (H.R. 3632)

The Department of Justice supported the passage of the Intellectual Property Protection and Courts Amendment Act (H.R. 3632), which advanced the goal, set forth in the 2004 Report, of thwarting the distribution of counterfeit products and authorizing the seizure of the materials and equipment used to make them. The legislation expanded a previous law, which prohibited trafficking in counterfeit labels for copyrighted works, to also prohibit the trafficking in genuine but unauthorized labels. In addition, the legislation allowed the government to seize the equipment used in producing the counterfeit and illicit labels. The Bush Administration supported the legislation and offered suggestions for its improvement. The President signed the legislation on December 23, 2004.

Family Entertainment and Copyright Act of 2005 (S. 167)

In 2005, Congress enacted the Family Entertainment and Copyright Act of 2005 (S. 167). This legislation amended the federal criminal code to prohibit the knowing or attempted use of a video camera, or other audio-visual recording device, to make or transmit a copy of a motion picture or other copyrighted audio-visual work from a performance of such work in a movie theater or similar venue without authorization. The law established a maximum sentence of three years in prison for a first offense. The legislation also required

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the court to order the forfeiture and destruction of all unauthorized copies of the motion picture and any equipment used to carry out the violation. With reasonable cause, the owner, lessee, or employee of a theater is authorized to detain, in a reasonable manner for a reasonable time, suspected violators for questioning or to contact law enforcement.

In addition, this legislation established criminal penalties for the act of willful copyright infringement through distribution of certain copyrighted works being prepared for commercial distribution–including movies, software, games, and music–by making them available on a computer network accessible to members of the public, if the person knew, or should have known, that the work was intended for commercial distribution. Finally, the legislation directed the United States Sentencing Commission to review and potentially amend its guidelines for intellectual property crimes.

This legislation, and the related amendments to the United States Sentencing Guidelines, furthered two key principles identified in the 2004 Report: (1) the passive sharing of copyrighted works for unlawful distribution should be treated as the distribution of those works and should, where appropriate, be subject to prosecution; and (2) copyright law should recognize the premium value of a copyrighted work before the work is released for sale to the general public. A copy of a copyrighted work is more valuable before it can be legitimately obtained by anyone else. In such situations, not only is the "pre-release" copy more valuable, but it can also permit the holder to distribute copies as early as–or before–the copyrighted work's legitimate owner. As a result, although pre-release copies of a copyrighted work may not have a quantifiable retail value, they can be the most valuable copies of all, and their distribution can severely damage the rights holder.



President George W. Bush signs H.R. 32, the Stop Counterfeiting in Manufactured Goods Act, during ceremonies March 16, 2006, in the Eisenhower Executive Office Building. Looking on are, from left: Secretary Carlos Gutierrez, Department of Commerce; Secretary Elaine Chao, Department of Labor; Attorney General Alberto R. Gonzales, Department of Justice; U.S. Rep. Jim Sensenbrenner (R-Wis.); U.S. Rep. Joe Knollenberg (R-Mich.), and U.S. Rep. Bobby Scott (D-Va.). White House photo by Kimberlee Hewitt.

The President signed the Family Entertainment and Copyright Act into law in April 2005. As a result, the United States Sentencing Commission amended the United States Sentencing Guidelines to provide for an added penalty in cases involving a pre-release copyrighted work. The Bush Administration supported the passage of this legislation and the Department of Justice provided technical assistance to the Congress and the United States Sentencing Commission.

Stop Counterfeiting in Manufactured Goods Act (H.R. 32)

Based on the principles set forth in the 2004 Report, the Stop Counterfeiting in Manufactured Goods Act (H.R. 32) modified the federal criminal law relating to the trafficking in counterfeit goods and services by prohibiting trafficking in labels, documents, or packaging that bear counterfeit marks intended for goods or services. The legislation also expanded the definition of "trafficking" to include distribution of counterfeits for a wider variety of com-

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mercial purposes than was covered previously. Moreover, the legislation criminalized the possession of counterfeits with intent to distribute, as well as the importation and exportation of counterfeit goods. Finally, the statute subjected to forfeiture any article that bears or consists of a counterfeit mark, and any property derived from proceeds or used in the commission of the violation. The legislation was signed into law by President Bush on March 16, 2006.

"I will sign a bill that protects the hard work of American innovators, strengthens the rule of law, and helps keep our families and consumers safe."

- President George W. Bush, March 16, 2006

Intellectual Property Protection Act

In addition to the three already-enacted legislative packages relating to intellectual property, the Department of Justice has developed draft legislation, known as the Intellectual Property Protection Act of 2005, to further the goals established in the 2004 Report. This proposed legislation is designed to advance three general objectives. First, it would toughen penalties for intellectual property crimes by:

"This legislative package, if enacted, would strengthen penalties for repeat copyright criminals, expand criminal intellectual property protection, and add critical investigative tools for both criminal and civil enforcement."

- Attorney General Alberto R. Gonzales, November 10, 2005

- Strengthening the repeat-offender penalties against copyright criminals;
- Implementing broad forfeiture reforms that, among other things, ensure the ability to seize and obtain forfeiture of property derived from or used in the commission of intellectual property offenses; and
- Strengthening a victim's ability to recover losses for certain intellectual property crimes (*e.g.*, criminal copyright and Digital Millennium Copyright Act offenses).

Second, the bill would expand the criminal laws to increase intellectual property protection by:

- Clarifying that registration of a copyright is not a prerequisite to criminal prosecution;
- Criminalizing the attempt to commit copyright infringement; and
- Clarifying that both the exportation and importation of infringing items is illegal, even if the export or import is not to a third party (*e.g.*, when the shipment is from one party to itself).

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Third, the bill would add needed investigative tools for criminal and civil enforcement by:

- Amending civil copyright law to parallel civil trademark law by permitting civil litigants to obtain *ex parte* seizure orders for records or evidence in civil cases; and

- Amending 18 U.S.C. § 2516 to include, as predicate offenses necessary to obtain wire or oral intercepts, the crimes of economic espionage to benefit a foreign government, criminal copyright infringement, and trafficking in counterfeit goods or services.

The Intellectual Property Protection Act is an important legislative effort because it encourages the adoption of vital principles set forth in the 2004 Report, including the following:

- As with other laws involving intellectual property, an attempt to violate the criminal copyright statute should be a violation without regard to whether it is successful.

  Unlike the federal criminal trademark statute, the criminal copyright statute presently does not criminalize attempted violations. It is a general tenet of criminal law, however, that those who attempt to commit a crime are as morally culpable as those who succeed in doing so.

- Law enforcement officers should have access to the full range of accepted law enforcement tools when they investigate intellectual property crimes that pose a serious threat to public health or safety.

  A federal court may issue an order authorizing the use of a wire or voice intercept, otherwise known as a "wiretap," in the investigation of many federal crimes, including the theft of interstate shipments, but not for intellectual property crimes. Although there are good reasons to restrict the use of wiretaps in deference to individual privacy rights, some intellectual property crimes present a serious danger to public health or safety. Trademark violations, for instance, may involve the distribution of counterfeit goods that are defective and prone to causing widespread consumer injuries.

The Department of Justice's Task Force recommends that the Congress enact the Intellectual Property Protection Act at its earliest opportunity.

International Treaties

With the globalization of the economy and the rise of digital commerce, intellectual property crimes have crossed international borders with increasing frequency. To account for this trend, the United States has signed two treaties that currently are pending before the Senate: The United Nations Convention Against International Organized Crime, and the Council of Europe Convention on Cybercrime. These treaties would facilitate international cooperation in halting some of the most egregious crimes involving intellectual property. To further international cooperation and enforcement efforts, the Department of Justice supports the rat-

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ification of these treaties, but the Senate has not yet voted on them. The Task Force continues to recommend the expeditious ratification of both treaties.

D. Civil Enforcement Efforts – Civil Division

The Department of Justice combats intellectual property theft most visibly through enforcement of the Nation's criminal laws. The successful defense of intellectual property rights, however, also requires vigorous enforcement by the owners of intellectual property through the civil justice system.

The Department of Justice has filed numerous briefs, known as "*amicus*" or "friend-of-the-court" briefs, in the Supreme Court and lower courts supporting the maintenance and implementation of robust intellectual property rights. The Department of Justice also intervenes in appropriate cases to become a party in the litigation, thus promoting legal precedents that enforce intellectual property rights fairly and consistently. In these ways, the Department of Justice plays a vital role in promoting a legal environment that protects creativity and innovation. The Civil Division employs 14 lawyers devoted solely to intellectual property, as well as numerous appellate attorneys who assist with *amicus* filings as needed.

> ***"The Department of Justice takes intellectual property issues seriously, and we are doing something about them, both criminally and civilly."***
>
> ***- Associate Attorney General Robert D. McCallum, Jr., March 2, 2006***

Through these components, the Department of Justice also monitors civil enforcement developments that may hamper the ability of victims of intellectual property theft to use the civil courts effectively to defend themselves. For example, the Department of Justice actively consults with the USPTO and the United States Copyright Office about intellectual property cases. The Department of Justice also regularly reviews intellectual property trade publications, such as the Bureau of National Affairs' *Patent, Trademark, and Copyright Journal,* and the *United States Patents Quarterly*'s advance sheets, to determine if any private lawsuits merit involvement by the Department of Justice.

Since October 2004, the Department of Justice has filed 13 *amicus* briefs in the Supreme Court in cases involving intellectual property rights, and more than a dozen *amicus* briefs and Statements of Interest in lower courts. These filings occurred in cases that affect numerous high-tech industries, including pharmaceuticals, biotechnology, and online commerce. In many of these cases, courts have adopted the arguments made by the Department of Justice and consequently expanded protections for owners of intellectual property rights. Detailed explanations of these cases are set forth below in the Civil Recommendation section of this Progress Report.

E. Antitrust Enforcement Efforts – Antitrust Division

The Antitrust Division of the Department of Justice, the component charged with enforcing the federal antitrust laws, does not directly enforce intellectual property rights. But intellectual property plays an increasingly important role in the Department of Justice's antitrust merger and non-merger civil investigations. Intellectual property is an asset that can be bought, sold, and leased or licensed in much the same fashion as any other property. The Department of Justice therefore applies antitrust principles that give the same respect to intellectual property as to other forms of tangible or intangible property, taking into account special characteristics of intellectual property, such as the ease with which it can be misappropriated. Using this approach, the Department of Justice avoids creating intellectual property-specific rules that could conflict with normal

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business expectations, lead to marketplace uncertainty, or erode the value of intellectual property rights over time.

"Our systems of effective antitrust enforcement and strong intellectual property rights protection complement each other—they each foster dynamic competition that generates lower prices, greater innovation, and wider choice, which makes consumers better off."

- Assistant Attorney General for the Antitrust Division, Thomas O. Barnett, May 15, 2006

The Department of Justice promotes respect for intellectual property rights in the administration of antitrust law through international competition advocacy, as explained later in this Progress Report. Domestically, the Department of Justice engages in competition advocacy through public hearings, workshops, speeches, research, and academic publishing by its attorneys and economists (in the Antitrust Division's Economic Analysis Group), and through participation in court cases as *amicus curiae*.

Since the issuance of the 2004 Report, the United States has appeared as *amicus* in numerous antitrust cases involving intellectual property. The Supreme Court followed the recommendation of the United States in two such cases: *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), and *Monsanto Co. v. McFarling,* 125 S. Ct. 2956 (2005), which are described in more detail later in this Progress Report in the Civil Recommendation section.

The Department of Justice continues to participate as *amicus* in cases where the interplay of intellectual property and antitrust law presents an opportunity to strengthen or clarify intellectual property rights. In addition, the Department of Justice routinely reviews and comments on proposed legislation that involves issues at the intersection of antitrust and intellectual property, or that may influence incentives to engage in competition or innovation.

The Antitrust Division also provides trade associations and other business organizations a business review procedure to receive guidance from the Department of Justice regarding the scope, interpretation, and application of the antitrust laws to proposed conduct, including activities involving intellectual property rights. Under that procedure, persons concerned, for example, about whether a particular proposed standard-setting activity is legal under the antitrust laws may ask the Department of Justice for a statement of its current enforcement intentions with respect to that conduct. When sufficient information and documents are submitted to the Department of Justice, it will make its best effort to resolve the business review request within 60 to 90 days. In this way, the Department of Justice can protect competition while at the same time facilitating efficient business arrangements that enable intellectual property owners to protect their rights.

F. International Efforts — Free Trade Agreements

Since the 2004 Report was issued, the Department of Justice has worked closely with the United States Trade Representative ("USTR") on interagency development of trade policy issues affecting competition and intellectual property rights and on participation in negotiations concerning Free Trade Agreements ("FTAs") with foreign trading partners. The most recent negotiations concerned FTAs with Australia, South Korea, and Thailand. To enhance the Department of Justice's involvement in the process, Department of Justice attorneys in the Antitrust, Civil, and Criminal Divisions have undertaken a comprehensive review of existing FTAs

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and proposed a series of recommendations to USTR to strengthen support for intellectual property rights enforcement in the intellectual property rights chapters of FTAs and other trade pacts. After a series of discussions, USTR adopted several of the Department of Justice's recommendations, including: (1) revising language to ensure that foreign courts have the authority to order infringers to provide intellectual property owners with access to information relevant to an infringement; (2) adding language to ensure that FTA partners adopt policies or guidelines that encourage their courts to impose penalties, including sentences of actual imprisonment, at levels sufficient to constitute a deterrent to intellectual property theft; (3) expanding language to ensure that FTA partners provide for presumptions in civil, criminal, and administrative proceedings that intellectual property rights are valid and enforceable; (4) ensuring that foreign courts have the authority to order the infringer to pay the intellectual property rights holder's attorney's fees and other litigation costs; and (5) restricting the ability of FTA partners to order compulsory licensing of patents and clarifying that patents should not be presumed to create antitrust market power. The Department of Justice recognizes the importance of strengthening intellectual property rights through international agreements, and it will continue to work closely with USTR on an ongoing basis.

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VII. What is the Status of the Intellectual Property Task Force's Recommendations?

Immediately after the 2004 Report was released in October 2004, the Department of Justice began implementing the recommendations of the Task Force. For example, the Department of Justice immediately distributed the funding necessary to create five new CHIP Units and to supplement the prosecutors in the Central and Northern Districts of California. In addition, the Department of Justice began implementing many of the long-term recommendations, including drafting a package of legislative proposals consistent with the principles set forth in the 2004 Report.

In February 2005, Attorney General Alberto R. Gonzales renewed the Department of Justice's commitment to the Task Force by appointing new members. Importantly, he announced that the Department of Justice would implement all of the 2004 Report's recommendations and would continue to enforce aggressively federal intellectual property laws. As of this publication, the Department of Justice has implemented all 31 of the recommendations contained in the 2004 Report.

The Task Force formed an Executive Staff of experts from throughout the Department of Justice to implement the recommendations and draft this Progress Report. The following sections set forth each of the recommendations and indicate their status as follows:

- IMPLEMENTED – the Department of Justice has fully implemented the recommendation.
- IMPLEMENTED AND ONGOING – the Department of Justice has implemented the recommendation, which requires an ongoing commitment and action.

A. CRIMINAL ENFORCEMENT RECOMMENDATIONS

Enforcement of the criminal intellectual property laws is one of the Department of Justice's highest priorities. The Attorney General has stated on several occasions that criminal enforcement is an important and essential effort in the fight against intellectual property theft.

The Department of Justice prosecutes criminal cases involving the theft of copyrighted works, trademark counterfeiting, and thefts of trade secrets. Many divisions and offices of the Department of Justice participate in the enforcement of intellectual property laws, including federal prosecutors located throughout the Nation. These prosecutors work closely with local, State, and federal law enforcement agents to identify criminals and prosecute them in accordance with the law. While the Department of Justice has successfully prosecuted numerous intellectual property cases over the past several years, the Task Force concluded that additional success was possible. Accordingly, the Task Force made recommendations to further expand and strengthen the fight against intellectual property crime. Those recommendations and their status are set forth below.

(1) Create five additional Computer Hacking and Intellectual Property ("CHIP") Units in regions of the country where intellectual property producers significantly contribute

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to the national economy. These areas are the District of Columbia; Sacramento, California; Pittsburgh, Pennsylvania; Nashville, Tennessee; and Orlando, Florida;

STATUS: IMPLEMENTED

(2) Reinforce and expand existing CHIP Units located in key regions where intellectual property offenses have increased, and where the CHIP Units have effectively developed programs to prosecute CHIP-related cases, coordinate law enforcement activity, and promote public awareness programs;

STATUS: IMPLEMENTED

(3) Designate CHIP Coordinators in every federal prosecutors' office and make the coordinators responsible for intellectual property enforcement in that region;

STATUS: IMPLEMENTED

(4) Examine the need to increase resources for the Computer Crime and Intellectual Property Section of the Criminal Division in Washington, D.C., to address additional intellectual property concerns;

STATUS: IMPLEMENTED

(5) Recommend that the FBI increase the number of Special Agents assigned to intellectual property investigations, as the Department of Justice itself increases the number of prosecutors assigned to intellectual property enforcement concerns;

STATUS: IMPLEMENTED AND ONGOING

(6) Recommend that the FBI increase the number of personnel assigned to search for digital evidence in intellectual property cases;

STATUS: IMPLEMENTED AND ONGOING

(7) Dismantle and prosecute more nationwide and international criminal organizations that commit intellectual property crimes;

STATUS: IMPLEMENTED

(8) Enhance programs to train prosecutors and law enforcement agents investigating intellectual property offenses;

STATUS: IMPLEMENTED

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(9) Prosecute aggressively intellectual property offenses that endanger the public's health or safety;

STATUS: IMPLEMENTED AND ONGOING

(10) Emphasize the importance of charging intellectual property offenses in every type of investigation where such charges are applicable, including organized crime, fraud, and illegal international smuggling;

STATUS: IMPLEMENTED AND ONGOING

(11) Enhance its program of educating and encouraging victims of intellectual property offenses and industry representatives to cooperate in criminal investigations. Recommended enhancements include:

(A) Encouraging victims to report intellectual property crime to law enforcement agencies;

STATUS: IMPLEMENTED AND ONGOING

(B) Distributing the new "Department of Justice Guide to Reporting Intellectual Property Crime" to victims and industry representatives regarding federal intellectual property offenses; and

STATUS: IMPLEMENTED AND ONGOING

(C) Hosting a conference with victims and industry representatives to educate participants on how they can assist in law enforcement investigations; and

STATUS: IMPLEMENTED

(12) Issue internal guidance to federal prosecutors regarding how victims can assist prosecutors in intellectual property cases.

STATUS: IMPLEMENTED

CRIMINAL ENFORCEMENT RECOMMENDATION #1

Expand the CHIP Program by Adding Five New Units

RECOMMENDATION: The Department of Justice should create five additional CHIP Units in regions of the country where intellectual property producers significantly contribute to the national economy. These areas are (1) the District of Columbia; (2) Sacramento, California; (3) Pittsburgh, Pennsylvania; (4) Nashville, Tennessee; and (5) Orlando, Florida.

STATUS: IMPLEMENTED

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EXPLANATION: In 2005, the Department of Justice funded five new CHIP Units in: the District of Columbia; Sacramento, California; Pittsburgh, Pennsylvania; Nashville, Tennessee; and Orlando, Florida. A total of ten new AUSA positions were allocated to these Units. This fully implemented the Task Force's recommendation.

CHIP prosecutors focus on copyright and trademark violations, theft of trade secrets, computer intrusions, theft of computer and high-tech components, and Internet fraud. In addition, CHIP Unit prosecutors develop public awareness programs and provide training to other prosecutors and law enforcement agencies regarding high-tech issues. During the 2003 fiscal year, the first full year after all 13 of the CHIP Units became operational, the offices with CHIP Units filed charges against 46 percent more defendants than they had averaged in the four fiscal years prior to the formation of the units. Similar improvement and results are forecast for the five new Units created in 2004.

SUPPLEMENTAL RECOMMENDATION FOR NEW CHIP UNITS: Recognizing the success of the CHIP Unit program, the Task Force has recommended to the Attorney General the creation of additional CHIP Units in areas where intellectual property theft and cyber crime are significant problems. After reviewing submissions from various United States Attorneys' Offices and analyzing resource needs, the Department of Justice recently created seven new CHIP Units in the following cities:

- Austin, Texas
- Baltimore, Maryland
- Denver, Colorado
- Detroit, Michigan
- Newark, New Jersey
- New Haven, Connecticut
- Philadelphia, Pennsylvania

With the addition of these seven new Units, which are well above the number recommended by the Task Force in October 2004, the total number of CHIP Units nationally will be 25. To ensure consistency with the national CHIP Program, the Department of Justice has issued guidance to all United States Attorneys in districts with new and existing CHIP Units regarding expectations for the use of CHIP Program resources.

CRIMINAL ENFORCEMENT RECOMMENDATION #2

Reinforce and Expand CHIP Units in Key Regions

RECOMMENDATION: The Department of Justice should reinforce and expand existing CHIP Units located in key regions where intellectual property offenses have increased, and where the CHIP Units have effectively developed programs to prosecute CHIP-related cases, coordinate law enforcement activity, and promote public awareness programs.

STATUS: IMPLEMENTED

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EXPLANATION: In January 2005, the Attorney General provided additional, full-time funding for a total of three AUSAs to serve as CHIP prosecutors in the Central and Northern Districts of California.

The Central and Northern regions of California historically have had especially heavy intellectual property caseloads. Los Angeles, for example, has approximately 18 million people, hosts the largest seaport in the world, and is home to a thriving entertainment industry, numerous high-tech businesses, and universities. San Jose is the center of the intellectual property-based economy of Silicon Valley. Both the San Jose and Los Angeles regions have a large economic base and numerous actual and potential victims of intellectual property theft. Moreover, the existing CHIP Units in these districts have been the most productive in the country in terms of intellectual property prosecutions. Accordingly, these districts were provided additional prosecutors to cope with the high incidence and severe regional impact of intellectual property crimes.

CRIMINAL ENFORCEMENT RECOMMENDATION #3

Designate CHIP Coordinators in Every Federal Prosecutor's Office in the Nation

RECOMMENDATION: The Department of Justice should designate CHIP Coordinators in every federal prosecutor's office and make the coordinators responsible for intellectual property enforcement in that region.

STATUS: IMPLEMENTED

EXPLANATION: In 1995, the Department of Justice created the Computer and Telecommunications ("CTC") Program, which designated at least one federal prosecutor to prosecute cyber crime within each district. CTCs were made responsible for providing technical advice to fellow prosecutors, assisting other CTCs in multi-district investigations, and coordinating public awareness efforts.

In October 2004, the Department of Justice re-designated all CTCs as CHIP Coordinators to better align all 94 United States Attorney's Offices with the Attorney General's CHIP Unit Program, announced in 2001, as well as the enforcement mission of CCIPS in Washington, D.C. The addition of "Intellectual Property" in the title helped clarify the CHIP Coordinator's responsibility to prosecute intellectual property offenses and coordinate public awareness and training efforts on intellectual property crime within the district.

The Department of Justice has increased overall CHIP attorney numbers by nearly 30 percent in the past four years to approximately 230 nationally, with at least one, and frequently more than one, CHIP Coordinator in every United States Attorney's Office. Moreover, the Department of Justice has issued guidance to all United States Attorneys clarifying the role of CHIP Coordinators in prosecuting both computer crime and intellectual property offenses.

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CRIMINAL ENFORCEMENT RECOMMENDATION #4

Examine the Need to Increase CCIPS Resources

RECOMMENDATION: The Department of Justice should examine the need to increase resources for the Computer Crime and Intellectual Property Section of the Criminal Division in Washington, D.C., to address additional intellectual property enforcement concerns.

STATUS: IMPLEMENTED

EXPLANATION: The Department implemented this recommendation by formally seeking funding for two additional prosecutor positions in the Criminal Division's CCIPS for the 2007 budget year. The President has forwarded the request to Congress as part of the Bush Administration's Fiscal Year 2007 Budget submission.

The past four years have seen a marked evolution in the Criminal Division's intellectual property rights enforcement efforts. CCIPS has made the investigation and prosecution of large-scale, multi-national intellectual property cases a top priority, and has increased its intellectual property caseload by nearly 800 percent, from 23 pending cases and investigative matters at the beginning of Fiscal Year 2002, to 203 cases and investigations at the beginning of Fiscal Year 2006. In addition to prosecuting cases, CCIPS develops Department of Justice programs and policies to address important aspects of intellectual property enforcement, and it provides legislative advice to lawmakers.

Currently, there are 14 prosecutors in CCIPS dedicated to the enforcement of intellectual property rights. In light of CCIPS's proactive prosecution strategy and its markedly increased workload, the Department of Justice recognized that CCIPS both needed and deserved additional resources. The Task Force recommends that the Congress fully fund the President's Fiscal Year 2007 request for additional prosecutors for CCIPS.

CRIMINAL ENFORCEMENT RECOMMENDATION #5

Increase the Number of FBI Agents Assigned to Intellectual Property Investigations

RECOMMENDATION: The Department of Justice should recommend that the FBI increase the number of Special Agents assigned to intellectual property investigations, as the Department of Justice itself increases the number of prosecutors assigned to intellectual property enforcement.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The FBI has proven its tremendous investigative and technical capabilities in numerous complex intellectual property cases prosecuted by the Department of Justice, including multi-district investigations and technically sophisticated enforcement actions. In addition, FBI agents are on the front line of criminal investigations, and they are typically the first responders when trade secret thefts or other intellectual property crimes are reported.

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Pictured at a press conference is Attorney General Alberto R. Gonzales and FBI Director Robert S. Mueller. Photo by Lonnie D. Tague.

Since the 2004 Report was issued, the FBI has revised its Cyber National Strategy and made investigating intellectual property crimes a top priority of the Cyber Division. Moreover, the FBI has increased its domestic and international training programs for FBI Special Agents and task force members. For example, in February 2006, the FBI hosted a seminar for more than 100 FBI Special Agents on intellectual property investigations. The seminar included presentations from numerous victim-industry groups, such as representatives from the pharmaceutical, luxury goods, motion picture, software, and automotive manufacturing industries. The training included methods for investigation of intellectual property cases and legal instruction.

The FBI has increased the number of personnel assigned to investigating intellectual property violations by frequently assigning Supervisory Special Agents and Investigative Analysts from FBI Headquarters in Washington, D.C., to FBI field offices throughout the country. These specially-trained personnel have been temporarily deployed to major cities such as Atlanta, Georgia; Chicago, Illinois; Los Angeles and San Francisco, California; as well as smaller cities including Oklahoma City, Oklahoma and Richmond, Virginia. These agents and analysts provide significant guidance, analytical support, and investigative assistance in complex intellectual property matters.

The FBI also provides law enforcement training to numerous international partners on intellectual property issues. From January 2005 through May 2006, FBI Special Agents have traveled to Brazil, Cambodia, China, India, Iceland, Italy, and the United Kingdom to train law enforcement officers on intellectual property investigations. The FBI has also provided, in the United States, training to numerous international visitors in conjunction with the USPTO.

While the FBI has produced numerous cases with limited resources, it is constantly reviewing methods to increase the number of Special Agents assigned to intellectual property crime. Through increased training and the hard work of its Special Agents, the FBI has increased the number of indictments involving intellectual property offenses by 38 percent in Fiscal Year 2005, and it will continue to pursue aggressively investigations involving intellectual property offenses.

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CRIMINAL ENFORCEMENT RECOMMENDATION #6

Increase FBI Personnel Assigned to Search for Digital Evidence

RECOMMENDATION: The Department of Justice should recommend that the FBI increase the number of personnel assigned to search for digital evidence in intellectual property cases.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: Digital evidence is often the foundation of successful intellectual property prosecutions, particularly in online piracy investigations. The Department of Justice's ability to locate and interpret this evidence is therefore a critical factor in obtaining convictions and identifying other criminals. Information found on computers and other digital devices, such as cell phones and personal digital assistants, is also essential evidence in many intellectual property prosecutions. Timely computer forensic examinations are necessary to identify the offenders, analyze the stolen materials, and determine whether additional evidence is needed before criminal charges can be filed. Consequently, increasing the number of personnel who can examine digital evidence is critical to ensuring swift investigations and prosecutions.

To respond effectively to the increased sophistication of intellectual property theft, the FBI has increased the amount of FBI personnel available to review forensic evidence and to maintain its advantage over high-tech intellectual property criminals in the following three ways:

1. Case Agent Investigative Review ("CAIR") Program

Since the issuance of the 2004 Report, the FBI has increased its efforts to explore methods to streamline the computer forensic examination process. One method that the FBI has expanded to its 56 field offices is the CAIR program. Based on a pilot program in FBI Field Offices in Los Angeles and Washington, D.C., the FBI has trained approximately 1,000 Special Agents and other investigators to review evidence seized from computers. In addition to the case agents reviewing computer evidence, specially-trained Computer Analysis Response Team ("CART") forensic examiners analyze and examine computer evidence that is seized during the course of a criminal investigation. These highly-trained examiners assist the case agents in the CAIR process and also perform independent analyses and examinations.

2. CART Storage Area Network ("CARTSAN")

Another method for increasing the number of personnel equipped to review computer evidence is through the CARTSAN program. This program involves a network of computers that specially-trained FBI agents use to review–from their desktops–copies of seized computer evidence. There are 23 systems in the CARTSAN program, and 15 FBI field offices have the ability to share computer evidence with each other. CARTSAN speeds up the initial review of seized digital evidence and helps maximize the productive use of existing CART resources by allowing more FBI personnel to review the critical evidence that is often found on seized computers.

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3. Regional Computer Forensic Laboratories ("RCFLs")

The FBI's third method to increase the number of personnel available to examine digital evidence is through the RCFL program. An RCFL is a regional lab for examining computer evidence seized during criminal investigations by various State, local, and federal law enforcement agencies. It is a full-service forensics laboratory and training center devoted to examining digital evidence in support of FBI criminal investigations–including investigations of theft of intellectual property, terrorism, child pornography, violent crimes, Internet crimes, and fraud.

RCFLs exist in the following cities:

- Chicago, Illinois
- Dallas, Texas
- Denver, Colorado
- Hamilton, New Jersey
- Houston, Texas
- Kansas City, Missouri
- Menlo Park, California
- Portland, Oregon
- Salt Lake City, Utah
- San Diego, California

Four additional RCFLs are scheduled to open by the end of 2006 in Buffalo, New York; Dayton, Ohio; Louisville, Kentucky; and Philadelphia, Pennsylvania. This will bring the total number of RCFLs to 14.

CRIMINAL ENFORCEMENT RECOMMENDATION #7

Target Large, Complex Criminal Organizations That Commit Intellectual Property Crimes

RECOMMENDATION: The Department of Justice should dismantle and prosecute more nationwide and international criminal organizations that commit intellectual property crimes.

STATUS: IMPLEMENTED

EXPLANATION: Since the inception of the Task Force in April 2004, the Department of Justice has led the two largest international enforcement efforts ever undertaken against organized online piracy. Operations FastLink and Site Down each involved coordinated law enforcement action among 12 countries and attacked the highest levels of the criminal groups–known as "warez release groups"–that act as first-providers of pirated software, movies, games, and music to the Internet. Together, these operations resulted in approximately 210 searches or arrests worldwide; the seizure of hundreds of thousands of pirated works conservatively valued at more than $100 million; the elimination of more than 20 major online distribution centers; and, to date, convictions of 60 individuals on criminal copyright infringement charges.

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The Department of Justice's enforcement efforts against organized criminal groups have not been limited to online piracy. In the past two years, the Department of Justice has conducted a number of investigations and prosecutions of organized crime groups that traffic in counterfeit manufactured goods.

For instance, in November 2004, federal agents in New York arrested 28 individuals who were members of criminal organizations allegedly engaged in attempted murder, loan sharking, alien smuggling, narcotics distribution, gambling, and trafficking in counterfeit clothing accessories. The arrests included members of two Asian criminal enterprises operating in Manhattan's Chinatown and in Flushing, Queens. Twelve of the gangs' members were charged federally with criminal racketeering, and 24 individuals connected with the criminal enterprises have since pleaded guilty to numerous federal charges. These criminal organizations' illegal activities included selling counterfeit Chanel, Gucci, and Coach accessories at stores they owned in Midtown Manhattan, as well as distributing the counterfeit apparel to other retail outlets.

As reflected in these cases and others, organized crime in intellectual property theft and counterfeiting cases is a global enforcement problem. In the past two years, the Department of Justice has successfully dismantled and prosecuted more of these criminal groups than ever before. The increase in such prosecutions is reflected in case statistics from Fiscal Year 2003 through Fiscal Year 2005, which show a general rise in the number of defendants being charged per case. In Fiscal Year 2003, 245 defendants were charged in 162 cases, for an average of 1.51 defendants per case; in Fiscal Year 2004, 177 defendants were charged in 129 cases, for an average of 1.37 defendants per case; and in Fiscal Year 2005, 350 defendants were charged in 169 cases, for an average of 2.07 defendants per case.

Continued success in this area will take a sustained commitment. To that end, the Department of Justice issued guidance to all United States Attorneys encouraging them to prosecute more nationwide and international criminal organizations that commit intellectual property crimes.

CRIMINAL ENFORCEMENT RECOMMENDATION #8

Enhance Training Programs for Prosecutors and Law Enforcement Agents

RECOMMENDATION: The Department of Justice should enhance programs to train prosecutors and law enforcement agents investigating intellectual property offenses.

STATUS: IMPLEMENTED

EXPLANATION: Law enforcement must be able to adapt its methods to the changing nature of intellectual property crime, and there must be a sufficient number of trained prosecutors to respond to this growing threat. Counterfeiters and copyright infringers rapidly adapt to new security measures, swiftly modify communication techniques and distribution channels in response to enforcement actions, and constantly create novel methods to advance their criminal activities.

In the past year, the Department of Justice has enhanced its programs to train prosecutors and law enforcement agents investigating intellectual property offenses. For example, in January 2006, the Department of Justice conducted a five-day annual training conference for approximately 200 CHIP prosecutors in Albuquerque, New Mexico; a significant portion of that training conference was devoted

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to improving intellectual property prosecutions. Three months later, the Department of Justice conducted a three-day Intellectual Property Seminar for approximately 50 AUSAs and federal agents at the National Advocacy Center in Columbia, South Carolina. For the first time ever, a large portion of the course was devoted to hands-on network and technology training for online investigations.

Recognizing the importance of these training conferences and seminars, the Department of Justice has issued guidance to all United States Attorneys setting forth the training responsibilities of CHIP prosecutors and CHIP Units. The guidance stressed the responsibility of each United States Attorney and CHIP prosecutor to ensure that CHIP Coordinators maintain their expertise by attending conferences and seminars sponsored by the Department of Justice's Office of Legal Education, especially the annual CHIP conference and Intellectual Property Seminar. In addition, CHIP AUSAs were encouraged to conduct in-office legal training to keep other AUSAs apprised of critical search and seizure law applicable to obtaining electronic evidence and conducting electronic surveillance. Finally, CHIP prosecutors, especially those in CHIP Units, were directed to enhance regional training on intellectual property enforcement for federal and state agents, and to continue to conduct outreach to the high-tech industry and rights-holder sector to foster the sharing of information critical to effective prosecutions.

In June 2006, the Department of Justice also published a comprehensive resource manual on prosecuting intellectual property crimes. This nearly 400-page manual is an invaluable training resource for federal prosecutors and agents nationwide. It presents comprehensive descriptions and analysis on all the federal criminal intellectual property laws, including copyright, trademark, theft of trade secrets, and counterfeit labeling. It improves on earlier versions by adding broader and more in-depth coverage of all areas; fully identifying recent changes to the case law, statutes, and sentencing guidelines; and adding new chapters on the Digital Millennium Copyright Act, patent law, and victim issues.

The Department of Justice's training efforts have not been limited to the United States. Intellectual property theft and counterfeiting are global problems that require a strong and coordinated global enforcement response. Building relationships between American law enforcement and its counterparts overseas is essential to ensuring continued success in multi-national cases. Therefore, the Department of Justice has increased and improved its international training efforts as well. For example, in the last year alone, Department of Justice prosecutors met with more than 2,000 prosecutors, investigators, judges, and intellectual property experts from 94 countries to provide training and technical assistance in intellectual property enforcement. These types of bilateral and multilateral outreach efforts help develop greater enforcement capacity in other countries, while also developing cooperative law enforcement contacts for better coordination on international protection of intellectual property rights.

CRIMINAL ENFORCEMENT RECOMMENDATION #9

Prosecute Intellectual Property Offenses That Endanger the Public's Health or Safety

RECOMMENDATION: The Department of Justice should prosecute aggressively intellectual property offenses that endanger the public's health or safety.

STATUS: IMPLEMENTED AND ONGOING

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EXPLANATION: Intellectual property crime can pose a serious health and safety risk to the public, from faulty electrical cords to fake medicines and pesticides that can harm unsuspecting consumers. Although the Department of Justice has long prioritized the prosecution of intellectual property cases that place the public at risk, this prioritization had not previously been formally emphasized at the highest levels of the Department of Justice. Accordingly, the Department of Justice has issued guidance to all United States Attorneys emphasizing the importance of aggressively prosecuting intellectual property offenses that endanger the health and safety of the public.



Counterfeit (left) and genuine batteries (right) discovered by United States Customs and Border Protection inspectors in Los Angeles, California. Photo by Dept. of Homeland Security, Immigration and Customs Enforcement.

The Department of Justice has also continued to work with federal, State, and local agencies that encounter these products at the Nation's borders and in the marketplace, and it has continued to prosecute those who endanger the public through intellectual property offenses. For example, in January 2005, a 58-year-old California man was convicted of conspiracy to import into the United States at least 50,000 counterfeit Viagra tablets manufactured in China, and conspiracy to manufacture another 700,000 tablets of counterfeit Viagra. The counterfeit Viagra was valued at over $5.6 million.



Corroded counterfeit batteries seized in Los Angeles, California by Special Agents of the United States Immigration and Customs Enforcement agency in June 2005. Photo by Dept. of Homeland Security, Immigration and Customs Enforcement.

In August 2005, 11 individuals and three businesses were indicted in Missouri for participating in a $42 million conspiracy to sell counterfeit, illegally imported, and misbranded cholesterol medication (Lipitor) and other drugs and for participating in a conspiracy to sell stolen drugs.

In September 2005, as part of an ICE investigation known as Operation Ocean Crossing, a Washington man was indicted on charges of importing and distributing counterfeit pharmaceuticals from China. These charges arose from information provided by the ICE liaison in Beijing, China, regarding the online Internet site "*bestonlineviagra.com.*" The defendant owned and operated the Internet site in order to distribute bulk quantities of counterfeit Viagra and Cialis manufactured in China. In conjunction with the investigation of the defendant in the United States, agents assisted officials from the Ministry of Public Security and Public Security Bureau in China in determining the source of the counterfeit pharmaceutical drugs. The joint investigation resulted in Chinese authori-

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ties' arresting 11 individuals in China for manufacturing and distributing counterfeit Viagra, Cialis, and Lipitor. In February 2006, the defendant pleaded guilty in Houston to trafficking in counterfeit pharmaceuticals in violation of federal drug laws.

On May 25, 2006, the Department of Justice obtained a jury verdict against a licensed Texas pharmacist on charges of conspiring to import counterfeit drugs from China bearing the trademarks Viagra and Cialis, without authorization of the manufacturers and owners of those marks, Pfizer and Eli Lilly, and thereafter distributing the fake drugs to the public; trafficking in counterfeit goods; and misbranding and mislabeling drugs in violation of federal drug laws.

CRIMINAL ENFORCEMENT RECOMMENDATION #10

Emphasize Charging of Intellectual Property Offenses

RECOMMENDATION: The Department of Justice should emphasize the importance of charging intellectual property offenses in every type of investigation where such charges are applicable, including organized crime, fraud, and international smuggling.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: Many crimes involve intellectual property offenses. When the focus of the investigation centers on another serious offense, however, the intellectual property offenses are often not emphasized and sometimes not charged. For example, defendants who commit organized crime or fraud offenses that involve counterfeiting are usually charged with racketeering or fraud violations, sometimes without additional intellectual property charges. The Task Force recommended that the Department of Justice emphasize that intellectual property offenses should always be charged when appropriate, and that Department of Justice prosecutors should seek to convict defendants involved in intellectual property offenses regardless of whether the focus of the investigation is on another serious offense.

To implement this recommendation, the Department of Justice has issued guidance to all United States Attorneys that, among other things, emphasizes the importance of using the intellectual property statutes "to combat the burgeoning trade in counterfeit and infringing goods and digital property." The guidance directs that, whenever possible, United States Attorneys should charge and convict offenders of readily provable violations of the following core intellectual property statutes: criminal copyright infringement, 18 U.S.C. § 2319; trademark (counterfeit product) offenses, 18 U.S.C. § 2320; circumvention of copyright control systems in violation of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-04; satellite signal piracy, 47 U.S.C. §§ 553, 605; economic espionage and theft of trade secrets, 18 U.S.C. §§ 1831-32; counterfeit labeling, 18 U.S.C. § 2318; live music infringement, 18 U.S.C. § 2319A; unauthorized recording of motion pictures, 18 U.S.C. § 2319B; and counterfeit drug offenses in violation of the Food, Drug and Cosmetic Act, 21 U.S.C. § 331(i).

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CRIMINAL ENFORCEMENT RECOMMENDATION #11

Enhance Victim Education Programs and Increase Cooperation

RECOMMENDATION: The Department of Justice should enhance its program of educating and encouraging victims of intellectual property offenses and industry representatives to cooperate in criminal investigations. Recommended enhancements include:

(1) Encouraging victims to report intellectual property crime to law enforcement agencies;

(2) Distributing the new "Department of Justice Guide to Reporting Intellectual Property Crime" to victims and industry representatives regarding federal intellectual property offenses; and

(3) Hosting a conference with victims and industry representatives to educate participants on how they can assist in law enforcement investigations.

STATUS: IMPLEMENTED

EXPLANATION: Combating intellectual property crime often requires cooperation among law enforcement, prosecutors, and victims of intellectual property theft. Information-sharing and prompt reporting by victims can be essential to the success of an investigation or prosecution; victims are often in the best position to detect immediately when their intellectual property has been stolen. Accordingly, in the past 18 months, the Department of Justice has taken a number of measures to encourage victim reporting and enhance cooperation.

First, the Department of Justice has been proactive in its outreach to industry and victims to encourage reporting of intellectual property crime. The Department of Justice has sought opportunities to partner with other federal agencies to educate and inform rights holders. For example, the Department of Justice participated in a series of six conferences organized by the USPTO on intel-



State and Federal intellectual property prosecutors at Victims' Conference in New York City on April 27, 2006. From the left: Asst. D.A. Gregory Pavlides (Queens D.A.'s Office); Asst. U.S. Attorney Jed Davis (Eastern Dist. of New York); Vice Chairman, Intellectual Property Task Force Arif Alikhan (U.S. Dept. of Justice); Asst. U.S. Attorney Joseph DeMarco (Southern Dist. of New York); Asst. D.A. Jeff Levinson (Manhattan D.A.'s Office); Asst. D.A. Richard Baker (Bronx D.A.'s Office); Asst. D.A. Tiana Walton (Manhattan D.A.'s Office); and Trial Attorney Matthew Bassiur (U.S. Dept. of Justice). Photo by Susan Butler.

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lectual property basics for small- and medium-size businesses, entrepreneurs, and independent inventors. These two-day "Conference[s] on Intellectual Property in the Global Marketplace" were held in Austin, Texas; Miami, Florida; Phoenix, Arizona; San Diego, California; Salt Lake City, Utah; and Columbus, Ohio. They were designed to assist small business owners in learning about their rights and the new realities of intellectual property counterfeiting and piracy in the global marketplace. At each of these national conferences, local CHIP prosecutors gave presentations on federal criminal intellectual property enforcement, criminal statutes, case development, and cooperation with victims. Copies of the "Department of Justice Guide to Reporting Intellectual Property Crime" were distributed to small business owners and industry representatives in attendance.

Second, the Department of Justice was also proactive in organizing two of its own victim education conferences, each entitled "Counterfeit Goods: The Danger, The Crimes, The Victims." These one-day conferences in Los Angeles and New York City brought together private investigators from the manufacturing industry, company representatives, federal and State prosecutors, and federal, State, and local agents. Topics included how criminal cases are investigated and the types of evidence most useful to those investigations. A particular focus of the conferences was educating industry representatives and their investigators on the laws, regulations, Department of Justice directives, and rules of professional conduct that are implicated when victim companies offer assistance or seek to donate resources in connection with federal investigations.

CRIMINAL ENFORCEMENT RECOMMENDATION #12

Issue Internal Guidance to Federal Prosecutors Regarding How Victims Can Assist Prosecutors in Intellectual Property Cases

RECOMMENDATION: The Department of Justice should issue internal guidance to federal prosecutors regarding how victims can assist prosecutors in intellectual property cases.

STATUS: IMPLEMENTED

EXPLANATION: Prosecutions of intellectual property crime often depend on cooperation between victims and law enforcement. Without information from victims, prosecutors cannot enforce the intellectual property laws as effectively. Many industry groups and victims of intellectual property theft are eager to assist law enforcement in finding intellectual property offenders and bringing them to justice. Certain types of assistance, however, such as the donation of funds, property, or services by outside sources, can raise legal and ethical issues. In order to maintain the Department of Justice's independence and integrity, federal rules and regulations place limitations on the types of assistance victims and outside sources can provide to law enforcement authorities.

Additionally, the Department of Justice's newly published 400-page resource manual on "Prosecuting Intellectual Property Crimes" contains an in-depth section on offers of assistance from victims and related parties in intellectual property investigations and prosecutions. The manual advises Department of Justice prosecutors on applicable laws and regulations relating to the acceptance of gifts; the distinction between "gifts" and "assistance"; professional responsibility issues; and case-related concerns.

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B. INTERNATIONAL COOPERATION RECOMMENDATIONS

"[T]he protection of intellectual property is among the powers expressly delegated to Congress by Article I of the Constitution in 1789. Those benefits are undermined, however, when other nations permit, whether overtly or tacitly, infringement on intellectual property rights."

- Associate Attorney General, Robert D. McCallum, Jr., March 2, 2006

The Task Force continues to believe that international cooperation is critical to stemming the tide of global intellectual property crime. Foreign governments must themselves prosecute intellectual property criminals and assist the United States in gathering evidence and prosecuting those who violate American intellectual property laws. Accordingly, in 2004, the Task Force recommended that the Department of Justice adopt the following recommendations regarding international cooperation. The status of each recommendation is set forth below.

(1) Deploy federal prosecutors to Hong Kong and Budapest, Hungary, and designate them as "Intellectual Property Law Enforcement Coordinators" ("IPLECs") to coordinate intellectual property enforcement efforts in those regions;

STATUS: IMPLEMENTED AND ONGOING

(2) Recommend that the FBI co-locate Legal Attachés with intellectual property expertise to Hong Kong and Budapest, Hungary, to assist the newly assigned IPLECs in investigative efforts;

STATUS: IMPLEMENTED AND ONGOING

(3) Direct prosecutors and agents to increase the use of alternative channels of communication, such as "law enforcement-to-law enforcement" contacts, to collect information and evidence quickly in foreign investigations;

STATUS: IMPLEMENTED AND ONGOING

(4) Enhance its intellectual property training programs for foreign prosecutors and law enforcement investigators in coordination with the Department of State;

STATUS: IMPLEMENTED

(5) Prioritize treaty negotiations for legal assistance agreements with foreign governments where intellectual property enforcement is a significant problem;

STATUS: IMPLEMENTED AND ONGOING

(6) Ensure that intellectual property crimes are included in all extradition treaties and prioritize negotiations with foreign countries according to intellectual property enforcement concerns; and

STATUS: IMPLEMENTED AND ONGOING

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(7) **Emphasize intellectual property enforcement issues during discussions with foreign governments.**

STATUS: IMPLEMENTED AND ONGOING

Additional information regarding each of the recommendations and its status is set forth below.

INTERNATIONAL COOPERATION RECOMMENDATION #1

Deploy Intellectual Property Law Enforcement Coordinators to Asia and Eastern Europe

RECOMMENDATION: The Department of Justice should deploy federal prosecutors to the United States consulate in Hong Kong and embassy in Budapest, Hungary, and designate them "Intellectual Property Law Enforcement Coordinators" ("IPLECs") to coordinate intellectual property enforcement efforts in those regions.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The 2004 Report correctly forecast the expanding challenge of combating intellectual property crimes throughout the world and recommended that the Department of Justice deploy Intellectual Property Law Enforcement Coordinators (or "IPLECs") in Asia (Hong Kong) and Eastern Europe (Budapest, Hungary). In January 2006, a new Department of Justice attaché was assigned to the United States Embassy in Bangkok, Thailand. The Department of Justice used this existing resource to designate an IPLEC for the region. The attaché is an experienced intellectual property prosecutor who formerly led the CHIP Unit in Northern California. Since being designated the IPLEC for Asia, he has been successful in advancing the Department of Justice's regional intellectual property goals.

Since January 2006, the IPLEC has participated in intellectual property rights enforcement seminars and meetings in China, Hong Kong, Cambodia, Thailand, Taiwan, the Philippines, Indonesia, and Malaysia, and has additional visits planned to Korea, Japan, and Singapore. These meetings, whose participants have included foreign judges, prosecutors, investigators and other intellectual property officials, have allowed the Department of Justice to establish valuable contacts with regional counterparts and gather information about the unique intellectual property rights enforcement challenges confronting individual Asian countries. In presentations at these meetings, the IPLEC has highlighted the Department of Justice's successes in combating intellectual property crime, the benefits of specialized intellectual property prosecutorial and investigative units (*e.g.*, CHIP units and CCIPS), and the importance of international cooperation and coordinated, cross-border prosecutions. In the near future, the IPLEC will play an important role in programs to increase criminal enforcement of intellectual property laws in both China and India, two countries with enormous capacity to produce counterfeit and pirated goods and a history of damaging United States rights-holders by manufacturing infringing goods.

The IPLEC is also developing an Intellectual Property-Prosecution and Investigation Network ("IP-PIN") comprised of key intellectual property prosecutors and investigators from countries in the

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region. Intellectual property officials from several countries have already committed to participate in the network, which will better enable the sharing of information and strategies, help identify regional training opportunities, and facilitate coordinated prosecutions. The Department of Justice plans to host an IP-PIN conference within the next six to nine months to strengthen these important law enforcement relationships.

Recognizing that effective prosecution of intellectual property crime depends heavily on cooperation between victims and law enforcement authorities, the IPLEC has regularly met with regional industry representatives with extensive experience in intellectual property rights enforcement in Asia, including representatives from the Motion Picture Association and the Business Software Alliance, as well as pharmaceutical and other "hard good" industries. The IPLEC has also improved regional awareness of the Department of Justice's efforts to combat intellectual property crime by addressing the American Chamber of Commerce in Asian countries and by collaborating closely with representatives from the Departments of Commerce and State to promote interagency cooperation and better achieve the goals of the Bush Administration's STOP Initiative.

The Department of Justice has also secured agreement in principle from the Bureau for International Narcotics and Law Enforcement Affairs at the Department of State (subject to Congressional approval and approval of a budget and work plan) to provide start-up costs to support a full-time IPLEC for Eastern Europe for one year. The Department of Justice will begin interviewing experienced intellectual property prosecutors for the new IPLEC position in the next month. The Department of Justice will be responsible for the Eastern European IPLEC position after Fiscal Year 2007. The Department of Justice will work with the Department of State to identify an appropriate location for the IPLEC in the region.

INTERNATIONAL COOPERATION RECOMMENDATION #2

Deploy FBI Legal Attachés To Assist IPLEC Investigative Efforts

RECOMMENDATION: The FBI should co-locate Legal Attachés with intellectual property expertise to Hong Kong and Budapest, Hungary, to assist the newly assigned IPLECs in investigative efforts.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice has designated its legal attaché in Bangkok, Thailand, as the IPLEC to oversee the entire Asian region. Similarly, the FBI has a Legal Attaché and an Assistant Legal Attaché posted in Bangkok and attachés in Eastern Europe. Although these agents are assigned to investigate all FBI matters, they are available to assist the IPLEC in any intellectual property matters. The FBI also has personnel assigned in Beijing and Hong Kong, China; Kuala Lumpur, Malaysia; Manila, Philippines; Seoul, South Korea; Singapore; and Tokyo, Japan. In addition, the FBI has personnel assigned throughout Eastern Europe including in Bulgaria, Latvia, Romania and Russia. If additional resources are necessary for intellectual property investigations in these areas, FBI Headquarters is dedicated to providing agent support through temporary assignments as needed.

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INTERNATIONAL COOPERATION RECOMMENDATION #3

Increase the Use of Informal Contacts to Gather Evidence from Foreign Countries

RECOMMENDATION: Direct prosecutors and agents to increase the use of alternative channels of communication, such as "law enforcement-to-law enforcement" contacts, to collect information and evidence quickly in foreign investigations.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: As noted in the 2004 Report, international cooperation in the area of intellectual property crime often requires immediate action or the evidence may be lost. The Department of Justice continues to increase its network of worldwide contact points to allow for quick and direct communication in fast-moving investigations. Where appropriate, the Department of Justice encourages using informal channels of communication, outside formal Mutual Legal Assistance Treaties, to obtain information from overseas. One example of the Department of Justice's progress in this area is the increased emphasis on a "24/7 network" for immediate international assistance in computer crime cases. Each of the 43 countries that participates in this international network has designated a point of contact who can be reached in an urgent case at any hour. This 24/7 network is especially useful to preserve information and evidence stored on a computer in a foreign country that may disappear without quick action by foreign authorities. Building upon the success of the 24/7 network for the investigation of computer-based crimes, the Department of Justice is developing and updating an international directory of law enforcement officials with the authority to criminally enforce intellectual property laws.

The Department of Justice has also issued guidance to all United States Attorneys' Offices encouraging use of all available tools and informal federal law enforcement channels–including federal investigative agencies' foreign legal attachés stationed in-country–to establish communication and cooperation with our foreign counterparts.

INTERNATIONAL COOPERATION RECOMMENDATION #4:

Increase International Law Enforcement Training on Intellectual Property

RECOMMENDATION: Enhance its intellectual property training programs for foreign prosecutors and law enforcement investigators in coordination with the Department of State.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice has taken an active role in providing training and expertise to develop effective criminal intellectual property enforcement regimes around the world. With funds provided by the State Department's International Narcotics and Law Enforcement Bureau for intellectual property training, the Department of Justice has organized and participated in more than 20 international programs in fiscal years 2005 and 2006. Programs have included: the development of manuals for prosecutors and investigators in intellectual property cases (in Panama and Paraguay); programs designed to

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increase cooperation between law enforcement agencies (in Mexico and Brazil); and regional programs addressing specific problems, such as the production and distribution of counterfeit optical media (Hong Kong). In the last year, Department of Justice prosecutors have met with more than 2,000 prosecutors, investigators, judges, and intellectual property experts from 94 countries to provide training and technical assistance in intellectual property enforcement. Department of Justice prosecutors also regularly support United States Embassy programs on intellectual property, typically working with Economic Bureau Officers or Department of Justice Resident Legal Advisors to provide in-country training on intellectual property enforcement. Through these types of bilateral and multilateral efforts, the Department of Justice seeks to develop greater enforcement capacity in these countries while also developing necessary law enforcement contacts to better coordinate international protection of intellectual property rights.

INTERNATIONAL COOPERATION RECOMMENDATION #5

Prioritize Negotiations for Legal Assistance Treaties

RECOMMENDATION: The Department of Justice should prioritize treaty negotiations for legal assistance agreements with foreign governments where intellectual property enforcement is a significant problem.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice is pleased to report progress in the area of treaty negotiations since the publication of the 2004 Report. Significantly, more than a dozen countries have ratified the Council of Europe Convention on Cybercrime, with ratification pending in over two dozen other countries. This Convention is the first international treaty that specifically addresses the subject of computer crime. Among its provisions is a requirement that countries criminalize intellectual property infringement. The Convention will strengthen intellectual property law enforcement by allowing the United States to better protect its intellectual property rights in an international environment. The United States Senate Committee on Foreign Relations has approved the Convention and ratification by the full Senate is pending. The Task Force continues to recommend that the full Senate ratify the Convention on Cybercrime as soon as possible.

The 2004 Report identified Asia as a region relevant to many United States intellectual property investigations. On April 7, 2006, the United States Senate gave its advice and consent to a new Mutual Legal Assistance Treaty with Japan. Negotiations with Japan on this treaty lasted over 10 years, ending in early 2003. The treaty was signed in August 2003. The Department of Justice is currently in treaty negotiations with other countries in Asia where intellectual property is a concern. In treaty negotiations, the Department of Justice deliberately raises intellectual property as an issue of significant importance.

In addition to treaties with Asian countries, extradition and mutual legal assistance agreements with the European Union that were signed in June 2003 are now closer to implementation. As anticipated, following signature of the agreements, technical negotiations took place between the United States and the European Union countries to conform the agreements to the terms of existing bilateral treaties

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and to address the situation in which there is no bilateral mutual legal assistance treaty in force. The United States-European Union agreements will enter into force when the bilateral instruments between the United States and all 25 European Union countries have been completed, signed, and approved by the United States Senate. The Department of Justice has executed these bilateral agreements to implement obligations of United States-European Union Mutual Legal Assistance and Extradition Agreements that ensure cooperation regarding intellectual property crimes with Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Greece, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom; and has completed negotiations with the remaining country of Poland. Like the treaty with Japan, these agreements with the European Union should improve cooperation in intellectual property and other criminal investigations.

"The list of countries cooperating in these efforts is long, but the Department is committed to building on these successes and achieving even greater global participation in the future. In the increasingly connected global economy, nothing short of a global effort will suffice."

- Attorney General Alberto R. Gonzales, November 10, 2005

INTERNATIONAL COOPERATION RECOMMENDATION #6

Prioritize Negotiations and Include Intellectual Property Crimes in Extradition Treaties

RECOMMENDATION: The Department of Justice should ensure that intellectual property crimes are included in all extradition treaties and prioritize negotiations with countries according to intellectual property enforcement concerns.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: It is important to have effective international extradition treaties that include intellectual property offenses in order to promote global cooperative efforts. In treaty negotiations with countries where intellectual property crime is a concern, the Department of Justice specifically raises intellectual property rights to ensure that the treaty will cover this type of crime. Each year, the Department of Justice prioritizes treaty negotiations with countries according to law enforcement concerns, including intellectual property. As mentioned previously, the United States is progressing toward implementation of a new extradition agreement with the European Union and the Department of Justice continually seeks to enter into new treaties or update existing treaties with other countries. Accordingly, the Department of Justice has implemented this recommendation and continues to seek additional opportunities to engage foreign partners on intellectual property issues.

INTERNATIONAL COOPERATION RECOMMENDATION #7

Emphasize Intellectual Property Enforcement During Discussions with Foreign Governments

RECOMMENDATION: The Department of Justice should emphasize intellectual property enforcement issues during discussions with foreign governments.

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During an official visit to Beijing, China, Attorney General Alberto R. Gonzales meets with Chinese Communist Party Official, Luo Gan, on November 18, 2005, where he discusses the importance of intellectual property rights and enforcement. Photo by Carolyn Nelson.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice holds regular high-level meetings with foreign governments, both in Washington and abroad. In these meetings, Department of Justice officials discuss international cooperation in criminal matters, including intellectual property crime. For example, intellectual property law enforcement was a primary topic at the annual United States/China Joint Liaison Group on Law Enforcement ("JLG") meeting in June 2006 in Washington, D.C., and talks are continuing to establish an expert working group on intellectual property law enforcement within the JLG framework. Moreover, the Attorney General raised intellectual property issues directly with his Chinese counterparts during his trip to China in November 2005. He also discussed intellectual property with Germany's Minister of Justice, Brigitte Zypries, in Washington, D.C., in April 2006. Minister Zypries has taken an aggressive stance in Germany against the theft of intellectual property. In addition, the Attorney General has raised intellectual property law enforcement in high-level meetings with Pakistan, which has aggressively pursued the producers of pirated optical media, and Canada, which played a significant role combating online piracy in Operation Site Down.

The Department of Justice has also pursued many opportunities to address and emphasize the importance of intellectual property enforcement through the International Visitors program administered by the Department of Justice's Office of Overseas Prosecutorial Development, Assistance, and Training.

C. CIVIL ENFORCEMENT

The Department of Justice fights against the theft of intellectual property most visibly through its enforcement of the Nation's criminal laws. The successful defense of intellectual property rights, however, also requires vigorous enforcement by the owners of intellectual property through the civil justice system. In 2004, the Task Force made the following recommendation regarding the Department of Justice's efforts to protect intellectual property rights in the civil courts. Following are the recommendation and its status.

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CIVIL ENFORCEMENT RECOMMENDATION

Support Civil Enforcement of Intellectual Property Laws by Owners of Intellectual Property Rights

RECOMMENDATION: The Department of Justice should assist private parties in enforcing civil laws that protect intellectual property owners against theft by supporting an effective statutory framework for such enforcement. When a court decision or lawsuit threatens the civil remedies available under federal law, the Department of Justice should defend in court all appropriate intellectual property protections and vigorously defend Congress's authority in protecting intellectual property rights.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: In October 2004, the Task Force recommended that the Department of Justice support civil enforcement of intellectual property laws by victims of intellectual property theft and defend in court all appropriate intellectual property protections.

Since the adoption of the recommendations by the Attorney General, the Department of Justice has filed numerous *amicus* briefs in matters in which the United States was not a party but desired to express its opinion in the Supreme Court and in appellate courts. In these ways the Department of Justice consistently supported the maintenance and implementation of robust intellectual property rights. The Department of Justice also intervened in appropriate cases to become a party to the litigation. These briefs and interventions promote legal precedents that enforce intellectual property rights fairly and consistently. By filing briefs in civil cases, the Department of Justice plays a vital role in promoting a legal environment that protects creativity and innovation.

Since October 2004, the Department of Justice has filed 13 *amicus* briefs in the Supreme Court in cases involving intellectual property rights, and more than a dozen *amicus* briefs and Statements of Interest (which are filed at the trial court and appellate court level) in such cases. These filings encompass all types of intellectual property, from pharmaceuticals to music and movies. In many of these cases, courts have adopted the arguments made by the Department of Justice and, consequently, expanded protections for owners of intellectual property rights. A description of some of these matters follows.

A. Supreme Court Cases

- *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 125 S. Ct. 2764 (2005):

In recent years, many individuals have used "file-sharing" software, such as "Grokster," to copy and distribute copyrighted music, movies, and software over the Internet without the authorization of the copyright owners. In this case, the Supreme Court addressed whether Grokster and other software providers could be held secondarily liable for copyright infringement.

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The Department of Justice's *amicus* brief argued that the Court should examine Grokster's business plan and knowledge of likely infringement to determine whether Grokster could be liable for actively inducing users to infringe copyrights on its peer-to-peer network. The Department of Justice focused on evidence that Grokster intended to use the enticement of illegally copied music to generate advertising revenue.

The Supreme Court ultimately ruled against the software providers and adopted a liability standard that closely followed one of the standards proposed by the Department of Justice. This decision will help victims of intellectual property theft protect the value of their property from unauthorized online distribution by allowing lawsuits against those who may be secondarily liable for infringing the owner's rights.

- *eBay Inc. v. MercExchange, LLC*, 2006 WL 1310670 (May 15, 2006):

The *eBay* case was the subject of considerable press commentary about the role of intellectual property enforcement as it relates to innovation and, in particular, the standards that judges must use to grant a permanent injunction against a patent infringer.

On March 10, 2006, the Department of Justice filed an *amicus* brief regarding these standards. The Department of Justice argued in favor of a permanent injunction against the patent infringer and advocated a set of principles that should apply in such cases. On May 15, 2006, the Supreme Court issued a decision that adopted much of the Department of Justice's reasoning.

- *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006):

The Nation's antitrust laws prohibit companies from using a monopoly in one market to establish a monopoly in another market, or in other words, from "tying" the sale of one product to the sale of another product. Oftentimes, a company will sue a patent holder under the antitrust laws and claim that the patent holder illegally "tied" the sale of another product to the patented product. As part of this claim, the company alleges that the patent's existence gives the patent holder an economic monopoly, or "market power," in a particular market.

In this case, the U.S. Court of Appeals for the Federal Circuit held that Supreme Court precedent established a rebuttable presumption that the defendant has such market power if the tying product is patented. The Supreme Court granted review, and the United States filed an *amicus* brief arguing both that controlling precedent did not mandate a presumption that patents confer market power and that such a presumption would conflict with the procompetitive policies of the antitrust laws. In a unanimous decision, the Supreme Court rejected the presumption and, as the United States had urged, vacated the Federal Circuit's judgment and remanded the case for further proceedings in the district court to determine, among other things, whether the defendant had market power.

- *McFarling v. Monsanto Co.*, 125 S. Ct. 2956 (2005):

In this case, a licensee had claimed that a patent owner committed patent misuse or related antitrust violations when it refused to permit the saving and replanting of second generation genetically-modified agricultural seeds. The Federal Circuit rejected the licensee's claim. On petition for certiorari before the U.S. Supreme

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Court, the United States, as amicus, stated that it is well-settled that "[a] patentee . . . does not engage in patent misuse when it merely invokes its core right to refuse to license its patented invention," and therefore, there was no need for the Supreme Court to review the Federal Circuit's decision. The Court agreed, denying the petition in June 2005.

- *Laboratory Corp. of America v. Metabolite Laboratories, Inc.*, No. 04-607:

The patent laws preclude patent protection for principles of nature, such as electricity and magnetism. Biotechnology inventions, however, often employ such discovered principles in methods of diagnosis.

In an *amicus* brief, the Department of Justice discussed the USPTO's recent guidelines regarding the circumstances in which the principles-of-nature doctrine will bar patent protection. The brief counseled the Court to exercise caution before broadly reviewing the principles-of-nature doctrine. As the brief argued, an overly broad application could jeopardize protection for a number of valuable patents on methods used to detect and treat various diseases. The brief also suggested a number of narrower rationales for resolving this particular case. A decision by the Supreme Court is expected in June 2006.

- *MedImmune, Inc. v. Genentech, Inc.*, No. 05-608:

The Declaratory Judgment Act generally permits parties having concrete disputes to obtain a judicial determination of their rights without having to run the risks that might flow from breaching a contract or infringing a patent. However, the Federal Circuit has required a party to face a reasonable apprehension of an infringement suit in order to challenge a patent through a declaratory judgment action. The court has further held that a licensee who pays royalties under protest cannot file a declaratory judgment action because it lacks an apprehension that it will be sued. In an *amicus* brief, the Department of Justice has argued that the Federal Circuit's rule for patent cases is at odds with the general principles underlying the Declaratory Judgment Act, and that it impairs competition by prohibiting the party that may have the most interest in challenging a patent (a licensee) from bringing an action to have the patent declared invalid unless the licensee also breaches the license and incurs substantial risks. We expect that this case will be heard in the fall of 2006.

- *KSR International Co. v. Teleflex, Inc.*, No. 04-1350:

In this case, the Supreme Court has been asked to reverse a decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") on the meaning of Section 103(a) of the patent laws and the use of prior art. That section prohibits patentability of an invention "if the differences between the subject matter sought to be patented and the prior art [*i.e.*, the preexisting state of knowledge in the relevant field] are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." Prior art includes knowledge available to those skilled in the art through prior publications, patents, and products that have been sold or publicly used more than one year before the filing of a patent application. The Federal Circuit reversed a summary judgment that an adjustable automobile pedal patent was invalid because, in its view, the district court had not pointed to a specific suggestion in the prior art to combine features of two prior art devices. The petitioner contends that the suggestion test adds an element not con-

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tained in the statutory test for obviousness and is inconsistent with prior Supreme Court precedent. The Supreme Court has asked the Department of Justice for its views regarding the case.

- *Apotex Inc. v. Pfizer, Inc.*, No. 05-1006:

This case involves the circumstances in which companies that seek to market generic equivalents of patented brand-name drugs will be permitted to challenge the patents on the brand-name drug. In this case, the Court of Appeals held that a prospective generic drug manufacturer could not sue a patent holder to obtain a judicial ruling that its generic drug would not infringe the patent, because there was no risk that the patent holder would sue for infringement in the near future. Petitioner contends that it should be permitted to obtain judicial confirmation that its generic drug would not infringe the patents in order to facilitate government approval. The Supreme Court has asked the Department of Justice for its views regarding this complex case.

- *Empresa Cubana del Tabaco d/b/a Cubatabaco v. Culbro Corp.*, 399 F.3d 462 (2d Cir. 2005):

In trademark law, the "famous marks doctrine" permits a foreign trademark owner to establish certain rights if the trademark has achieved a certain level of consumer recognition from sales in other countries. In this case, the court considered whether the Cuban embargo prevented a Cuban company from acquiring the rights to the COHIBA trademark by operation of the famous marks doctrine.

In an *amicus* brief, the Department of Justice argued that the embargo prevented the Cuban company from acquiring the mark, but did not prevent it from cancelling the United States mark that was previously awarded to another entity in the United States but was cancelled based on the Cuban entity's use of the mark abroad. A federal court of appeals agreed with the Department of Justice's analysis under the embargo, but disagreed that the Cuban entity could obtain a cancellation of the mark. The Supreme Court invited the Department of Justice to file a brief expressing the views of the United States, which was filed on May 19, 2006.

B. Lower Court Cases

- *DMCA subpoena litigation:*

Unfortunately, some Internet users illegally distribute copyrighted material over the Internet. The Digital Millennium Copyright Act ("DMCA") authorizes copyright owners to subpoena Internet Service Providers ("ISPs") to learn the identity of the ISPs' subscribers. In several lawsuits, however, ISPs have argued that the DMCA does not apply to them if they merely serve as "conduits" to transmit infringing material, such as copyrighted music, and that if the DMCA does apply to them, it violates the Constitution.

In a number of cases, the Department of Justice intervened to defend copyright owners' use of civil subpoenas. The Department of Justice argued that the DMCA was constitutional and that it applied to ISPs who act as conduits. To date, courts generally have found that the DMCA does not reach conduit ISPs. Nevertheless, the Department of Justice continues to support the federal government's authority to enable private companies to combat copyright infringement by participating in appeals in these matters and intervening in lower court cases.

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- *KISS Catalog v. Passport Int'l Productions, Inc.*, No. 03-CV-08514 (C.D. Cal. Dec. 21, 2005):

In this case, the rock band KISS sued a company for distributing an unauthorized recording of a 1976 concert. The Department of Justice intervened in the lawsuit and argued that an anti-bootlegging statute barred the company's unauthorized distribution. In its brief, the Department of Justice argued that the anti-bootlegging statute was valid because it fell outside the domain of the Copyright Clause's time limits on copyright protection, which apply to "writings" of an author. The court agreed with the Department of Justice's position, and held that the anti-bootlegging statute addresses live performances and unauthorized recordings rather than the "writings" of an author and serves to complement, rather than violate, the Copyright Clause. The court's decision expands the scope of intellectual property protection.

- *Aharonian v. Gonzales*, No. 04-5090 (District Court), No. 06-15361 (on appeal in the Ninth Circuit Court of Appeals):

The plaintiff, a computer programmer, sued the Department of Justice to block the enforcement of copyright laws against persons who copy computer source code. The plaintiff argues that the copyright laws are unconstitutionally vague as applied to source code. The plaintiff also argues that patent law, rather than copyright law, is the sole source of protection for intellectual property in computer programs. The Department of Justice is defending the suit on the ground that copyright laws clearly apply to computer programs and are not unconstitutionally vague. The district court ruled in the Department's favor, and the Department is now defending the district court's decision on appeal.

- *Elektra Entertainment Group, Inc. v. Barker*, No. 05-CV-7340 (S.D.N.Y.):

In this case, a peer-to-peer system user allegedly posted copies of recorded songs online and, thus, transferred those copies when they were downloaded by other system users. The defendant argued that electronically transferring a copy of a song was not the same thing as "distributing" the song within the meaning of the relevant statute. On April 21, 2006, the Department of Justice filed a Statement of Interest arguing that when a peer-to-peer system user electronically transfers a copy of a copyrighted file without authorization, that user infringes the copyright owner's distribution right. The Department of Justice's position, which comports with a number of court decisions, serves as a basis for many of the Department of Justice's criminal copyright infringement prosecutions. A decision is pending on the defendant's motion to dismiss.

- *Fonovisa, Inc. v. Alvarez*, No. 06-CV-011 (N.D. Tex.):

This case, like *Elektra Entertainment*, also involved a claim of peer-to-peer transfer of copyrighted works in which the defendant raised the same argument that an electronic transfer of a song did not constitute an infringing "distribution." On May 16, 2006, the Department of Justice filed a Statement of Interest advancing the same arguments as it did in the *Elektra Entertainment* case.

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D. ANTITRUST RECOMMENDATIONS

The Antitrust Division's mission is to enforce federal antitrust laws. However, intellectual property plays an increasingly important role in the Antitrust Division's merger and civil non-merger investigations, and the Department of Justice bears in mind that the antitrust and intellectual property laws share the common purpose of promoting innovation and enhancing consumer welfare. The Department of Justice recognizes that enforcing antitrust laws in a way that condemns beneficial uses of intellectual property rights could undermine pro-competitive incentives.

Given the importance of antitrust enforcement to the protection of intellectual property rights, the Task Force made the following recommendations listed below. The status of each recommendation is also indicated below.

(1) Support the rights of intellectual property owners to decide independently whether to license their technology to others.

STATUS: IMPLEMENTED AND ONGOING

(2) Encourage trade associations and other business organizations seeking to establish industry standards for the prevention of intellectual property theft to use the Department of Justice's business review procedure for guidance regarding antitrust enforcement concerns.

STATUS: IMPLEMENTED AND ONGOING

(3) Continue to promote international cooperation and principled agreement between nations on the proper application of antitrust laws to intellectual property rights.

STATUS: IMPLEMENTED AND ONGOING

Detailed background information and an explanation of the status of each recommendation is set forth below.

ANTITRUST RECOMMENDATION #1

Support the rights of intellectual property owners to determine independently whether to license their technology.

RECOMMENDATION: The Department of Justice should support the rights of intellectual property owners to decide independently whether to license their technology to others.

STATUS: IMPLEMENTED AND ONGOING

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EXPLANATION: As its primary implementation of this recommendation, the Department of Justice ensures that its own antitrust enforcement efforts do not impair the important right of intellectual property owners to decide whether to license that property. In addition, the Department of Justice advocates frequently, before both domestic and international audiences, that this policy should exist throughout the world. The Department of Justice's Assistant Attorney General for Antitrust delivered a keynote address at the European Union Competition Workshop in June 2005 in which he stressed the importance of licensing freedom, tracing the development of this principle through United States Supreme Court precedent and comparing it to developing doctrines of law in the European Union. In addition, the Department of Justice has argued to uphold this principle in *amicus* briefs in several civil cases, as explained previously in this Progress Report.

Given the many Supreme Court cases indicating that the right to exclude is a fundamental right embodied in the grant of a patent, the Department of Justice has concluded that the right of intellectual property owners to unilaterally, unconditionally refuse to license a valid patent is clear. The Department of Justice will continue to focus on international advocacy, particularly in foreign jurisdictions that adopt a contrary view, for its future implementation of this recommendation.

ANTITRUST RECOMMENDATION #2

Encourage the use of the Justice Department's business review procedure.

RECOMMENDATION: The Department of Justice should encourage trade associations and other business organizations seeking to establish industry standards for the prevention of intellectual property theft to use the Justice Department's business review procedure for guidance regarding antitrust enforcement concerns.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice promotes the use of its business review procedure through individual contact with interested parties and through various outreach efforts, including Internet resources. The Department of Justice maintains an Internet site that explains the business review procedure in detail (*www.usdoj.gov/atr/public/busreview/procedure.htm*) and provides searchable copies of business review letters issued since 1992. In addition, since the issuance of the 2004 Report, Department of Justice representatives, including the Assistant Attorney General for Antitrust, have encouraged industry to use the business review process through more than a dozen speeches and presentations that discuss the Task Force's recommendations.

Several intellectual property owners, both individually and as members of trade associations or other organizations, have begun preliminary discussions with the Department of Justice about the antitrust implications of their planned efforts to protect intellectual property rights, and may submit business review requests in the future. The Department of Justice treats pending business reviews as ongoing investigations and therefore does not recount the specifics of such requests to the public.

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ANTITRUST RECOMMENDATION #3

Promote international cooperation on the application of antitrust laws to intellectual property rights.

RECOMMENDATION: The Department of Justice should continue to promote international cooperation and principled agreement between nations on the proper application of antitrust laws to intellectual property rights.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice promotes sound intellectual property and competition policy through a variety of efforts under the coordination of its Antitrust Division's Foreign Commerce Section, assisted by the National Criminal Enforcement, Appellate, and Legal Policy Sections of the Antitrust Division and other Department of Justice components as appropriate. These efforts fall within several categories, including:

Intellectual Property Working Groups. Since the issuance of the 2004 Report, the Department of Justice has continued to engage in a number of intellectual property working groups, as well as more informal consultations, with the antitrust agencies of major United States trading partners. These agencies include the Japanese Fair Trade Commission, the Korean Fair Trade Commission, the Canadian Competition Bureau, and the Federal Competition Commission of Mexico. Throughout 2005 and 2006, the Department of Justice held meetings with representatives of the People's Republic of China, Chinese academics, and United States and Chinese business persons regarding China's efforts to enact its first general antitrust statute. In those meetings and in subsequent discussions, the Department of Justice has recommended that China's new law reflect the importance of ensuring that intellectual property rights are respected in order to foster the investment in innovation necessary for a competitive and dynamic market. The Department of Justice also meets on a frequent, informal basis with representatives of European nations and the European Union, including the Competition Directorate General of the European Commission, to discuss particular investigations and general principles involving competition law and intellectual property. In each of these efforts, the Department of Justice has worked jointly with the Bureau of Competition of the United States Federal Trade Commission.

Competition Advocacy through Multinational Organizations, Policy Forums, and Direct Training of Foreign Competition Agencies. The Department of Justice incorporates the promotion of sound intellectual property principles into its participation in numerous international conferences devoted to competition policy and economic growth. The Department of Justice helped found the International Competition Network ("ICN") in 2001 to promote effects-based competition laws worldwide and the principled convergence of antitrust analysis. The Department of Justice emphasized the protection of intellectual property rights at the June 2005 and May 2006 meetings of the ICN. The Department of Justice chairs the Working Party on Competition and Enforcement of the Competition Committee of the Organization for Economic Cooperation and Development and has advocated sound intellectual property policy in that forum throughout various meetings in 2005 and 2006. The Department of Justice regularly promotes the view that intellectual property and antitrust laws are complementary in speeches to public-private forums around the globe. In addition, it fre-

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quently provides guidance to foreign antitrust authorities seeking to create or revise their own intellectual property and antitrust enforcement policies and guidelines. Moreover, the Antitrust Division has had an active technical assistance program for many years through which it has advised governments in the process of adopting competition laws and new competition agencies on a wide range of antitrust issues, including the interplay between competition policy and intellectual property. In 2005-06, the recipients of such missions included Egypt, India, Russia, and several Latin American and Southeast Asian nations. Of particular interest, the current Assistant Attorney General for Antitrust visited authorities in China in June 2005, and the Antitrust Division's Deputy Assistant Attorney General for International Enforcement, Appellate, and Legal Policy visited China in May 2005 and March and May 2006. In many of these efforts, the Department of Justice coordinated its intellectual property policy and competition advocacy efforts with the Bureau of Competition of the United States Federal Trade Commission, and in some cases the Department of Justice also coordinated its efforts with the Competition Directorate General of the European Commission.

E. PREVENTION RECOMMENDATIONS

Education is a key tool in Department of Justice's mission to promote intellectual property protection. Protecting intellectual property is a collective effort of all citizens and therefore the public must be aware of their individual responsibilities. Therefore, the Department of Justice is constantly exploring opportunities to educate the public about intellectual property laws and the role that the Department of Justice plays in enforcement of those laws. In addition, the Department of Justice continues to form partnerships with victims of intellectual property theft in common educational initiatives. The Department of Justice has forged important, long-term partnerships with federal agencies, nonprofit educational institutions, and network television, with the goal of educating students and adults about the importance of protecting creativity through the development of educational programs and materials for classroom use. Accordingly, the recommendations set forth below were designed to increase the Department of Justice's effectiveness in preventing intellectual property crimes from occurring and raising public awareness. The status of each recommendation is set forth below.

(1) Develop a national education program to prevent intellectual property crime.

(A) Developing materials for student educational programs;

STATUS: IMPLEMENTED AND ONGOING

(B) Creating partnerships with non-profit educational organizations to promote public awareness regarding intellectual property crimes;

STATUS: IMPLEMENTED AND ONGOING

(C) Developing a video to teach students about the negative consequences of intellectual property theft; and

STATUS: IMPLEMENTED AND ONGOING

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(2) Educate the public regarding the Department of Justice's policy on peer-to-peer networks.

STATUS: IMPLEMENTED

(3) Promote authorized use and awareness of the FBI's new anti-piracy seal and warning.

STATUS: IMPLEMENTED AND ONGOING

PREVENTION RECOMMENDATION #1

Develop a National Education Program to Prevent Intellectual Property Crime

RECOMMENDATION: The Department of Justice should develop a national program to educate students about the value of intellectual property and the consequences of committing intellectual property crimes by: (A) developing materials for student educational programs, (B) creating partnerships with non-profit educational organizations to promote public awareness regarding intellectual property crime, (C) developing a video to teach students about the negative consequences of intellectual property theft, and (D) encouraging federal prosecutors handling intellectual property crime cases throughout the nation to promote the Department of Justice's public awareness programs.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice has developed strategic partnerships with non-profit educational organizations and other federal agencies to create and fund development of educational curricula, conduct educational events for students to learn interactively, and fund long-term teacher training programs.

National Educational Prevention Teacher Training Initiative

In a joint venture, the USPTO and the Department of Justice are funding a three-year, $300,000 annual program with three national nonprofit educational organizations: Street Law, i-Safe, and the Constitutional Rights Foundation. The program will focus on training teachers (who in turn will train other teachers) about intellectual property, the laws protecting it, and the responsibilities of citizens to respect it. The program will select major cities across the country to develop teacher-training seminars where teachers will be instructed about intellectual property by education experts, a network of local professional volunteer lawyers, federal investigators; federal prosecutors, and curriculum developers. Teachers will take their experience and knowledge back into the classroom and, with the curriculum developed by the nonprofit educational organization i-Safe, students will be taught about intellectual property and the importance of respecting it. The program also contemplates developing a website with free downloadable materials, games, and links to other Department of Justice intellectual property educational and outreach activities.

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Activate Your Mind: Protect Your Ideas



In October 2004, the Department of Justice formed an educational partnership with Street Law, i-Safe, and Court TV, with the goal of developing a national campaign aimed at educating students about intellectual property protection. One part of the national campaign involved creating a series of educational events entitled "Activate Your Mind: Protect Your Ideas" ("AYM"). The AYM campaign conducted a series of educational events throughout the country involving students, teachers, high-level government representatives, and victims of intellectual property theft. The AYM events were filmed by Court TV and broadcast on their educational series entitled "Choices and Consequences," which targets thousands of middle school and high school students across the country. The Court TV footage also served as material for an educational DVD to be used in conjunction with curriculum materials and public awareness events. The weeks leading up to the event created an opportunity for i-Safe and Street Law to introduce a curriculum to the participating students of the AYM events in an effort to educate and raise the student's level of awareness about intellectual property.



Attorney General Alberto R. Gonzales participates in the second installment of Court TV's "Activate Your Mind: Protect Your Ideas" program on April 28, 2005 at UCLA with over 120 high school students to discuss movie and television piracy and the importance of protecting creativity. Photo courtesy of Court TV.

The first AYM event was held in October 2004 in Washington, D.C., at the Department of Justice and involved 100 area high school students. With a focus on music piracy, the event included presentations by songwriters, Department of Justice officials, victim representatives, a convicted intellectual property felon, on the impact of piracy.

On April 28, 2005, Attorney General Gonzales participated in the second installment of the AYM program at UCLA, with over 120 high school students, to discuss movie and television piracy and the importance of protecting creativity. The Attorney General led students in a question and answer session and students also heard from a convicted intellectual property offender, Assistant United States Attorneys, FBI agents, actors, stuntmen, and the President of the Motion Picture Association of America.

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Attorney General Alberto R. Gonzales greets cheering students at the Windmill Springs Middle School on March 30, 2006 in San Jose, California where he participated in an educational event focused on intellectual property protection. Photo courtesy of Court TV.

The third AYM event was held in March 2006 in San Jose and involved 100 middle school children. The Department of Justice partnered with the USPTO, Court TV, and Web Wise Kids (child internet safety experts), to discuss intellectual property. Focusing on software piracy, the educational partners used computer tools and programs to teach the students about intellectual property. The students then designed their own intellectual property software. An Assistant United States Attorney also educated the children about intellectual property laws. The students heard from, and interacted with, the Attorney General, the Director of the USPTO, and victim-industry representatives from the Electronic Software Alliance.

Intellectual Property Forum

In October 2005, Attorney General Gonzales joined Commerce Secretary Carlos Gutierrez, Senator John Cornyn, and Congressman Lamar Smith at the University of Texas Law School in Austin, Texas, to discuss intellectual property with legal scholars and high-tech industry leaders. The panelists discussed the importance of the criminal and civil enforcement of intellectual property for future economic growth and innovation. This event was filmed by Court TV and incorporated into its educational programming that aired as part of its "Choices and Consequences" series. Copies of the program will be disseminated in conjunction with the Department of Justice's educational package for classrooms.



U.S. government officials joined together to discuss the importance of intellectual property protection in the high-tech industry at the University of Texas Law School in Austin, Texas on October 31, 2005. Photographed from left to right are: Secretary Carlos Gutierrez, Department of Commerce, Attorney General Alberto R. Gonzales, U.S. Senator John Cornyn (R-Texas), and U.S. Rep. Lamar Smith (R-Texas). Photo courtesy of Court TV.

International Outreach

European countries have expressed interest in the efforts of the Department of Justice to prevent intellectual property theft through education. Department of Justice officials have traveled to various countries to participate in, and showcase, the strategies behind the efforts of the Department of Justice. Italy invited the Department of Justice and its educational partners to share,

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with high-level Italian officials, the Department of Justice's model of private sector and public cooperation in educational outreach. Similarly, French government officials invited the Department of Justice to share law enforcement strategies on educating the public about intellectual property theft and, as a result of the Attorney General's meeting with the Justice Minister of Germany, the Department is pursuing a partnership with German officials on intellectual property strategies for educational efforts.

Industry Outreach

In partnership with the United States Chamber of Commerce's Coalition Against Counterfeiting and Piracy ("CACP"), the Department of Justice has developed a working group of federal, State, and local prosecutors, investigators, and law enforcement officials to address the problems facing intellectual property enforcement and the importance of intellectual property victim-industry referrals. This working group participated in two conferences and invited intellectual property victim-industry members to attend. The purpose of the conferences was to explain the various aspects of intellectual property investigations for federal, state, and local enforcement and develop a better understanding among intellectual property victims of how to refer an intellectual property theft to law enforcement. The first conference was held in Los Angeles on March 7, 2006, and involved participants from the Los Angeles Police Department, the Los Angeles Sheriff's Office, the Los Angeles District Attorney's Office, ICE, the FBI, and prosecutors from the United States Attorney's Office for the Central District of California.

The second conference was held in New York City in April 2006, and involved members from the New York Police Department's Trademark Infringement Group, the New York County District Attorney's office, the Bronx District Attorney's office, the Queens District Attorney's office, ICE, the FBI, United States Secret Service, and the United States Attorneys' Offices for the Eastern and Southern Districts of New York. The conference involved over 130 law enforcement and industry participants.

PREVENTION RECOMMENDATION #2

Educate the Public Regarding the Department of Justice's Policy on Peer-to-Peer Networks

RECOMMENDATION: The Department of Justice should educate the public regarding its policy prohibiting the use of peer-to-peer file-sharing networks on Justice Department computer systems.

STATUS: IMPLEMENTED

EXPLANATION: On September 17, 2004, the Department of Justice's Chief Information Officer issued a memorandum (contained in the Appendices of the 2004 Report) discussing the policy prohibiting the use of peer-to-peer software on its computer system. Since that time, the Department of Justice has distributed several thousand copies of the 2004 Report of the Department of Justice's Task Force on Intellectual Property to the public.

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PREVENTION RECOMMENDATION #3

Promote Authorized Use and Awareness of the FBI's New Anti-Piracy Seal and Warning

RECOMMENDATION: The Department of Justice should promote authorized use and awareness of the FBI's new Anti-Piracy Seal to deter copyright infringement and trademark offenses.

STATUS: IMPLEMENTED AND ONGOING

EXPLANATION: The Department of Justice has heavily promoted the use of the FBI's Anti-Piracy Seal to industry associations. Currently, the FBI has written agreements with the Motion Picture Association of America, the Recording Industry Association of America, the Software Information Industry Association, and the Entertainment Software Association, which use the Anti-Piracy Seal on copyrighted works to serve as a visible warning of the consequences of committing intellectual property crimes. The Department of Justice will continue to promote the use of the Anti-Piracy Seal with industry association representatives.

CONCLUSION

The Department of Justice has implemented all of the recommendations contained in the 2004 Report. In addition, the Department of Justice has proposed and implemented additional recommendations to promote intellectual property rights. Notwithstanding these achievements, the Department of Justice will not cease its efforts. The Department of Justice will continue to increase its effectiveness in protecting the creativity and innovation that drives our Nation's economy. As indicated throughout this Progress Report, and in statements by the Attorney General, the theft of intellectual property is a threat to our national economic security. The Department of Justice will continue to wage an aggressive campaign to protect the Nation's intellectual resources.

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APPENDIX A.

DEPARTMENT OF JUSTICE TASK FORCE ON INTELLECTUAL PROPERTY

SUMMARY OF RECOMMENDATIONS

A. CRIMINAL ENFORCEMENT RECOMMENDATIONS

The Task Force has determined that protection of intellectual property is essential to maintain the nation's economic national security. Accordingly, the recommendations re-emphasize the Department of Justice's commitment to enforce aggressively the laws against the theft of copyrighted works, trademark counterfeiting, theft of trade secrets, and other intellectual property offenses. Accordingly, the recommendations set forth below are designed to strengthen the Department's commitment to protect intellectual property.

(1) The Department of Justice should create five additional CHIP Units in regions of the country where intellectual property producers significantly contribute to the national economy. These areas are the District of Columbia; Sacramento, California; Pittsburgh, Pennsylvania; Nashville, Tennessee; and Orlando, Florida;

(2) The Department of Justice should reinforce and expand existing CHIP Units located in key regions where intellectual property offenses have increased, and where the CHIP Units have effectively developed programs to prosecute CHIP-related cases, coordinate law enforcement activity, and promote public awareness programs;

(3) The Department of Justice should designate CHIP Coordinators in every federal prosecutor's office and make the coordinators responsible for intellectual property enforcement in that region;

(4) The Department of Justice should examine the need to increase resources for the Computer Crime and Intellectual Property Section of the Criminal Division in Washington, D.C., to address additional intellectual property enforcement concerns;

(5) The Department of Justice should recommend that the FBI increase the number of Special Agents assigned to intellectual property investigations, as the Justice Department itself increases the number of prosecutors assigned to intellectual property enforcement;

(6) The Department of Justice should recommend that the FBI increase the number of personnel assigned to search for digital evidence in intellectual property cases;

(7) The Department of Justice should dismantle and prosecute more nationwide and international criminal organizations that commit intellectual property crimes;

(8) The Department of Justice should enhance programs to train prosecutors and law enforcement agents investigating intellectual property offenses;

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(9) The Department of Justice should prosecute aggressively intellectual property offenses that endanger the public's health or safety;

(10) The Department of Justice should emphasize the importance of charging intellectual property offenses in every type of investigation where such charges are applicable, including organized crime, fraud, and illegal international smuggling;

(11) The Department of Justice should enhance its program of educating and encouraging victims of intellectual property offenses and industry representatives to cooperate in criminal investigations.

Recommended enhancements include:

(A) Encouraging victims to report intellectual property crime to law enforcement agencies;

(B) Distributing the new "Department of Justice Guide to Reporting Intellectual Property Crime" to victims and industry representatives regarding federal intellectual property offenses; and

(C) Hosting a conference with victims and industry representatives to educate participants on how they can assist in law enforcement investigations.

(12) The Department of Justice should issue internal guidance to federal prosecutors regarding how victims can assist prosecutors in intellectual property cases.

B. INTERNATIONAL COOPERATION RECOMMENDATIONS

International cooperation is a critical component in stemming the tide of global intellectual property theft. Intellectual property thieves in foreign countries must be subject to, and prosecuted by, foreign governments. In addition, foreign governments must assist the United States in its efforts to gather evidence and prosecute intellectual property criminals who violate the laws of the United States. Accordingly, the following recommendations are designed to increase cooperation with foreign countries regarding intellectual property enforcement:

(1) The Department of Justice should deploy federal prosecutors to the United States embassies in Hong Kong and Budapest, Hungary, and designate them as "Intellectual Property Law Enforcement Coordinators" ("IPLECs") to coordinate intellectual property enforcement efforts in those regions;

(2) The Department of Justice should recommend that the FBI co-locate Legal Attachés with intellectual property expertise to Hong Kong and Budapest, Hungary, to assist the newly assigned IPLECs in investigative efforts;

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(3) Direct prosecutors and agents to increase the use of alternative channels of communication, such as "law enforcement-to-law enforcement" contacts, to collect information and evidence quickly in foreign investigations;

(4) The Department of Justice should enhance its intellectual property training programs for foreign prosecutors and law enforcement investigators in coordination with the Department of State;

(5) The Department of Justice should prioritize treaty negotiations for legal assistance agreements with foreign governments where intellectual property enforcement is a significant problem;

(6) The Department of Justice should ensure that intellectual property crimes are included in all extradition treaties and prioritize negotiations with foreign countries according to intellectual property enforcement concerns; and

(7) The Department of Justice should emphasize intellectual property enforcement issues during discussions with foreign governments.

C. CIVIL ENFORCEMENT RECOMMENDATION

The Department of Justice fights against the theft of intellectual property most visibly through its enforcement of the Nation's criminal laws. The successful defense of intellectual property rights, however, also requires vigorous enforcement by the owners of intellectual property through the civil justice system. In 2004, the Task Force made the following recommendation regarding the Department of Justice's efforts to protect intellectual property rights in the civil courts.

(1) The Department of Justice should assist private parties in enforcing civil laws that protect intellectual property owners against theft by supporting an effective statutory framework for such enforcement. When a court decision or lawsuit threatens the civil remedies available under federal law, the Justice Department should defend in court all appropriate intellectual property protections and vigorously defend Congress's authority in protecting intellectual property rights.

D. ANTITRUST RECOMMENDATIONS

The Department of Justice's Antitrust Division is responsible for promoting and protecting the competitive process and the American economy through enforcement of antitrust laws. These laws prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce competition, and predatory acts designed to achieve or maintain monopoly power. When these practices involve intellectual property, they can raise complex questions about the proper application of antitrust to intellectual property rights. The Task Force Report recognizes that intellectual property rights can promote competition

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by creating incentives to innovate and commercialize new ideas that enhance consumer welfare and that enforcing the antitrust laws in a way that condemns the beneficial use of intellectual property rights could undermine the incentive to create and disseminate intellectual property. The following recommendations help ensure that the antitrust laws are appropriately applied to intellectual property in a way that does not chill the exercise of legitimate intellectual property rights:

(1) The Department of Justice should support the rights of intellectual property owners to decide independently whether to license their technology to others;
(2) The Department of Justice should encourage trade associations and other business organizations seeking to establish industry standards for the prevention of intellectual property theft, to use the Justice Department's business review procedure for guidance regarding antitrust enforcement concerns; and

(3) The Department of Justice should continue to promote international cooperation and principled agreement between nations on the proper application of antitrust laws to intellectual property rights.

E. LEGISLATIVE RECOMMENDATIONS

The Task Force examined a number of pending bills in Congress and developed a set of general principles to guide pending and future legislation regarding the enforcement of intellectual property rights.

Principles for Pending Legislation

The circumvention of technological safeguards protecting copyrighted works should be subject to prosecution. The owners of intellectual property have the primary responsibility for protecting their creative works from unauthorized duplication. Technological safeguards such as digital rights management software and other forms of copy-protection provide means of doing so. Federal law should reinforce the use of these technological safeguards by preventing their deliberate and unauthorized circumvention.

The distribution of counterfeit products should be thwarted by seizing, when possible, the materials and equipment used in making them. The distribution of counterfeit products (both goods and creative works) represents not only a theft of intellectual property and a potential source of consumer fraud, but a significant threat to public health and safety. In order to prevent the distribution of counterfeit products, the government should take reasonable steps to prevent their production. When law enforcement officials find materials and equipment that are used to create counterfeit products, the materials and equipment should be seized. Legal loopholes should not allow trafficking in counterfeit labels simply because they have not yet been attached to counterfeit goods.

The passive sharing of copyrighted works for unlawful duplication should be treated as the distribution of those works and should, where appropriate, be subject to prosecution. Distributing unauthorized copies of copyrighted works is a criminal violation if the total retail value of the original work, multiplied by the number of unauthorized copies, reaches a certain monetary threshold. Given the minimal cost of distributing copyrighted works over the Internet, making such files available for others to copy is equivalent to distribut-

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ing them. The criminal copyright statute should therefore prohibit people from knowingly making available to the public a threshold number of infringing copies or exceeding a threshold value.

Copyright law should recognize the premium value of a copyrighted work before the work is released for sale to the general public. A copy of a copyrighted work is more valuable before it can be legitimately obtained by anyone else. In such situations, not only is this "prerelease" copy rarer, but it can also permit the holder to distribute copies as early as – or before – the copyrighted work's legitimate owner. As a result, although pre-release copies of a copyrighted work have no legitimate retail value, they can be the most valuable copies of all and their distribution can damage the rights holder. The copyright laws should reflect the premium value of pre-release copies, particularly at the stage of sentencing defendants for criminal violations.

The law should provide a remedy against those who intentionally induce infringement. Owners of intellectual property have the primary responsibility for protecting their intellectual property through civil enforcement actions if necessary. Computer networks that facilitate the unauthorized sharing and copying of copyrighted works by users are some of the most dangerous threats to copyright ownership today. A copyright owner should have some express remedy against such networks and other businesses, to the extent that they depend upon and intend for their customers to violate the owner's copyright.

Principles for Future Legislation

The law should prohibit not only the sale of counterfeit goods, but also the possession of counterfeit goods with the intent to sell them. Under current law, it is illegal to sell counterfeit goods (or to attempt to do so), but it is not illegal to possess even large quantities of counterfeit goods with the intention of selling them. As a result, someone who is caught with a warehouse full of counterfeit handbags may escape prosecution for trademark violations if there is no evidence that he has already sold or attempted to sell them. The Task Force recommended further consideration of a proposal to criminalize the possession of counterfeit goods with the intention of selling or otherwise trafficking in them.

The law should not distinguish between selling counterfeit goods for cash and giving them away with the general expectation of receiving any other type of benefit in the future. Under current trademark law, it is a criminal violation to sell or traffic in counterfeit goods. At least one court has held, however, that it is not illegal to give away such goods where there is no agreement to get something of value from the recipient in return. Under that standard, the distribution of counterfeit goods as samples or as gifts to cultivate a customer's goodwill might not be illegal.

The Task Force recommended further consideration of a proposal to broaden the definition of the word "traffic" in the federal trademark law so that it would explicitly include any distribution of counterfeit goods from which the distributor hopes to gain something of value from any source.

As with other laws involving intellectual property, an attempt to violate the criminal copyright statute should be a violation without regard to whether it is successful. Unlike the federal criminal trademark statute, the criminal copyright statute does not criminalize attempted violations. It is a general tenet of criminal law, however, that those who attempt to commit a crime are as morally culpable as those who succeed in doing so. As a practical matter, individuals who attempt to commit copyright crimes are disproportionately likely to

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have committed them in the past and to commit them again in the future (unless they have been caught and punished).

The Task Force recommended further consideration of a proposal to amend the criminal copyright statute to outlaw attempted violations.

Law enforcement officers should have access to the full range of accepted law enforcement tools when they investigate intellectual property crimes that pose a serious threat to public health or safety. A federal court may issue an order authorizing the use of a voice intercept, otherwise known as a "wiretap," in the investigation of many federal crimes, including the theft of interstate shipments, but not for intellectual property crimes. Although there are good reasons to restrict the use of wiretaps in deference to individual privacy rights, some intellectual property crimes present a more serious danger to public health or safety. Trademark violations, for instance, may involve the distribution of counterfeit goods that are defective and prone to causing widespread consumer injuries.

The Task Force recommended further consideration of a proposal to amend the Federal Wiretap Act to provide for the use of voice intercepts in investigating intellectual property crimes specifically when they threaten public health or safety.

Counterfeit and stolen intellectual property should not be permitted to flow into or out of the United States. Under current law, it is not a violation of intellectual property laws simply to import or export unauthorized copies of copyrighted works or counterfeit goods. Given the central role that international distribution plays in intellectual property crimes and the importance of not contributing in any way to intellectual property violations in other countries, the shipping of infringing products across the nation's borders should be expressly prohibited.

The Task Force recommended further consideration of a proposal to criminalize the importation and exportation of counterfeit goods and unauthorized copies of copyrighted works into and out of the United States.

Copyright law should recognize that copies of a copyrighted work are more valuable before copies of the work are released for sale to the general public. The criminal copyright statute often requires federal prosecutors to prove the retail value of the copyrighted work that has been stolen, both to establish that a criminal violation has occurred and to assess the appropriate penalty upon conviction. As explained above, however, copyrighted works that are stolen before they are released for sale lack an established retail value and yet are extraordinarily valuable. The copyright law should recognize and eliminate this tension. The Task Force recommended a proposal to assign a presumed retail value to copies of copyrighted works that have not yet been released for sale to the public.

The United States should facilitate the prosecution of individuals who are accused of intellectual property violations in another country if the violations would have been crimes under American law. Given the ease and frequency with which perpetrators of intellectual property crimes cross international borders, it is important for the United States and other nations to cooperate whenever necessary in the prosecution of these crim-

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inals. Nevertheless, under current law, the United States will not extradite an individual accused of intellectual property crimes unless (1) the United States has a treaty with the nation seeking extradition and (2) that treaty lists intellectual property crimes as a basis for extradition. This presents a significant obstacle to international cooperation because the United States has not finalized extradition treaties with many nations, and many of the treaties that the United States has concluded do not list intellectual property crimes. Therefore, the United States is often precluded from extraditing, and thus securing the extradition of, individuals accused of even the most egregious intellectual property violations.

The Task Force recommended further consideration of a proposal to permit the extradition of individuals who are accused of intellectual property violations that are criminalized under the laws both of the United States and of the other nation, even in the absence of a formal extradition treaty between them.

The United States should support enhanced international enforcement of intellectual property laws. With the globalization of the economy and the rise of digital commerce, intellectual property crimes have crossed international borders with increasing frequency. The United States has signed two treaties that would facilitate international cooperation in halting some of the most egregious of these crimes: the United Nations Convention Against Transnational Organized Crime and the Council of Europe Convention on Cybercrime. The Department of Justice supports the ratification of these treaties, but the Senate has not yet voted on them.

The Task Force recommended the expeditious ratification of both treaties.

E. PREVENTION RECOMMENDATIONS

Preventing crimes from occurring in the first place is a critical component to any crime-fighting program. Publicizing successful prosecutions is an important way to deter future crimes. In addition, educational initiatives that make clear the consequences of choices must play a key role in any solution to such a pervasive and complex problem. Accordingly, the Task Force examined several public awareness and prevention issues and recommended that:

(1) The Department of Justice should develop a national program to educate students about the value of intellectual property and the consequences of committing intellectual property crimes by:

(A) Developing materials for student educational programs;

(B) Creating partnerships with non-profit educational organizations to promote public awareness regarding intellectual property crime;

(C) Developing a video to teach students about the negative consequences of intellectual property theft; and

(D) Encouraging federal prosecutors handling intellectual property crime cases throughout the nation to promote the Department of Justice's public awareness programs.

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(2) The Department of Justice should educate the public about its policy prohibiting the use of peer-to-peer software on Justice Department computer systems; and

(3) The Department of Justice should promote authorized use and awareness of the FBI's new Anti-Piracy Seal to deter copyright infringement and trademark offenses.

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APPENDIX B.

REPORTING INTELLECTUAL PROPERTY CRIME: A Guide for Victims of Counterfeiting, Copyright Infringement, and Theft of Trade Secrets

Contents

- What Are Copyrights, Trademarks and Trade Secrets?
- How Can Intellectual Property Be Stolen?
- What Types of Intellectual Property Theft Constitute a Federal Crime?
- Why Should You Report Intellectual Property Crime?
- What Should You Do if You Are Victimized?
- How Can You Assist Law Enforcement?
- Checklist for Reporting a Copyright Infringement or Counterfeit Trademark Offense
- Checklist for Reporting a Theft of Trade Secrets Offense

The information contained in this document has been provided by the Department of Justice's Task Force on Intellectual Property as a general guide for victims of intellectual property crime. This document is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. In addition, this document is not intended as a United States Department of Justice directive or as a document that has the force of law.

What Are Copyrights, Trademarks and Trade Secrets?

The United States has created enforceable rights in "intangibles" that are known as intellectual property, including copyrights, trademarks, and trade secrets. Copyright law provides federal protection against infringement of certain exclusive rights, such as reproduction and distribution, of "original works of authorship," including computer software, literary works, musical works, and motion pictures. The use of a commercial brand to identify a product is protected by trademark law, which prohibits the unauthorized use of "any word, name, symbol, or device" used by a person "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods." Finally, trade secret law protects any formula, device, or compilation of information used in a business from being disclosed without the owner's permission. Legal protection is only afforded, however, to those trade secrets that possess independent economic value and that the owner has taken reasonable measures to keep secret.

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How Can Intellectual Property Be Stolen?

Intellectual property can be stolen or misappropriated in many ways. A copyrighted work may be illegally infringed by making and selling an unauthorized copy, as with infringing computer software. A trademark may be infringed by selling a good with a counterfeit mark. A trade secret may be stolen from its owner and used to benefit a competitor.

What Types of Intellectual Property Theft Constitute a Federal Crime?

Although civil remedies may provide compensation to wronged intellectual property rights holders, criminal sanctions are often warranted to ensure sufficient punishment and deterrence of wrongful activity. Congress has continually expanded and strengthened criminal laws for violations of intellectual property rights to protect innovation and ensure that egregious or persistent intellectual property violations do not merely become a standard cost of doing business for defendants. Among the most significant provisions are the following:

Counterfeit Trademarks: The Trademark Counterfeiting Act, 18 U.S.C. § 2320(a), provides penalties of up to ten years imprisonment and a $2 million fine, or twice the gross gain or gross loss, for a defendant who "intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services."

Counterfeit Labeling: The counterfeit labeling provisions of 18 U.S.C. § 2318 prohibit trafficking in counterfeit labels designed to be affixed to, enclosing, or accompanying, or designed to be affixed to, phonorecords, copies of computer programs, motion pictures, audiovisual works, literary works, visual art, documentation, or packaging, as well as trafficking in counterfeit documentation or packaging for computer programs. Violations are punishable by up to 5 years imprisonment and a $250,000 fine or twice the gross gain or gross loss.

Criminal Copyright Infringement: Copyright infringement is a felony punishable by up to 3 years imprisonment and a $250,000 fine under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319 when a defendant willfully reproduces or distributes at least one or more copies of phonorecords or one or more copyrighted works with a total retail value of more than $2,500 within a 180-day period. The maximum penalty rises to 5 years imprisonment if the defendant acted "for purposes of commercial advantage or private financial gain." Misdemeanor copyright infringement occurs where the value exceeds $1,000 but is equal to, or less than $2,500.

Theft of Trade Secrets: The Economic Espionage Act contains two separate provisions that criminalize the theft of trade secrets. The first provision, 18 U.S.C. § 1831(a), prohibits thefts of the trade secrets for the benefit of a foreign government or agent, and is punishable by up to 15 years imprisonment and a $500,000 fine. The second, 18 U.S.C. § 1832, prohibits thefts of commercial trade secrets, and is punishable by up to 10 years imprisonment and a $250,000 fine. The statute broadly defines the term "trade secret" to include all types of information that the owner has taken reasonable measures to keep secret and which has independent economic value.

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Confidentiality: Federal law also provides special protections to victims in trade secret cases to preserve the confidentiality of the information during criminal proceedings. The statute provides that courts "shall enter such orders and take such action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws." 18 U.S.C. § 1835.

Why Should You Report Intellectual Property Crime?

Intellectual property is an increasingly important part of the United States's economy, representing its fastest growing sector. For example, in 2002, copyright industries alone contributed approximately six percent, or $626 billion, to America's gross domestic product, and employed four percent of America's workforce, according to an economic study commissioned by the International Intellectual Property Alliance. As the Nation continues to shift from an industrial economy to an information-based economy, the assets of the country are increasingly based in intellectual property.

In recognition of this trend, the Department of Justice is waging the most aggressive campaign against the theft and counterfeiting of intellectual property in its history. The priority of criminal intellectual property investigations and prosecutions nationwide has been increased and additional resources on both the prosecutive and investigative levels have been brought to bear on the growing problem of intellectual property theft.

Effective prosecution of intellectual property crime, however, also requires substantial assistance from its victims. Because the holders of intellectual property rights are often in the best position to detect a theft, law enforcement authorities cannot act in many cases unless the crimes are reported in the first place. Once these crimes are reported, federal law enforcement authorities need to quickly identify the facts that establish jurisdiction for the potential intellectual property offenses, such as federal copyright and trademark registration information, as well as facts concerning the extent of the victim's potential loss, the nature of the theft, and possible suspects. In a digital world where evidence can disappear at the click of a mouse, swift investigation is often essential to successful intellectual property prosecutions.

Accordingly, the Department of Justice has created this handbook to facilitate the flow of critical information from victims of intellectual property crimes to law enforcement authorities. The Department of Justice's aim is to make it as easy as possible to report incidents of intellectual property crime to law enforcement authorities, including whom to call and what to tell them.

Note: The guidelines set forth below seek information that, in the experience of Department of Justice prosecutors and investigators, is useful or even critical to the successful prosecution of the most common intellectual property crimes. These guidelines are not intended to be exhaustive, nor does the presence or absence of responsive information from the victim necessarily determine the outcome of an investigation.

What Should You Do if You are Victimized?

Victims of intellectual property crime, such as counterfeiting and theft of trade secrets, often conduct internal investigations before referring matters to law enforcement. These investigations can encompass a variety of

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investigative steps, including interviews of witnesses, acquisition of counterfeit goods, surveillance of suspects, and examination of computers and other evidence. Victims can maximize the benefit of these independent investigative activities as follows:

1. Document All Investigative Steps: To avoid duplication of effort and retracing of steps, internal investigations should seek to create a record of all investigative steps that can later be presented to law enforcement, if necessary. If a victim company observes counterfeit goods for sale online and makes a purchase, for example, investigators should record the name of the website, the date and time of the purchase, the method of payment, and the date and manner of delivery of the goods. Any subsequent examination of the goods should then be recorded in a document that identifies the telltale characteristics of theft or counterfeiting, such as lack of a security seal, poor quality, or the like.

Similarly, in the case of a suspected theft of trade secrets, any internal investigation or surveillance of the suspect, or a competitor believed to be using the stolen information, should be recorded in writing. A record of any interviews with suspects or witnesses should be made by tape or in writing. The pertinent confidentiality agreements, security policies, and access logs should also be gathered and maintained to facilitate review and reduce the risk of deletion or destruction.

2. Preserve the Evidence: Any physical, documentary, or digital evidence acquired in the course of an internal investigation should be preserved for later use in a legal proceeding. In the online theft example identified above, victims should printout or obtain a digital copy of the offending website and safely store any infringing goods and their packaging, which may contain valuable details of their origin. If the computer of an employee suspected of stealing trade secrets has been seized, any forensic analysis should be performed on a copy of the data, or "digital image," to undermine claims that the evidence has been altered or corrupted.

3. Contact Law Enforcement Right Away: Victims can maximize their legal remedies for intellectual property crime by making contact with law enforcement soon after its detection. Early referral is the best way to ensure that evidence of an intellectual property crime is properly secured and that all investigative avenues, such as the execution of search warrants and possible undercover law enforcement activities, are fully explored. Communication with law enforcement authorities at the onset of suspected violations also allows a victim to coordinate civil proceedings with possible criminal enforcement. Use the reporting guides set forth later in this document to organize the information you gather and provide the necessary information to your law enforcement contact.

How Can You Assist Law Enforcement?

Prosecutions of intellectual property crime often depend on cooperation between victims and law enforcement. Indeed, without information sharing from intellectual property rights holders, prosecutors can neither discern the trends that suggest the most effective overall enforcement strategies, nor meet the burden of proving the theft of intellectual property in a specific case. The following seeks to provide guidance concerning the types of assistance that may be offered by victims of intellectual property theft to law enforcement authorities.

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Identify Stolen Intellectual Property: Just as in cases involving traditional theft, such as a burglary or shoplifting, victims of intellectual property theft may – and often must – assist law enforcement in the identification of stolen property. Thus, law enforcement may call upon a victim representative or expert to examine items obtained during an investigation to determine their origin or authenticity. In a copyright infringement or trademark investigation, for example, an author or software company may be called upon to analyze CDs or other media that appear to be counterfeit, while a victim representative in a theft of trade secret case may be asked to review documents or computer source code. Prosecutors may later seek expert testimony from the victims at trial.

In certain investigations, law enforcement agents also may request a victim's presence during the execution of a search warrant to help the agents identify specific items to be seized. In those circumstances, the victim's activities will be strictly limited to those directed by supervising law enforcement agents.

Share the Results of Internal Investigations or Civil Lawsuits: As with any suspected crime, victims may provide law enforcement with information gathered as a result of internal investigations into instances of intellectual property theft. In addition, unless the proceedings or information have been ordered sealed by a court, victims may generally provide law enforcement with any evidence or materials developed in civil intellectual property enforcement actions, including court pleadings, deposition testimony, documents, and written discovery responses.

Participate in Law Enforcement Task Forces: Federal, state, and local law enforcement agencies and prosecutors all over the country have formed task forces to combat computer and intellectual property crime and to promote information sharing between government and industry. The United States Secret Service, for example, has created Electronic Crimes Task Forces in 13 cities, and the Federal Bureau of Investigation has founded more than 60 "Infragard" chapters around the country. In addition, many areas have "high-tech crime" task forces that investigate intellectual property theft. Members of the intellectual property industry are encouraged to participate in these organizations to establish law enforcement contacts that will enable these members to quickly respond to incidents of intellectual property and other crime. (Information on joining these organizations is available online at *www.ectaskforce.org* and *www.infragard.net*).

Contributions of Funds, Property, or Services: Donating funds, property, or services to federal law enforcement authorities can raise potential legal and ethical issues that must be addressed on a case-by-case basis. In general, federal law places limitations on contributions to law enforcement authorities.

If you or your company have become the victim of a copyright infringement or counterfeit trademark offense, please fill out the information indicated below and contact a federal law enforcement official to report the offense.

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CHECKLIST FOR REPORTING A COPYRIGHT INFRINGEMENT OR COUNTERFEIT TRADEMARK OFFENSE

Background and Contact Information:

1. Victim's Name:

2. Primary Address:

3. Nature of Business:

4. Contact:

   Phone: Fax:

   Email: Pager/Mobile:

Description of the Intellectual Property

5. Describe the copyrighted material or trademark (e.g., title of copyrighted work, identity of logo):

6. Is the copyrighted work or trademark registered with the United States Copyright Office or the United States Patent and Trademark Office? ___ YES ___NO

   a. If so, please provide the following:

      i. Registration Date:

      ii. Registration Number:

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iii. Do you have a copy of the certificate of registration?

iv. Has the work or mark been the subject of a previous civil or criminal enforcement action? If so, please provide a general description.

b. If not, state if and when you intend to register:

7. What is the approximate retail value of the copyrighted work or trademarked good?

Description of the Intellectual Property Crime

8. Describe how the theft or counterfeiting was discovered:

9. Do you have any examination reports of the infringing or counterfeit goods?
___YES ___NO. (If so, please provide those reports to the law enforcement official).

10. Describe the scope of the theft or counterfeiting operation, including the following information:

a. Estimated quantity of illegal distribution:

b. Estimated time period of illegal distribution:

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c. Is the illegal distribution national or international? Which states or countries?

11. Identify where the theft or counterfeiting occurred, and describe the location:

12. Identify the name(s) or location(s) of possible suspects, including the following information:

Name (Suspect #1):

Phone number:

Email address:

Physical address:

Current employer, if known:

Reason for suspicion:

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Name (Suspect #2):

Phone number:

Email address:
Physical address:

Current employer, if known:

Reason for suspicion:

13. If the distribution of infringing or counterfeit goods involves the Internet (e.g., World Wide Web, FTP, email, chat rooms), identify the following:

    a. The type of Internet theft:

    b. Internet address, including linking sites (domain name, URL, IP address, email):

    c. Login or password for site:

    d. Operators of site, if known:

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14. If you have conducted an internal investigation into the theft or counterfeiting activities, please describe any evidence acquired:

Civil Enforcement Proceedings

15. Has a civil enforcement action been filed against the suspects identified above?
___YES ___NO

a. If so, identify the following:

i. Name of court and case number:

ii. Date of filing:

iii. Names of attorneys:

iv. Status of case:

b. If not, is a civil action contemplated? What type and when?

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16. Please provide any information concerning the suspected crime not described above that you believe might assist law enforcement.

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CHECKLIST FOR REPORTING A THEFT OF TRADE SECRETS OFFENSE[1]

If you or your company have become the victim of a theft of trade secrets offense, please fill out the information indicated below and contact a federal law enforcement official to report the offense. An insert with contact information for law enforcement officials in your area should be included at the end of this guide.

NOTE ON CONFIDENTIALITY: Federal law provides that courts "shall enter such orders and take such action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws." 18 U.S.C. § 1835. Prosecutors utilizing any of the information set forth below will generally request the court to enter an order to preserve the status of the information as a trade secret and prevent its unnecessary and harmful disclosure.

Background and Contact Information

1. Victim's Name:

2. Primary Location and Address:

3. Nature of Primary Business:

4. Law Enforcement Contact:

   Phone: Fax:

   Email: Pager/Mobile:

Description of the Trade Secret:

5. Generally describe the trade secret (e.g., source code, formula):

[1] Special thanks to Deputy District Attorney James Sibley, Santa Clara District Attorney's Office, for providing this checklist.

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Provide an estimated value of the trade secret identifying ONE of the methods and indicating ONE of the ranges listed below:

Method

___Cost to Develop the Trade Secret;

___Acquisition Cost (identify date and source of acquisition); or

___Fair Market Value if sold.

Estimated Value:

___Under $50,000;

___Between $50,000 and $100,000;

___Between $100,000 and $1 million;

___Between $1 million and $5 million; or

___Over $5 million.

Identify a person knowledgeable about valuation, including that person's contact information:

General Physical Measures Taken to Protect the Trade Secret

6. Describe the general physical security precautions taken by the company, such as fencing the perimeter of the premises, visitor control systems, using alarming or self-locking doors, or hiring security personnel.

7. Has the company established physical barriers to prevent unauthorized viewing or access to the trade secret, such as "Authorized Personnel Only" signs at access points? (See below if computer stored trade secret.) ___YES ___NO

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8. Does the company require sign in/out procedures for access to and return of trade secret materials? ___YES ___NO

9. Are employees required to wear identification badges? ___YES ___ NO

10. Does the company have a written security policy? ___YES ___NO

    a. How are employees advised of the security policy?

    b. Are employees required to sign a written acknowledgment of the security policy? ___YES ___NO

    c. Identify the person most knowledgeable about matters relating to the security policy, including title and contact information.

11. How many employees have access to the trade secret?

12. Was access to the trade secret limited to a "need to know" basis? ___YES ___NO

Confidentiality and Non-Disclosure Agreements

13. Does the company enter into confidentiality and non-disclosure agreements with employees and third-parties concerning the trade secret? ___YES ___NO

14. Has the company established and distributed written confidentiality policies to all employees? ___YES ___NO

15. Does the company have a policy for advising company employees regarding the company's trade secrets? ___YES ___NO

Computer-Stored Trade Secrets

16. If the trade secret is computer source code or other computer-stored information, how is access regulated (e.g., are employees given unique user names and passwords)?

17. If the company stores the trade secret on a computer network, is the network protected by a firewall? ___YES ___NO

18. Is remote access permitted into the computer network? ___YES ___NO

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19. Is the trade secret maintained on a separate computer server? ___YES ____NO

20. Does the company prohibit employees from bringing outside computer programs or storage media to the premises? ___YES ___NO

21. Does the company maintain electronic access records such as computer logs? ___YES ___NO

Document Control

22. If the trade secret consisted of documents, were they clearly marked "CONFIDENTIAL" or "PROPRIETARY"? ___YES ___NO

23. Describe the document control procedures employed by the company, such as limiting access and sign in/out policies.

24. Was there a written policy concerning document control procedures and, if so, how were employees advised of it? ___YES ___NO

25. Identify the person most knowledgeable about the document control procedures, including title and contact information.

Employee Controls

26. Are new employees subject to a background investigation? ___YES ___NO

27. Does the company hold "exit interviews" to remind departing employees of their obligation not to disclose trade secrets? ___YES ___NO

Description of the Theft of Trade Secret

28. Identify the name(s) or location(s) of possible suspects, including the following information:

    Name (Suspect #1):

    Phone number:

    Email address:

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Physical address:

Employer:

Reason for suspicion:

Name (Suspect #2):

Phone number:

Email address:

Physical address:

Employer:

Reason for suspicion:

29. Was the trade secret stolen to benefit a third party, such as a competitor or another business? ___YES ___NO

    If so, identify that business and its location:

30. Do you have any information that the theft of the trade secret was committed to benefit a foreign government or instrumentality of a foreign government? ___YES ___NO

    If so, identify the foreign government and describe that information.

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31. If the suspect is a current or former employee, describe all confidentiality and non-disclosure agreements in effect.

32. Identify any physical locations tied to the theft of the trade secret, such as where it may be currently stored or used.

33. If you have conducted an internal investigation into the theft or counterfeiting activities, please describe any evidence acquired:

Civil Enforcement Proceedings

34. Has a civil enforcement action been filed against the suspects identified above?
___YES ___NO

a. If so, identify the following:

i. Name of court and case number:

ii. Date of filing:

iii. Names of attorneys:

iv. Status of case:

b. If not, is a civil action contemplated?

What type and when?

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35. Please provide any information concerning the suspected crime not described above that you believe might assist law enforcement.

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U.S. Department of Justice
Office of Justice Programs
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NIJ

Research Report

Reducing Gun Violence



Community Problem Solving in Atlanta

CDC

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U.S. Department of Justice
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NIJ

JUNE 06

Reducing Gun Violence: Community Problem Solving in Atlanta

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Findings and conclusions of the research reported here are those of the authors and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

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Foreword

This Research Report is part of the National Institute of Justice's (NIJ's) Reducing Gun Violence publication series. Each report in the series describes the implementation and effects of an individual, NIJ-funded, local-level program designed to reduce firearm-related violence in a particular U.S. city. Some studies received cofunding from the U.S. Department of Justice's Office of Community Oriented Policing Services; one also received funding from the Centers for Disease Control and Prevention and the Justice Department's Office of Juvenile Justice and Delinquency Prevention.

Each report in the series describes in detail the problem targeted; the program designed to address it; the problems confronted in designing, implementing, and evaluating the effort; and the strategies adopted in responding to any obstacles encountered. Both successes and failures are discussed, and recommendations are made for future programs.

While the series includes impact evaluation components, it primarily highlights implementation problems and issues that arose in designing, conducting, and assessing the respective programs.

The Research Reports should be of particular value to anyone interested in adopting a strategic, data-driven, problem-solving approach to reducing gun violence and other crime and disorder problems in communities.

The series reports on firearm violence reduction programs in Boston, Indianapolis, St. Louis, Los Angeles, Atlanta, and Detroit.

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Arthur L. Kellermann, Dawna Fuqua-Whitley, and Constance S. Parramore

The Problem and the Approach

When firearm-related deaths and injuries among Atlanta's young people[1] began to reach record heights in the early 1990s, it became evident that law enforcement could no longer go at it alone (see "Gun Violence in Atlanta"). The city turned in a new direction, adopting a strategic, problem-solving approach. A similar approach had been used elsewhere, most notably in Boston, where it had shown remarkable success in reducing juvenile homicides.[2]

The key to problem solving is ongoing, communitywide action involving multiple public agencies and private organizations. Because this approach is data driven, researchers work side by side with practitioners. All partners share the same concern about the problem, but because they have different missions, achieving consensus is no easy task. Problem solving is also a dynamic process, requiring frequent shifts in direction.[3]

Initially, Atlanta's goal was to preempt juvenile gun violence by breaking the chain of illegal events leading up to these crimes—disrupting illegal gun supply, demand, and carrying, and rehabilitating offenders.[4] Community groups were to have a major role. The goal evolved during the life of the project, both in response to research findings and when resource constraints and other priorities limited or curtailed the involvement of some partners.

In its final form, the Atlanta gun violence project consisted of a small but determined coalition of Federal, State, and local law enforcement agencies and prosecutors, with the Atlanta Police Department (APD) in a central role. Tactics ranged from traffic stops and directed patrol[5] to Federal prosecution of adult gun traffickers. Although all planned tactics were employed with varying degrees of success, some were not fully implemented.

Violent crime fell in Atlanta during the intervention, but the researchers could not link the decline to the

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Gun Violence in Atlanta

Like many other U.S. cities in the mid-1980s, Atlanta experienced an epidemic of gun violence that continued for about a decade. In the 10 years before the Atlanta gun violence project was launched, the city experienced a major surge in gun violence, with juveniles and young adults as the primary targets.

Atlanta Reflected the Nation

The backdrop was the now-familiar nationwide scene in which firearm homicide rose 50 percent across all age groups and even faster among young people. Figures for firearm assaults were also disturbing: between 1987 and 1992, the rate of handgun crimes committed against youths 16–19 years of age was nearly three times higher than the national average.*

In Atlanta, as elsewhere, firearm violence struck young African-Americans particularly hard. In Fulton County, which includes most of the city of Atlanta (see exhibit 1 in the next chapter, "Problem Solving Through Project PACT"), murders of young black men between the ages of 14 and 17 increased fourfold between 1984 and 1993. The magnitude of gun violence indicated that the conventional approach—rapid response to 911 calls—was not working.

* Zawitz, M.W., and K.J. Strom, *Firearm Injury and Death From Crime, 1993–97,* Bureau of Justice Statistics Selected Findings, Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, October 2000, NCJ 182993.

intervention, because violent crime also fell statewide and nationally. Also, implementation problems limited researchers' ability to measure the program's impact. Nevertheless, some positive effects were evident. The partnerships that matured throughout the project still endure. Other communities facing similar problems can benefit from Atlanta's experience, if they recognize that innovation requires long-term commitment and flexibility and that change comes slowly.

Problem Solving Through Project PACT

With researchers as participants, problem solving can increase the understanding of the targeted problem so that more focused strategies can be developed.

Atlanta's decision to adopt the problem-solving approach to juvenile gun violence was prompted by its participation in Project PACT (Pulling America's Communities Together). The five counties constituting the core of Metro Atlanta were included (see exhibit 1).

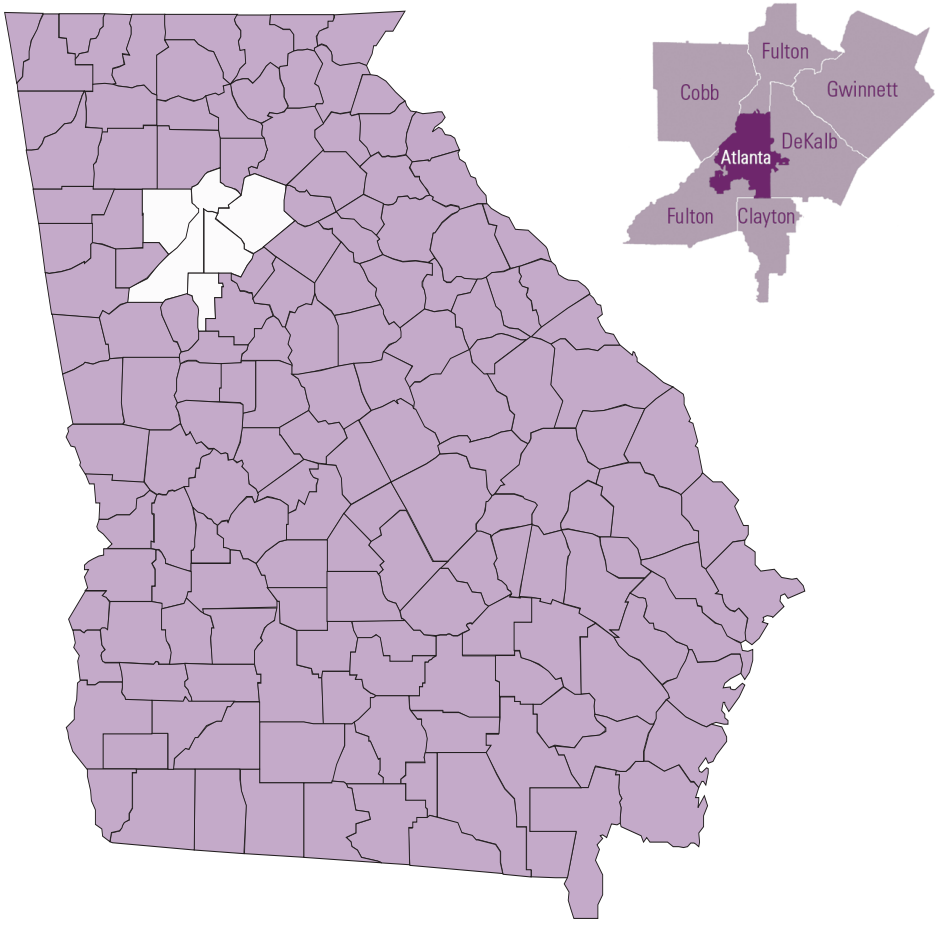
PACT was a U.S. Department of Justice initiative established in 1993 to help diverse institutions within a community collaborate on public safety issues in order to maximize the impact of broad-based strategies that were locally designed and implemented. Several other Federal agencies also were involved in PACT.[6]

Major steps in problem solving include identifying an issue on which to focus; obtaining detailed data to measure the extent and nature of the problem; designing an intervention; monitoring its implementation; modifying or otherwise refining the intervention; and measuring its impact.

Jurisdictions facing resource constraints rarely invite researchers to be partners, but in Atlanta, researchers were involved from the start. With researchers as participants, problem solving can increase the understanding of the targeted problem so that more focused strategies can be developed. During the course of the Atlanta project, the researchers' role evolved—they became more directly involved, trying to keep the effort on track.

Project PACT identified homicide, gun violence, and juvenile crime as the major community concerns in Atlanta. But this consensus needed to be confirmed by local data and analysis. Data gathering and problem definition began in 1995 and continued throughout the project (see the next chapter, "Measuring the Extent of the Problem"). After the baseline data were collected, three experts[7] were brought in during the spring of 1996 to brief Atlanta PACT members on how elements of the problem-solving

Exhibit 1. The five Metro Atlanta counties in Project PACT



Note: Fulton, DeKalb, Cobb, Clayton, and Gwinnett counties constitute Metro Atlanta (combined population 2,684,000). The city of Atlanta (population 401,000) is situated largely in Fulton County, with a portion extending into DeKalb.

approach had been used to reduce gun violence in Boston and Kansas City.

Following these sessions, project participants decided to focus on reducing juvenile firearm violence and devised a three-pronged approach to achieve the goal:

- Use a problem-solving approach to plan, implement, monitor, refine, and evaluate the program.
- Apply a strategic approach to violence prevention that combines the expertise of researchers with the experience of practitioners.
- Identify, implement, and evaluate a mix of strategies to prevent illegal carrying and use of firearms by juveniles.

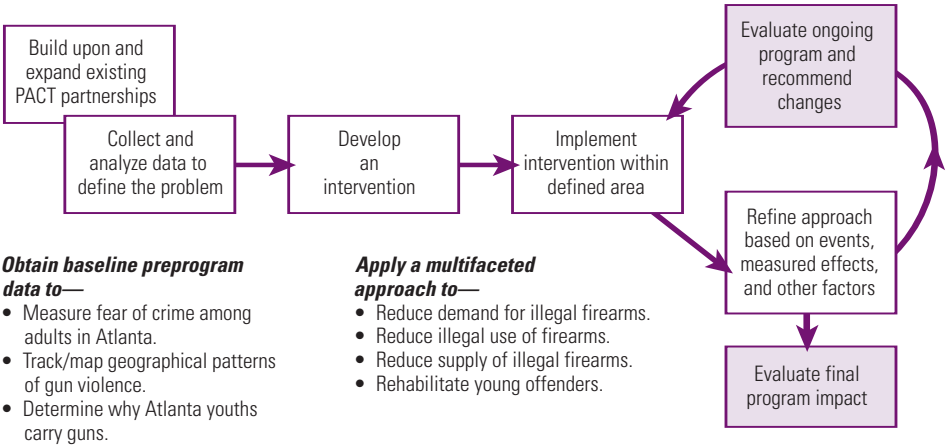
This three-part strategy to reduce juvenile firearm violence was divided into more specific objectives:

- Measure fear of crime among adults in the project area.[8]
- Map and track temporal and geographical patterns of juvenile gun violence.
- Determine where and why juveniles acquire guns.
- Develop a comprehensive intervention to reduce juvenile gun violence.
- Implement the intervention in a defined area of Atlanta.
- Monitor and evaluate the intervention and refine the approach based on events, measured effects, and impact.
- Evaluate the impact of the refined program on juvenile gun crime and on fear of crime among adults in the targeted area.

The strategy involved a cyclical process whereby results from ongoing evaluation of an experimental program or intervention are interpreted by the researcher-practitioner team and the intervention is modified accordingly (see exhibit 2). This dynamic has been expanded and continued in programs subsequent to Atlanta PACT (see the last chapter of this report, "Reducing Firearms Violence in Atlanta Today").

Exhibit 2. Project PACT in Atlanta—Program objectives and design

Overall objective: Reduce incidence of juvenile gun violence and homicide



Obtain baseline preprogram data to—

- Measure fear of crime among adults in Atlanta.
- Track/map geographical patterns of gun violence.
- Determine why Atlanta youths carry guns.
- Determine how they get guns.

Apply a multifaceted approach to—

- Reduce demand for illegal firearms.
- Reduce illegal use of firearms.
- Reduce supply of illegal firearms.
- Rehabilitate young offenders.

From postprogram data—

- Measure change in fear within community.
- Measure change in juvenile gun violence.

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Measuring the Extent of the Problem

The researchers set out to discover why Atlanta residents owned guns, the patterns of firearm-related crime in the city, and youths' views and experience with gun possession and violence.

Gauging adult fear of crime

As their first step, the researchers surveyed adults in the five PACT counties about their firearms ownership and to get a baseline measure of their perceptions and fear of juvenile violence. To track changes over time, the survey was conducted three times between 1995 and 1999.

Relationship between level of juvenile crime and fear of crime. Not surprisingly, citizen concern varied with the level of crime in each county. Residents of Fulton County, where juvenile crime was highest, expressed the most concern. In Cobb and Gwinnett counties, where the rates were much lower, citizen concern was lowest. This county-specific pattern did not change over time. Citizens of all five counties expressed more concern about juvenile crime in Metro Atlanta as a whole than in the county where they lived.

Legal gun ownership. Some residents stated that they own firearms because they are afraid of crime. According to the first survey, almost 40 percent of households in the five counties kept one or more firearms in their homes. (This number did not change appreciably over the course of the next two surveys.) As is often the case in urban communities, the majority of gun-owning households contained more than one handgun.

Tracking patterns of juvenile gun violence

How common was juvenile gun violence in Metro Atlanta? To find out, the researchers used data from a number of sources. From State crime statistics they compiled counts of juvenile weapons offenses and

Cops and Docs

The Georgia Firearm Injury Notification system—better known by its nickname "Cops and Docs"—was established in 1995 by Emory University's Center for Injury Control under a separate NIJ grant. Through this system, 34 law enforcement agencies, 21 emergency medical centers, and 5 medical examiners in the Metro Atlanta area* sent data to the Georgia Bureau of Investigation, which forwarded it to the Center for Injury Control for linkage and analysis of victim characteristics, incident location, circumstances, and weapon type.

These data were compared with firearm-related data from the Atlanta 911 system to generate reports showing trends (e.g., days and times of most gun violence activity) and geographic information system maps showing "hot spots" of gun violence activity down to the street level. This information was then relayed back to Federal, State, and local law enforcement officials.

For more information, see—

- Profile No. 24, "Youth, Firearms, and Violence—Atlanta, GA," in *Promising Strategies to Reduce Gun Violence,* Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, February 1999, NCJ 173950, available at www.ojjdp.ncjrs.org/pubs/gun_violence/173950.pdf: 111.
- "Community-Level Firearm Injury Surveillance: Local Data for Local Action," by A.L. Kellermann, K. Bartolomeos, D. Fuqua-Whitley, T.R. Sampson, and C.S. Parramore, *Annals of Emergency Medicine* 38(4)(Oct. 2001): 423–429 (reprints available).

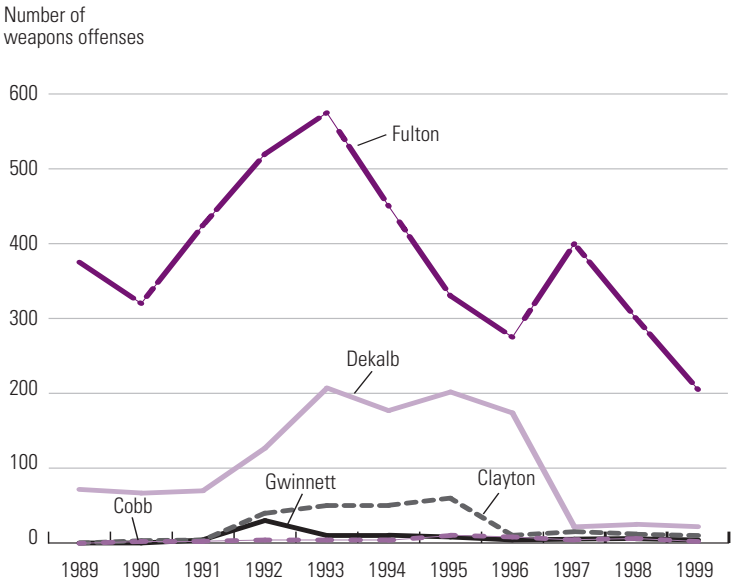
*Metro Atlanta consists of the five counties that surround and include the city, shown in exhibit 1.

assaults; from county medical examiners' data and State vital statistics they calculated the number of firearm-related deaths; and from a local firearm injury reporting system (see "Cops and Docs"), they compiled counts of nonfatal shootings of juveniles.

Fulton County stands out. Juvenile weapons[9] offenses in Metro Atlanta peaked in 1993 and fell thereafter. In four of the five counties, weapons offenses either declined or remained low throughout the entire period. Fulton County was the exception: Juvenile weapons offenses peaked there in 1993, fell until 1996, then started to rise again, but declined sharply in 1998 and 1999 (see exhibit 3).

Young victims, young offenders. Many firearm homicides were committed against very young victims. A striking number of homicide

Exhibit 3. Juvenile weapons offenses by county within Metro Atlanta, 1989–99.



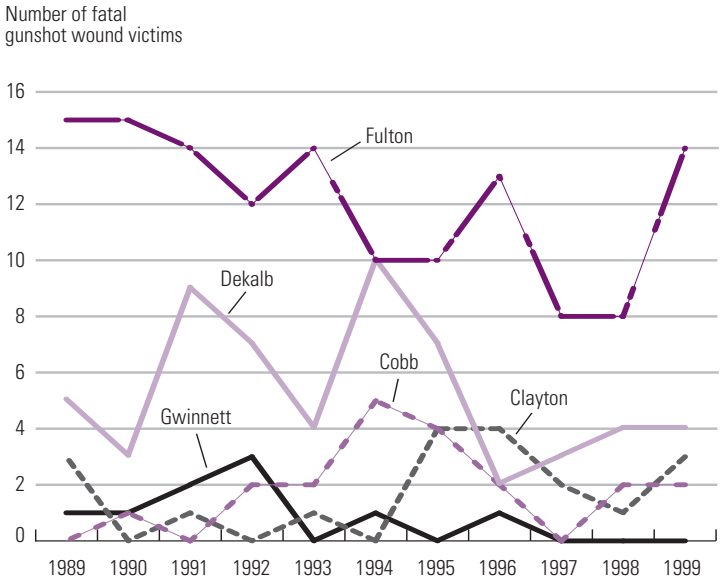
Source: Georgia Criminal Justice Information System Network, Georgia Bureau of Investigation.

victims (almost 40 percent) were between 15 and 24 years of age. Nearly 80 percent of juvenile firearm homicide victims in the Metro Atlanta area were African-American, and 84 percent were male. For the most part, shooters were of the same gender and ethnicity and in the same age range as their victims. Again, Fulton County stood out—each year, more than half the Metro Atlanta area's juvenile firearm homicides occurred there (see exhibit 4).

Listening to Atlanta's juveniles

Where, why, how, and when juveniles acquire and carry guns are questions sometimes best answered by young people themselves. For this reason, researchers conducted four focus group sessions with Atlanta youths and individual interviews with incarcerated juveniles (see exhibit 5).

Exhibit 4. Juvenile firearm homicides, by county within Metro Atlanta, 1989–99*



Source: Georgia Criminal Justice Information System Network, Georgia Bureau of Investigation

*Death certificate date

Juveniles' views. To encourage the young people to be candid, the sessions were divided by age group, gender, and ethnicity. The first group consisted of 15- to 16-year-old African-American males who lived in urban areas; the second was white males in the same age range who lived in the suburbs; the third group was African-American females ages 15 to 16; and the fourth group was younger African-American males.

A majority of focus group participants saw a direct connection between drugs, gangs, and violence.

Many youths, particularly the African-Americans surveyed, considered violence to be part of their everyday life. Blacks reported more frequent exposure to violence

Exhibit 5. Juvenile offenders' responses about gun acquisition and use*

Gun use behavior	Males (%)	Females (%)
Method of acquisition of first gun		
■ Given	39	58
■ Found accidentally	12	8
■ Borrowed	20	25
■ Bought	17	8
■ Stolen	12	0
Feelings experienced while carrying a gun		
■ Felt safer	29	75
■ Felt scared or anxious	34	33
■ Felt energized, excited, or powerful	39	42
■ Felt dangerous	7	8
■ Did not identify feeling different	21	0
Ever pointed a gun at a person	83	75
Ever fired a gun at a person	74	33
Loaned a gun to someone within 6 months prior to arrest	34	25
Sold a gun to someone else within 6 months prior to arrest	39	25

Note: Figures may not total 100 percent due to rounding or because some subjects reported more than one feeling.

*Responses were obtained through semistructured, private interviews between June and November 1995 with 63 offenders incarcerated at 5 detention centers in Metro Atlanta. For a complete description of the survey's methodology and results, see Ash, P., A.L. Kellermann, D. Fuqua-Whitney, and A. Johnson, "Gun Acquisition and Use by Juvenile Offenders," *Journal of the American Medical Association* 275(22)(June 12, 1996): 1754–1758. Exhibit (with minor changes) reproduced with permission.

than whites. Almost all—white and black alike—claimed they could easily obtain a gun. Gun carrying was seen as quite common.

Participants' perceptions changed little between the first sessions in 1995 and the second in 1999. Although many participants across all of the focus groups seemed largely resigned to the daily threat of violence, youths in the second round of focus groups were more hopeful that it could be reduced.

Juvenile offenders' views. The sample of incarcerated youths consisted of juvenile offenders ages 13 to 18. Like the other youths, the juvenile offenders reported that guns were readily available. Finding a seller was no problem, in their view. More than half said they would recommend the street as a place to buy a gun.

These young people had strong feelings about carrying guns—29 percent of males and 75 percent of females said they did it to feel safer (for protection), and approximately 40 percent overall said it conferred status and made them feel more "energized" and "powerful" (see exhibit 5).

Developing the Intervention

After analyzing the baseline data, the researchers suggested to the rest of the PACT team that gun violence could be viewed as the result of a predictable chain of events: Illegal demand for firearms by juveniles is satisfied by illegal sources of supply, which leads to illegal acquisition and carrying—necessary preconditions to the use of a gun to commit a violent crime. Therefore, to prevent firearm-related crimes and acts of violence, this chain should be broken at one or more points before the gun is used.

How PACT proposed to break the chain of gun violence

Although Atlanta PACT planned to use some of the tactics that were developed in Boston and Kansas City, the team knew that this would not be enough. They also borrowed from approaches that have been used in many communities to reduce use of illegal drugs—focusing in this case on guns rather than drugs.

The intervention that was developed had four broad goals:

- *Reduce illegal demand* for firearms using a combination of tactics, including youth outreach through community-based violence prevention, public education to reduce fear of crime, and high-visibility enforcement to enhance deterrence.
- *Reduce illegal supply* of firearms through proactive law enforcement, specifically targeting adult suppliers of guns to juveniles.
- *Reduce illegal carrying* of firearms by strengthening street-level enforcement and reducing juveniles' fear of victimization and/or by increasing their fear of arrest.
- *Rehabilitate juvenile gun offenders* through court-based diversion programs and other strategies.

The next chapter, "The Intervention Takes Shape," discusses the strategies implemented toward achieving these goals.

Nationally, PACT was conceived to promote cooperation among agencies at the Federal, State, and local levels. In Atlanta, PACT was anchored by four key organizations:

- The Atlanta Police Department (APD).
- The Fulton County District Attorney.
- The Federal Bureau of Alcohol, Tobacco and Firearms (ATF).[10]
- The U.S. Attorney for the Northern District of Georgia.

Many other agencies and organizations had supporting roles. They ranged from the Governor's Office to the city housing authority, from the Fulton County Sheriff's Department to an organization known as Atlanta Downtown Improvement District (see "Atlanta PACT Partners").

The plan required integrating the work of community-based organizations and Federal, State, and local law enforcement and juvenile justice agencies (see "Coordination Drives the Process). As it turned out, the intervention did not proceed exactly as planned, in that few community-based groups became active in PACT, and some criminal justice agencies had to drop out. The strategy was reconsidered and modified as events dictated.

Atlanta PACT Partners

Members of Atlanta PACT are shown below. Key partners during the intervention and those who have remained partners in Project Safe Neighborhoods (PSN) are indicated.[a] (For a discussion of PSN, see last chapter, "Reducing Firearms Violence in Atlanta Today.")

Federal Government

U.S. Attorney for the Northern District of Georgia ***PACT key partner; PSN***

Atlanta Field Office, Bureau of Alcohol, Tobacco and Firearms (ATF) ***PACT key partner; PSN***

U.S. Drug Enforcement Administration (DEA) ***PACT key partner; PSN***

Federal Bureau of Investigation

Atlanta High Intensity Drug Trafficking Area ***PSN***

United States Marshal ***PSN***

State law enforcement and other government

Governor's Office

Georgia State Board of Pardons and Paroles ***PSN***

Georgia Department of Corrections ***PSN***

Georgia Bureau of Investigation ***PSN***

Georgia Department of Children's and Youth Services[b]

Fulton County District Attorney

Georgia Public Safety Commissioner

Georgia National Guard

Local government and law enforcement

Atlanta Police Department (APD) ***PACT key partner; PSN***

Atlanta Department of Corrections ***PSN***

Fulton County Juvenile Court[b]

Fulton County District Attorney ***PACT key partner; PSN***

Housing Authority of the City of Atlanta ***PSN***

Metropolitan Atlanta Regional Transit Authority (MARTA) Police Services

Atlanta City Solicitor ***PACT key partner; PSN***

Atlanta Mayor's Office ***PSN***

Research organizations

Emory University: Emory Center for Injury Control ***PACT key partner; PSN***

Emory University: Greater Atlanta Data Center ***PACT key partner***

Burruss Institute, Kennesaw State University

Other organizations

Atlanta Downtown Improvement District and Atlanta Ambassadors

United States Probation Office ***PSN***

Georgia Sheriffs' Association

Georgia Association of Chiefs of Police

Georgia District Attorneys Association

PSN = Participates in Project Safe Neighborhoods

Notes

a. All Metro Atlanta PSN participants are not represented here. For a more comprehensive list, see "Project Safe Neighborhoods Is Working: Violent Gun Crime Is Down About Fifteen Percent in Targeted Areas in Atlanta," News Advisory, U.S. Attorney's Office, Northern District of Georgia, December 11, 2003, available at www.usdoj.gov/usao/gan/press/12-11-03.html.

b. Dropped out due to resource constraints.

Coordination Drives the Process

The size and diversity of Atlanta PACT's core and supporting organizations made it essential to create separate working groups to coordinate their multiple and interrelated activities:

Atlanta Project PACT working groups

Operations group	Prosecutorial group	Steering committee
Coordinated the work of law enforcement agencies.	***Reviewed case files and criminal histories to identify cases that could be federally prosecuted.***	***Provided overall coordination and policy direction.***
■ Atlanta Police Department. ■ ATF (Atlanta field office). ■ Other State and local law enforcement agencies (see list in "Atlanta PACT Partners" above).	■ Atlanta Police Department. ■ ATF (Atlanta field office). ■ Fulton County District Attorney. ■ U.S. Attorney.	■ U.S. Attorney. ■ Atlanta Police Department. ■ ATF (Atlanta field office). ■ Fulton County District Attorney. ■ Other State and local agency heads.

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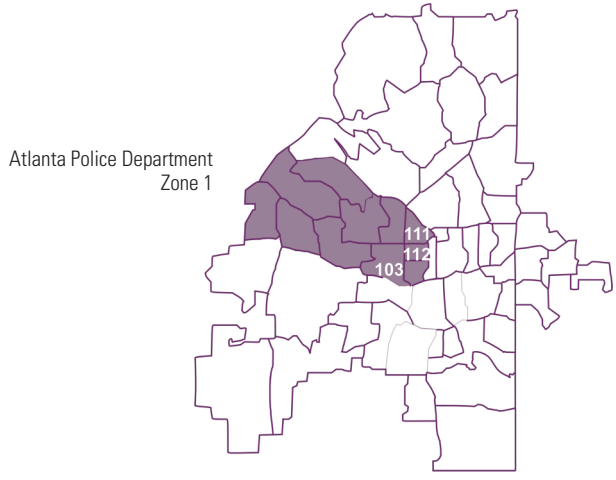
The Intervention Takes Shape

Geographic information system mapping of data generated from the Georgia Firearm Injury Notification System (see "Cops and Docs" on page 8) showed that the bulk of firearm assaults and homicides against juveniles and adults were concentrated in readily identifiable "hot spots." These areas of Atlanta are severely disadvantaged economically and historically have had high rates of homicide and other violent crimes.

To test the intervention, the PACT steering committee decided to focus on one hot spot—three police beats in the northwest quadrant of inner-city Atlanta, within Zone 1 of the Atlanta Police Department's six policing zones[11] (see exhibit 6). These three beats received the bulk of PACT's deterrent and enforcement police activities.

The multifaceted intervention was phased in over a

Exhibit 6. The three police beats targeted by Atlanta PACT



Source: Atlanta Police Department

2-year period starting in the fall of 1997.

Implementing the intervention

Several strategies were implemented toward the stated goals of reducing juvenile demand for and carrying of illegal guns, reducing the supply of illegal guns, and rehabilitating juvenile offenders.

Reducing illegal demand for guns. Interviews with juvenile offenders indicated that their demand for guns was largely driven by the need to feel protected, compounded by little fear of arrest. This suggested that the best way to reduce demand might be to reduce fear of victimization and/or increase fear of arrest. The program adopted three main strategies toward these ends:

- *Education and outreach.* Project PACT leaders hoped to counter juvenile offenders' perceptions through public education and media campaigns. They wanted to convey positive messages that would reduce juveniles' fear of crime and create a sense that something was being done to stop gun violence. Many attempts were made to engage the local media, but with little success.

  Community groups also were viewed as a means to help with demand-reduction strategies. It soon became apparent, however, that funds were insufficient to enable them to expand their work in a major way. Furthermore, these groups found it difficult to coordinate efforts, particularly when they perceived that they were competing with each other for limited resources.

- *Strengthened enforcement.* To change juveniles' way of thinking, PACT leaders chose to strengthen street-level enforcement in hopes of deterring illegal carrying of firearms, particularly within the known hot spots of gun violence. The deterrent value of directed patrols was first demonstrated by the Kansas City Police Department,[12] and the Atlanta researchers hoped to replicate those results. To that end, the APD established the Guns and Violent Crime Suppression Unit (Guns Unit), modeled after the Kansas City experiment, to proactively patrol the three-beat target area. The Guns Unit was

directed to identify and arrest felons in possession of a firearm before the weapon was used.[13]

The Guns Unit worked hard, but competing priorities, suboptimal scheduling, and lack of coordination with other APD units hindered their efforts. For example, the unit also was responsible for investigating firearms assault cases citywide, which worked against the intervention by competing for the attention of unit officers.

- *Enhanced prosecution of target offenders.* Because the juvenile offenders interviewed said that adult felons and drug dealers were their primary source of guns, prosecuting these adults became an intervention tactic (deterrence). To put teeth into it, adult gun offenders who met certain criteria were referred for prosecution in Federal court. Identifying these candidates required close coordination between Federal, State, and local law enforcement officers working in concert with prosecutors from the Fulton County District Attorney's Office and the U.S. Attorney for the Northern District of Georgia. The program was called "FACE–5" (Illegal Firearms in Atlanta Can Equal 5 Years in Federal Prison). Although only a small fraction of Atlanta's gun offenders were referred for Federal prosecution under the program, the FACE–5 list included some of the city's most notorious criminals. News of their sentences sent a strong message to the street that any felon caught illegally carrying or using a firearm could meet a similar fate.

  Adult gun offenders who are not candidates for Federal prosecution also need to be deterred from illegal firearm use. The Fulton County District Attorney and the County Solicitor sought higher bonds and penalties, and a special prosecutorial unit was established to speed investigation and prosecution when a firearm was used to commit a crime. Further help in deterring illegal acquisition and carrying came when the State General Assembly enacted a law making it a felony for an individual previously convicted of a forcible felony to purchase or carry a firearm.

By April 2002, more than 35 violent repeat offenders had been sentenced to Federal prison for terms ranging from 3 years to 21 years.

Reducing supply of illegal guns. Crime lab analysis of projectiles recovered at crime scenes or from the bodies of victims can sometimes link different incidents and trace the weapon used in the crime to a specific owner. To help in this process, the Bureau of Alcohol, Tobacco and Firearms (ATF) developed a system called the National Integrated Ballistic Information Network (NIBIN), which compares digitized images of projectiles to a database of images of bullets recovered from previous crime scenes and confiscated weapons that are test fired. The intervention tapped into this resource to identify patterns in Atlanta. To boost the number of projectiles submitted for analysis, two Atlanta area hospitals, including the city's only Level I trauma center, were asked to submit bullets recovered in surgery to the local crime lab. In addition, every confiscated weapon was test fired to generate projectiles for comparison.[14]

Subsequently, ATF launched Project LEAD[15] and the Youth Crime Gun Interdiction Initiative (YCGII). Both programs combined data from large numbers of firearm traces to identify illegal sales. If, for example, YCGII identified a single individual as the first purchaser of 15 guns seized from juvenile offenders, the data could provide the basis for a formal criminal investigation to determine whether that individual was breaking Federal firearms laws through straw purchases.[16]

A third tactic intended to reduce illegal supply of firearms never got off the ground. The researchers' surveys showed that adult handgun ownership is fairly common in Atlanta. They therefore reasoned that it might be possible to reduce theft and criminal diversion of firearms by encouraging gun owners to secure their firearms. A local public relations firm created a public education campaign, but the business community provided too little financial support to implement it.

Rehabilitating young offenders. At the outset, project leaders hoped to engage the juvenile justice system by expanding intensive supervision of youthful gun offenders on probation. They reasoned that this would reduce youths' interest in illegally carrying and using guns.

The proposal won the support of the Fulton County Juvenile Court, but the court's caseload and other resource problems prevented it from actively participating. A series of other obstacles barred participation by the Georgia Department of Children's and Youth Services. These setbacks caused the PACT team to defer this part of the intervention indefinitely.

Did Atlanta PACT Reduce Juvenile Gun Violence?

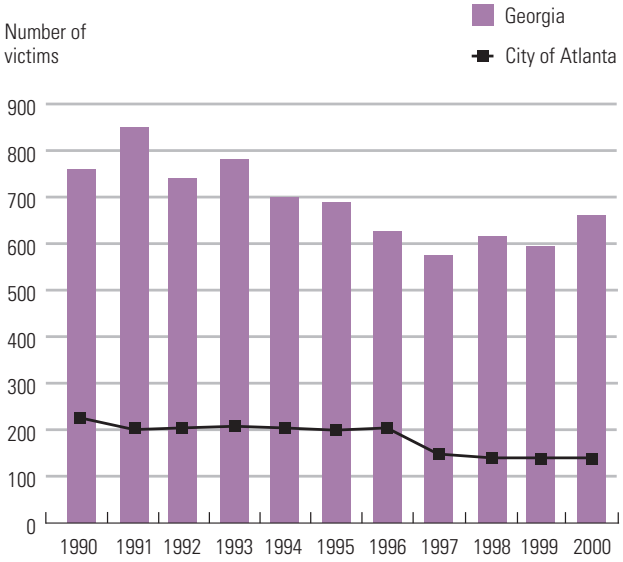
During the 6 years after the intervention started—from 1995 through 2000—the number of homicides in Atlanta fell 27 percent. The 134 homicides recorded in 2000 were the lowest number in the city in 30 years.

The dramatic decline was matched by a commensurate change in adults' perception of the severity of the incidence of juvenile violence—fewer saw it as a very serious or somewhat serious problem.

The most notable decrease was in Fulton County, the PACT intervention site. Juveniles' perceptions did not change appreciably during this time, however.

The decline in homicides probably cannot be attributed to Atlanta PACT, however, for three key reasons. First, Atlanta's homicide count began to fall 2 years before the intervention started. Second, a number of the strategies developed for the program were not implemented as designed. Third, the decrease in homicides was no greater within the three police beats that were the principal intervention focus, as would be expected if the intervention were the reason for the decline. Atlanta's decline in crime was mirrored by similar declines statewide (see exhibit 7).

Exhibit 7. Homicides in Georgia versus the city of Atlanta, 1990–2000



Source: Bureau of Justice Statistics Web site, www.ojp.usdoj.gov/bjs, accessed March 10, 2005

Lessons for Other Communities

The Atlanta PACT team learned valuable lessons about applying the problem-solving approach to an issue as complex as gun violence. These are summarized below.

Building effective partnerships "from scratch" takes time and energy

For the researchers, key tasks included compiling and analyzing data, presenting findings, convening stakeholders and consulting with them to devise strategies, conducting evaluations, and then refining the effort. Each step took much longer than expected.

Initial data gathering and presentation may be time consuming, but they are relatively straightforward. Translating research findings into action by agency partners is a different matter. The success of many partnerships depends on personalities rather than organizational structure, and this project was no exception.

Conceptual consensus about a problem does not guarantee a consensus about solving it

Everyone agreed that reducing juvenile gun violence was a worthy goal, but opinions varied on the magnitude of the problem and the best way to solve it. Officials in Fulton County—and particularly the city of Atlanta, where the problem was most serious—were more inclined than those in the other four counties to commit major resources. Over time, lack of interest led these counties to drift out of the coalition.

The cross-disciplinary cooperation that PACT was designed to nurture was not fully realized. For example, because the focus was so heavily on law enforcement, officials were initially reluctant to offer the faith community a meaningful role. When

faith community leaders belatedly were approached for input and support, none stepped forward. At the outset, a large number of community nonprofits came to the table, but most of them left when they realized that PACT did not have the resources to pay for their involvement. As noted previously, State and local juvenile justice leaders wanted to participate, but their agencies' resources were stretched too thin.

In the real world of problem solving, involving researchers is key

Problem solving is an evolutionary process that can blur the traditional boundaries between evaluators and evaluated. By definition, the problem-solving approach calls for researchers, law enforcement, and other partners to collaborate (as shown in exhibit 2). During this process, researchers are an integral part of the intervention; their operational involvement is part of the program's design. Nonetheless, the research team should retain the external perspective of observer/evaluator as much as possible during the monitoring and assessment stages of the program.

At first, the Atlanta PACT research team tried to distance itself from decision-making, but it soon became apparent this was not feasible. Team members were inexorably drawn in as they presented data, provided feedback, and attempted to engage additional partners. When the initiative began to lose momentum, the research team felt compelled to take a more active role through such actions as shuttle diplomacy between partners, active dissemination of data, and meetings with key stakeholders.

Local data are needed to prompt local action

Despite considerable research demonstrating the effectiveness of proactive policing elsewhere, many Atlanta officials were skeptical. They repeatedly quipped, "Atlanta isn't Boston." This prompted the researchers to probe the local problem of juvenile gun violence in depth. When the data showed the nature and magnitude of Metro Atlanta's problem, officials were more

willing to be engaged. It took local data to spur action.

Collaboration requires suspending self-interest

Law enforcement practitioners often speak of the three "Cs" of successful interagency efforts: communication, cooperation, and coordination. A fourth "C"—compromise—could be added. Throughout the intervention, concerns about "turf" surfaced repeatedly. For example, many participants were reluctant to share files and other information. Several had reservations about the feasibility of the project. A number were unwilling to commit resources to a metrowide venture they could not control.

It is difficult to focus on the long term when facing short-term challenges

Reluctance to back the project was not simply a matter of turf or ideology; it was often a practical matter of resources and logistics. Participating in PACT interventions often meant diverting people and/or resources from other missions. At several points, immediate concerns took priority. For example, the Olympic Park bombing in 1996 diverted substantial Federal and local resources from PACT.

Change comes slowly to large, complex organizations

Large organizations often resist change. This can be manifested in delayed, altered, or thwarted innovations. Atlanta experienced all three at various points. For example, APD's special gun unit created to deter illegal carrying through directed patrols did not achieve its most important objective: a sharp reduction in firearm violence and firearm-related 911 calls in the three-beat target area.

The researchers attributed this failure to differences in how the tactic was implemented in Atlanta from how it was implemented in Kansas City and Indianapolis. Rather than focusing on deterrence through directed patrol and high-visibility enforcement, the Guns Unit concentrated on generating gun seizures and arrests.

Lack of communication and local media coverage also undermined the intervention's deterrent effect. Local residents were unaware of the program.

In another tactical deviation from the planned intervention, regular APD units shifted their patrols to other beats when the Guns Unit appeared in the area. Thus, the Guns Unit essentially *replaced* rather than *supplemented* the regular police presence in the target beats.

To achieve the intervention's objective, APD line officers and supervisors—as well as other city officials—would have had to significantly change their behavior patterns in accordance with the intervention's original design. Without that followthrough, the intervention could not be implemented as designed, and its impact was dissipated.

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Reducing Firearms Violence in Atlanta Today

Atlanta PACT ended in 1999. On the strength of the interagency relationships created through PACT, Atlanta was invited to participate in a successor program, Strategic Approaches to Community Safety Initiative (SACSI).

SACSI

Coordinated by the U.S. Attorney, SACSI was based on Boston's strategic problem-solving model of reducing crime at the local level, including its multiagency law enforcement partnership, its involvement of a research partner as a key component of the program, and its outreach to social service agencies and the community.[17]

Project Safe Neighborhoods

In 2001, an even more comprehensive program, Project Safe Neighborhoods (PSN), superseded Atlanta SACSI. PSN is being carried out within all U.S. Attorney jurisdictions nationwide.[18]

Strategies developed through PACT and SACSI are being effectively pursued through PSN. These include—

- Selective use of directed patrols to deter illegal gun carrying.
- Systematic tracing of crime guns to identify and disrupt illegal sources of supply.
- Enhanced Federal and local prosecution to incapacitate repeat gun offenders and deter high-risk individuals (such as gang members).

The U.S. Attorney also integrated the highly successful Atlanta Mayor's Office of Weed and Seed program into PSN.[19]

Signs of progress are evident. Gun crime and violent crime in general appear to have declined overall in the PSN focus area. Atlanta Police Department records show that firearm-related crimes declined 44 percent, from 231 in 2002 to 130 in 2005. During the same period, violent crimes declined 37 percent, from 597 to 377.[20]

Continued focus on these neighborhoods has yielded Federal sentences for several offenders involved in illegal drugs and guns—many of them convicted of Federal firearms violations. Concerning arrests made in July 2005, an ATF official noted: "Firearms form the common link between gang crime, violent crime, and drug crime."[21]

The homicide rate in Atlanta today is the lowest since 1965; Atlanta's police chief attributes this success to the PSN partnerships. Researchers continue to play an active role in PSN, helping APD identify repeat offenders and design strategies to reduce firearm-related crime.

This research report is based on the authors' reports to the National Institute of Justice:

- "Community Problem-Solving to Reduce Juvenile Gun Violence: Atlanta's Experience," March 2004, NCJ 204856, available at www.ncjrs.org/pdffiles1/nij/grants/204856.pdf.
- "Youth, Firearms and Violence in Atlanta: A Problem-Solving Approach," April 2002, NCJ 194050, available at www.ncjrs.org/pdffiles1/nij/grants/194050.pdf.

Notes

1. The Atlanta project targeted youths 17 years old and younger, referred to in this report as "juveniles." Youths ages 18 to 24 are considered young adults; 25 and older are considered adults.

2. Boston's Operation Ceasefire was a strategic initiative that combined two tactics: *suppression* (by cracking down on illegal gun traffickers) and *deterrence* (through an innovative intervention that targeted gangs engaged in firearm violence). See Kennedy, D.M., A. Braga, A.M. Piehl, and E.J. Waring, *Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire,* Research Report, Washington, DC: U.S. Department of Justice, National Institute of Justice, 2001, NCJ 188741, available at www.ncjrs.org/pdffiles1/nij/188741.pdf.

3. The problem-solving approach to community violence is described in *Understanding and Controlling Violence,* ed. A.J. Reiss and J.A. Roth, Washington, DC: National Academies Press, 1993.

4. In this report, "gun" and "firearm" are used interchangeably.

5. Directed patrol is a policing tactic whereby officers are freed from responding to calls for service and assigned to a high-crime area, in order to concentrate on investigating suspicious activities. The tactic has more recently been known as "intensive patrol." Also see notes 12 and 13.

6. Project PACT was formed by the U.S. Department of Justice's Bureau of Justice Assistance. Other Federal agencies involved were the U.S. Department of Health and Human Services, the U.S. Department of Housing and Urban Development, the U.S. Department of Education, the U.S. Department of Labor, and the Office of National Drug Control Policy. Four experimental sites were chosen: Atlanta, Denver, Washington, DC, and the State of Nebraska. The Atlanta PACT grant was awarded October 1, 1994.

7. The experts were Lawrence Sherman, architect of the "Kansas City Gun Experiment" (see note 12, below), David Kennedy, and Anthony Braga. Kennedy and Braga are the Harvard researchers who helped Boston devise and implement Operation Ceasefire (see note 2, above).

8. As a local consciousness-raising measure only, not for evaluation purposes.

9. All weapons, not just firearms, are included in this count.

10. Formerly part of the U.S. Treasury Department, ATF is now the Bureau of Alcohol, Tobacco, Firearms and Explosives within the U.S. Department of Justice.

11. More than 80,000 people live in Zone 1, which covers 26 square miles.

12. An evaluation of the Kansas City project was published as *The Kansas City Gun Experiment,* by L.W. Sherman, J.W. Shaw, and D. Rogan, Washington, DC: U.S. Department of Justice, National Institute of Justice, 1995, NCJ 150855, available at www.ncjrs.org/pdffiles/kang.pdf. The evaluation found that directed patrols in gun crime "hot spots" can reduce gun crimes by increasing the seizures of illegally carried guns.

13. Directed patrol was also used in Indianapolis—see McGarrell, E., S. Chermak, and A. Weiss, *Reducing Gun Violence: Evaluation of the Indianapolis Police Department's Directed Patrol Project,* NIJ Special Report, 2002, NCJ 188740, available at www.ncjrs.org/pdffiles1/nij/188740.pdf.

14. For more information, see www.nibin.gov.

15. Project LEAD was an ATF system introduced in 1996 that used information obtained from tracing crime guns to identify and prosecute illegal firearms traffickers.

16. Project LEAD was supplanted in 2001 by broader gun tracing initiatives. For more information about YCGII, see www.atf.treas.gov/firearms/ycgii.htm.

17. See Coldren, J.R., Jr., S.K. Costello, D.R. Forde, J. Roehl, and D. Rosenbaum, "Partnership, Problem-Solving, and Research Integration—Key Elements of Success in SACSI: Phase I Findings From the National Assessment of the Strategic Approaches to Community Safety Initiative," final report to the National Institute of Justice, 2002, NCJ 204349, available at www.ncjrs.org/pdffiles1/nij/grants/204349.pdf.

18. For more information about Project Safe Neighborhoods, see www.psn.gov.

19. For information about the Office of Justice Programs' Weed and Seed initiative, see OJP Press Release, March 18, 2004, available at www.ojp.usdoj.gov/pressreleases/OJP04011.htm. Atlanta's Weed and Seed program is discussed at www.atlantaga.gov/mayor/weed_seed.aspx.

20. Internal correspondence, PSN Monthly Statistics, January–December, 2002–2005, Atlanta Police Department.

21. See "Indictments Unsealed in 'Project Safe Neighborhoods' Heroin Ring Prosecutions," press release, U.S. Attorney's Office, Northern District of Georgia, July 28, 2005, accessed November 14, 2005, available at www.usdoj.gov/usao/gan/press/2005/07-28-05.html.

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Responding to Victims of Terrorism and Mass Violence Crimes

Coordination and Collaboration Between American Red Cross Workers and Crime Victim Service Providers





Office for Victims of Crime
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Introduction and Overview

The American Red Cross (ARC) and the Office for Victims of Crime (OVC) in the U.S. Department of Justice fill critical and complementary roles in assisting victims of terrorism and mass violence. The deceased, survivors, and bereaved family members in these events are victims of a deliberately perpetrated criminal act. As such, they may be eligible for both state and federally legislated services and ARC disaster services.

Disaster-related human need and suffering trigger ARC relief operations. ARC disaster operations are activated based on the *results* of a disaster, not its cause. ARC assists communities affected by natural disasters, epidemics, transportation accidents, terrorism, weapons of mass destruction, and other hazards. In contrast, OVC and state and local crime victim assistance programs are activated when there is significant indication that a disaster has been caused by a criminal act. When both ARC and crime victim service agencies are involved in a response, thoughtful coordination of each program's efforts facilitates better service to victims and family members.

Since 1983, OVC has assisted crime victims at the federal, state, and local levels by funding direct support, advocacy programs, and compensation programs for crime-related expenses. More recently, OVC has supported the development of innovative programs and approaches for assisting victims and their families in cases like the bombing of the Alfred P. Murrah Building in Oklahoma City, the Columbine High School shootings, the bombing of the USS *Cole*, and the September 11 terrorist attacks in Pennsylvania, New York, and Virginia.

Similarly, ARC provided a range of disaster relief services in each of these criminal incidents, including food, shelter, emergency financial assistance, mental health support, and assistance with locating missing persons. The National Transportation Safety Board (NTSB) designated ARC to be the lead family assistance provider following aviation disasters. ARC disaster relief services are activated immediately after an air disaster, usually before the cause of the crash has been determined.





OVC/American Red Cross Collaborative Timeline

To better serve the victims of terrorism and mass violence, ARC, OVC, and the Executive Office for U.S. Attorneys (EOUSA) signed a letter of intent in 1996 that emphasized the necessity for close interagency cooperation among OVC, ARC, the U.S. Attorney's Office victim-witness coordinators, and state compensation and assistance programs to ensure timely and appropriate delivery of services to victims. This agreement was based on lessons learned from the Oklahoma City bombing response.

In 1999, ARC implemented a weapons of mass destruction/terrorism program to ensure that chapters across the Nation and in all lines of service are prepared to respond to terrorist incidents. This comprehensive program includes preparedness guidance and training for ARC chapters, information for the American public, and outreach to other federal agencies—including OVC—to promote a coordinated response.

Although nothing could have prepared our country completely for the events of September 11, 2001, the working relationship between OVC and ARC enabled both agencies to effectively meet unforeseen challenges and provide needed assistance to the victims of these horrific events. This booklet supports this important cooperative effort by providing ARC with the following information and support:

- It acquaints ARC chapters and disaster services staff and volunteers with the needs and rights of crime victims involved in these disasters so ARC may coordinate with crime victim assistance programs at the local, state, and federal levels during nationally administered relief operations.
- It assists ARC's disaster relief workers in responding to the unique concerns of victims of criminal acts involving terrorism and mass violence.

This booklet addresses the following issues:

- How are natural disasters similar to and different from disasters caused by criminal human behavior?
- How can ARC workers assist victims of terrorism and mass violence crimes?
- What is the Office for Victims of Crime?
- What types of crime victim assistance and services may bereaved family members and survivors receive following human-caused disasters?
- What is the significance of the criminal justice system for victims of terrorism and mass violence?





Natural Disasters, Acts of Terrorism, and Mass Violence Crimes: Similarities and Differences

Many types of natural disasters, such as floods, tornadoes, and hurricanes, follow regional and seasonal patterns. These patterns provide some degree of familiarity and predictability for community victims, emergency responders, and disaster relief workers. When a major disaster is caused by deliberate human acts, sudden and unexpected threat, horror, and destruction inevitably impact innocent and unsuspecting people in the course of their daily routines. The resulting deaths and property destruction become reminders to many of their own vulnerability and their inability to keep their loved ones out of harm's way. When fostering terror is the goal, the threat of attack at any time and in any public setting is implicit and intended.

In the guidelines for OVC's *Antiterrorism and Emergency Assistance Program for Terrorism and Mass Violence Crimes,* "terrorism occurring within the United States" is defined as—

> Activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnaping; and (C) occur primarily within the territorial jurisdiction of the United States [18 U.S.C. § 2331, as amended].

OVC has developed a working definition of "mass violence" as—

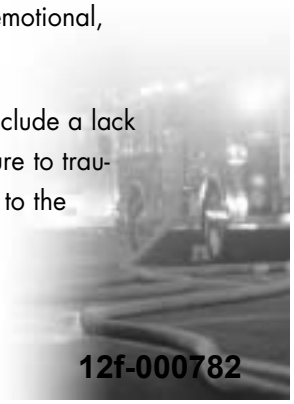
> An intentional violent criminal act, for which a formal investigation has been opened by the Federal Bureau of Investigation (FBI) or other law enforcement agency, that results in physical, emotional, or psychological injury to a sufficiently large number of people to significantly increase the burden of victim assistance and compensation for the responding jurisdiction as determined by the OVC Director.

Mass violence crimes may be under federal or state jurisdiction, but acts of terrorism are always federal crimes.

Emotional and Psychological Effects of Disaster

The psychological and emotional aftereffects of a major disaster are more severe and longer lasting when the disaster results in significant numbers of fatalities, seriously injured victims, and destroyed businesses and homes. Those most personally touched are likely to experience the greatest suffering. Surviving victims and bereaved families will experience a range of short- and long-term impacts that are emotional, physical, financial, and legal.

The characteristics of a disaster, which include a lack of warning, extreme threat to life, exposure to trauma, and uncontrollability, also contribute to the



severity and duration of the victims' psychological reactions. It is important to note that these attributes can be associated with either natural or human-caused disasters. Because mass casualties are usually an objective of terrorism, mass violence crimes, or incidents involving weapons of mass destruction, adverse psychological consequences are likely to be prominent.

Effects of Media Coverage

Criminal events that are highly traumatic and cause mass casualties receive considerable media coverage, exposing millions of U.S. citizens and people around the world to the horror and trauma of the tragedy. ARC disaster relief workers, traveling from different parts of the country, have likely viewed the disaster and its impact on television and bring their own reactions, fears, opinions, and personal vulnerabilities to the disaster operation. Disasters involving violent criminal mass victimization result in intensified psychological reactions not only among victims and families, but relief workers as well—thus making the relief effort more challenging and stressful.

Disaster's Effects on Targeted Groups

The crime may have targeted a particular group defined by culture, religion, nationality, politics, or ethnicity. Or, the crime may have been perpetrated by individuals from a specific group. Unfortunate social reactions may include blaming, scapegoating, stereotyping, and acting with prejudice to inflict additional trauma on already disenfranchised groups. Anger and the desire for revenge may motivate some people to aggressively act out their fears and feelings of powerlessness. It is important that relief workers foster community healing through respectful and equal treatment of all who seek services.

The table below presents many of the key differences between natural and human-caused disasters. The more prepared ARC relief workers are for the unique challenges of disasters involving criminal mass victimization, the better able they are to understand and respond to victims' needs.

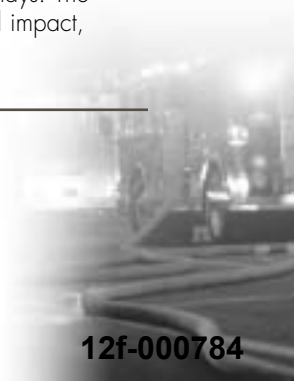
Comparison of Natural Disasters and Acts of Terrorism and Mass Violence Crimes

	Natural Disasters	Acts of Terrorism and Mass Violence Crimes
Examples	Hurricanes, earthquakes, tornadoes, floods, volcanic eruptions, wildfires, droughts.	Terrorist bombs, mass riots, aircraft hijackings, mass shootings, bioterrorism attacks.
Cause	Act of nature, interactions between natural forces and human error or actions.	Human evil intent, deliberate sociopolitical act, human cruelty, revenge, hate or bias against a group, mental illness.
Response	Local government emergency management agency leads the response activities; other agencies lend needed support.	Response environment often more complex, intense, demanding, chaotic, and stressful. Disaster impact area is a crime scene, which may limit the movements of responders.
Subjective Experience	Expectations defined by disaster type. Awe expressed about the power and destruction of nature. Disasters with warnings increase feelings of predictability and controllability. Recurring disasters pose ongoing threat. Anger and blame are directed toward agencies/individuals responsible for prevention, mitigation, and disaster relief.	Victims suddenly caught unaware in a dangerous, life-threatening situation. Many experience terror, fear, horror, helplessness, betrayal, and violation. The event seems incomprehensible and senseless. Some view the disaster as uncontrollable and unpredictable, while others view it as preventable. Outrage, blaming the responsible individual or group, desire for revenge, and demand for justice are common.



Comparison of Natural Disasters and Acts of Terrorism and Mass Violence Crimes (continued)

	Natural Disasters	Acts of Terrorism and Mass Violence Crimes
Psychological Impact	Separation from family members, trauma, evacuation, lack of warning, threat to life, and loss of irreplaceable items and homes contribute to disaster stress reactions. Property loss and damage are often primary results of a disaster; reactions are related to loss, relocation, financial stress, and daily challenges. Traumatic stress from a disaster is typically resolved in 18 months unless the number of fatalities and serious injuries was high.	Mass casualties, threat to life, exposure to trauma, and prolonged recovery efforts may result in significant and long-term physical and emotional reactions. Higher rates of posttraumatic stress disorder (PTSD), depression, anxiety, and traumatic bereavement that can last a long time.
World View/ Basic Assumptions	Spiritual beliefs may be shaken ("How could God allow this destruction?"). Lost sense of security in "terra firma"—no longer believe the earth is solid and dependable. Loss of all illusion of invulnerability—realization that everyone is vulnerable to random acts of nature.	Assumptions about humanity change—that the world is secure, just, orderly, and that danger can be kept out. Survivors confronted with the reality that evil things can happen to good people. Resulting distrust and fear of people or being "out in the world," may cause withdrawal and isolation. Loss of the illusion of invulnerability—realizing that anyone can be in the wrong place at the wrong time.
Stigmatization of Victims	Disasters tend to have greater impact on people with fewer economic resources because they live in more vulnerable, lower cost residences that are less structurally sound and located in higher risk areas. Certain groups, including survivors from specific cultural, racial, and ethnic groups; single parent families; people with disabilities; and the elderly on fixed incomes experience greater barriers to recovery, causing double jeopardy and potential stigma.	Some victims may come to feel humiliation, responsibility for others' deaths, survivor guilt, self-blame, and unworthy of assistance—thus assigning stigma to themselves. The larger community, associates, friends, and even family may become distant to avoid facing the fact that crime victimization could happen to anyone. Well-meaning loved ones may urge victims and those bereaved to "move on," causing them to feel rejected and wrong for continuing to suffer. Hate crimes reinforce the discrimination and stigma that targeted groups may already experience.
Secondary Injury	Disaster relief and assistance agencies and bureaucratic procedures can be seen as inefficient, fraught with stressors, and impersonal. Disillusionment can set in when the gap between losses, needs, and available resources is realized. Victims rarely feel that they have been "made whole" through relief efforts.	Victims' needs may conflict with necessary steps in the criminal justice process. Steps required to obtain crime victim benefits and compensation can seem confusing, frustrating, and bureaucratic, triggering feelings of helplessness. Bias-crime victims may suffer prejudice and blame. Victims often feel that the remedy ordered or the punishment imposed on the criminal is inadequate compared to the crime and their losses.
Media	Risk of violations of privacy of vulnerable victims. Need to protect children from harmful media exposure. Short-term, temporary media interest fosters a sense in the disaster-impacted community that "the rest of the world has moved on."	Risk of violations of privacy and retraumatization by graphic media exposure and replays. The greater the horror and psychological impact, the greater the media interest.





Office for Victims of Crime

The Victims of Crime Act (VOCA) was passed by Congress in 1984 with the overarching goals of reducing the mental health and other negative consequences of crime victimization and supporting victim participation in the criminal justice process. Programs supported through VOCA funding that focus on these goals have been implemented at the federal, state, and local levels across the country. Funding for these programs is derived primarily from fines and penalties assessed against convicted defendants of federal crimes, which are deposited into the Crime Victims Fund (the Fund). The funds are also used to compensate victims for out-of-pocket crime-related expenses, including medical and mental health services, lost wages, and burial expenses. OVC oversees the distribution of monies in the Fund to federal, state, and local programs. In addition, OVC plays a major role in influencing policies and procedures for the delivery of crime victim services in the field.

Services provided by VOCA-funded local crime victim assistance programs include crisis intervention, advocacy, and accompaniment to hearings and trials. They also provide support groups and trauma counseling for families of homicide victims and for victims of violent crime, including sexual assault, sexual abuse, and domestic violence. At the local level, crime victim assistance programs may be affiliated with police departments, district attorneys' offices, hospitals, and mental health agencies. Nationwide, there are more than 10,000 victim assistance programs. Further, all 50 states and 5 U.S. territories have crime victim compensation programs.

Large scale criminal acts, such as the bombing of Pan Am Flight 103, the bombing of the Alfred P. Murrah Building in Oklahoma City, and the September 11 terrorist attacks victimized thousands of people. Whether responding to a single assault victim or to thousands victimized by a terrorist attack, crime victim service organizations implement the following basic service goals:

- Protect the civil and legal rights of crime victims.
- Promote and restore the victim's sense of safety and dignity.
- Provide information about, and support victim participation in, the criminal justice process.
- Facilitate access to state crime victim and other appropriate compensation programs.
- Streamline procedures for accessing services and benefits.

In response to criminal acts of mass violence or terrorism, OVC coordinates with other federal and state agencies and nongovernmental organizations, including the American Red Cross (ARC). OVC disseminates information about resources, services, benefits and compensation; posts news releases; uploads timely information on available services to the OVC Web site; and may provide assistance in the form of



resources and referrals to crime victims through a national toll free help line. In addition, OVC provides technical assistance and supplemental funding to local crime victim assistance programs working directly with the victims and their families.

OVC relies on local programs to implement and staff crime victim services. Although ARC does not get involved at the local level with individual victims of crime, it works closely with OVC to ensure that victims of mass violence and terrorism are made aware of their rights and benefits.

Although ARC replicates its operational procedures consistently from disaster to disaster, variation can be expected from state to state with regard to the roles and capacities of crime victim service programs. Although state and local crime victim assistance programs have considerable expertise in assisting crime victims who have suffered violent and traumatic crimes, some programs may not have experience mobilizing a response to a large scale disaster. Communication and effective coordination are necessary between appropriate personnel within ARC, OVC, the FBI, the U.S. Attorney's Office victim-witness coordinator staff, the state compensation and assistance programs, local crime victim service provider agencies, and others who can facilitate timely access to the range of available services provided by each entity.



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Crime Victim Assistance and Services

As shown below, different types of assistance are available to crime victims at the federal, state, and local levels. At the ARC disaster operational level, liaison typically occurs with the state crime victim compensation program, the state U.S. Attorney's Office victim-witness coordinator, and the local victim assistance programs that are active in the crime victim compensation application process and in providing crisis counseling services and other services.

Services Available to Victims and Families Through OVC

Victim and Family Assistance Call Center

In certain circumstances, victims and families of victims may obtain information, assistance, and referrals through a national toll free hotline established by OVC.

Web site

Victims, their families, and the general public may seek information on the official OVC Web site. Information is provided about services; financial assistance; benefits provided by federal, state, local, and voluntary agencies; resources for coping with emotional trauma and loss; publications targeted for specific groups; updates on the criminal justice response; legal rights of crime victims and their families; and helpful Web links.

Services Available to Victims and Families Through State Crime Victim Compensation Programs

Crime victims and their family members may receive financial assistance with victim-related expenses (e.g., funerals, medical, mental health counseling, lost wages, loss of support). These programs are funded by states and receive additional funding via annual OVC formula grants. In cases of human-caused disaster, possible funding may be available from OVC's Antiterrorism and Emergency Assistance Program for Terrorism and Mass Violence Crimes. It is important to note that crime victim compensation programs are payors of last resort. This means that these programs fund crime-related expenses that other programs or organizations will not or cannot, such as a victim's private health insurance company, employer, or another social service agency. Please note that state programs vary slightly in terms of eligibility and benefits. Contact the specific state where the crime has occurred to determine exactly what costs are covered by the program.



Services Available to Victims and Families Through Local Crime Victim Assistance Programs

Crime victims, their families, and others affected by the crime may receive crisis intervention and counseling, advocacy, grief and trauma counseling, and information and referral, depending on the local program focus and capacity. These programs are funded by various sources, including annual OVC VOCA formula funds granted to states that are then subgranted to local victim assistance programs. For information on the location of victim assistance programs in a state, you may access OVC's Directory of Crime Victim Services on the OVC Web site or contact the VOCA assistance agency in your state.





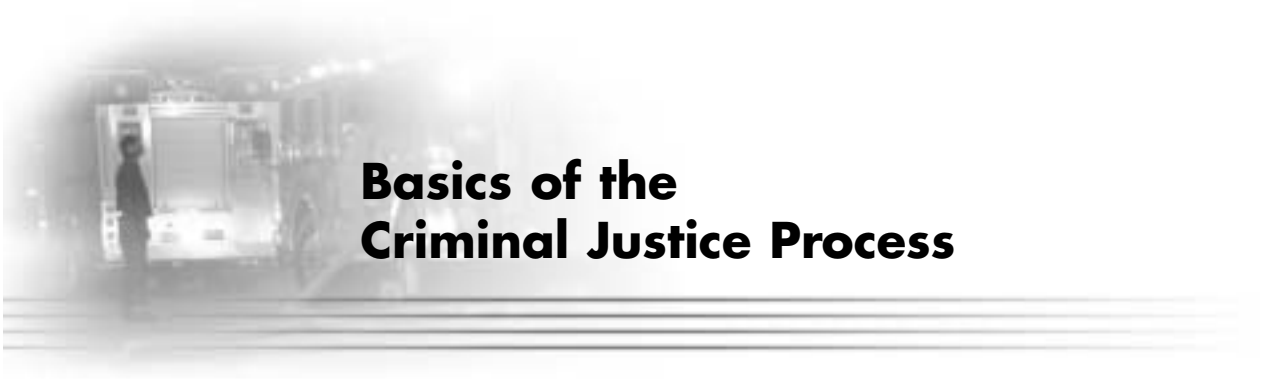
Grants and Funding Available to Organizations Through OVC

OVC administers the Antiterrorism and Emergency Assistance Program for Terrorism and Mass Violence Crimes. Eligible applicants for this program include state victim assistance and victim compensation programs; U.S. Attorneys' offices; victim service and nongovernmental organizations; and federal, state, and local governments. Funding is available to assist eligible applicants in the aftermath of terrorism and mass violence incidents. Individual victims are not eligible to apply directly for funds, but may receive assistance through the organizations that receive grants through this program.

Grants are available for the following categories of assistance:

- **Crisis Response Grants.** Provide emergency funds to help victims build adaptive capacities, decrease stressors, and reduce symptoms of trauma immediately following the terrorism or mass violence event.
- **Consequence Management Grants.** Provide supplemental funds to help victims recover from the traumatic event and to restore a sense of equilibrium.
- **Crime Victim Compensation Grants.** Provide supplemental funds to state crime victim compensation programs to reimburse victims for out-of-pocket expenses related to their victimization.
- **Criminal Justice Support Grants.** Provide supplemental funds to facilitate victim participation in the investigation or prosecution directly related to a terrorist act or mass violence incident.
- **Training and Technical Assistance.** Provide tools to help federal, state, and local authorities identify victim needs and needed resources, coordinate services to victims, develop strategies for responding, and address related issues. Training for mental health service providers is available in coordination with the Center for Mental Health Services (U.S. Department of Health and Human Services) and others.





Basics of the Criminal Justice Process

When people suffer personal and property losses due to a natural disaster, they typically engage with unfamiliar bureaucracies and procedures involving a range of federal, state, and voluntary agencies, in addition to receiving directions from their insurance carriers. The process can be confusing, frustrating, and overwhelming at times. Similarly, when victimized by a crime, those affected may become involved with law enforcement personnel, prosecutors' offices, and trial proceedings. Criminal justice procedures may not appear to make sense and can seem far removed from obtaining justice. Events throughout the criminal justice process often trigger painful feelings and distress for victims and families.

Basic information about the criminal justice system is included in this booklet so that ARC workers may better understand this key aspect of the aftermath of mass criminal victimization. For many victims and family members, a critical part of coming to terms with having been traumatically victimized is participating in the criminal justice process. Because the disaster was caused by a deliberate human act, all who have been impacted have been victimized by a crime that is punishable through the criminal justice system. Determining culpability and imposing punishments for these criminal acts are of significant concern for many crime victims and their loved ones.

Overview of the Criminal Justice Process: Investigation and Prosecution

Following an act of terrorism or mass violence, an investigation begins. If the investigation has identified suspects, then these alleged perpetrators may be arrested if located and depending on the circumstances of the case. When the initial investigation is completed, the law enforcement agency makes recommendations regarding the criminal offense charges to the prosecutor's office. The case is then transferred to the office responsible for prosecution of the crime.

Prosecution

A preliminary hearing or grand jury may be conducted to determine if there is sufficient evidence to proceed to trial. At the arraignment hearing, the suspect or accused is informed of the charges pending. At this point, the accused is referred to as "the defendant." The defendant then enters a plea of "guilty" or "not guilty." Each of these steps is likely to be distressing for victims and their loved ones.

Duration

There may be a long delay before the case goes to trial. If there has been considerable publicity surrounding the crime, the location of the trial may be



moved to another part of the country, making it more difficult for families to attend. The trial, sentencing, and appeals process may continue for years after the event. Updates regarding the discovery process, case events, continuances, and plea or sentence bargaining may be provided via telephone, written correspondence, and/or an official government Web site administered by the jurisdiction prosecuting the case.

Victim Impact Statement

During the sentencing phase of a criminal trial, some victims and family members may elect to provide written and/or oral victim impact statements to the judge and/or jury. A victim impact statement allows victims to express how the crime has affected their lives. Victim service providers can assist victims with a written or oral impact statement as this is often an extremely important and emotional process for crime victims.

Role of Victim Assistance and Advocacy Programs

A primary mission of OVC, U.S. Attorneys' Offices, state and local prosecutor offices, and crime victim assistance programs is to ensure that crime victims and their loved ones have the following:

- Information about the criminal investigation, the criminal justice system, the prosecution of the criminal case against the defendants, upcoming proceedings, and status updates.
- Emotional support that anticipates and responds to the impact of key events in criminal justice proceedings.
- Opportunities to make informed decisions about participation in the criminal justice process.
- Protections from intimidation and harassment.

Crime victim assistance providers and advocates remain engaged with the victims and their family members until the criminal justice process has concluded. In contrast to most ARC disaster relief and assistance responses, crime victim assistance programs may remain actively engaged for many years. In particular, the trial and sentencing phases require a significant programmatic response to ensure that the civil and legal rights of crime victims are protected. Advocacy and trial support involve providing frequent informational updates and explanations of case issues and legal procedures; providing crisis counseling and emotional support; possibly establishing closed-circuit television sites for viewing the trial; and funding the travel and lodging costs for out-of-town victims and family members attending the trial.





Conclusion

Following an act of terrorism and/or mass violence, components of ARC, OVC, and state and local crime victim assistance programs have key roles in assisting victims and their families. A timely, coordinated response to victims is enhanced by

- Understanding the unique issues faced by crime victims.
- Being informed about local and state crime victim assistance and compensation agencies and their services.

Exchanging resource information and clarifying the assistance roles and responsibilities prior to an act of terrorism or incident of mass violence aid coordination during the aftermath and, *most importantly,* result in victims having access to needed services more quickly.





References and Resources

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Office for Victims of Crime. (2000). *Responding to Terrorism Victims: Oklahoma City and Beyond.* Washington, DC: U.S. Department of Justice.

Office for Victims of Crime. (2000). *First Response to Victims of Crime: A Handbook for Law Enforcement Officers on How To Approach and Help.* Washington, DC: U.S. Department of Justice.

U.S. Department of Justice. (2000). *Attorney General Guidelines for Victim and Witness Assistance.* Washington DC: U.S. Department of Justice.

Helpful Internet Sites

American Red Cross
www.redcross.org

Center for Mental Health Services (CMHS), Substance Abuse and Mental Health Services Administration (SAMHSA)
U.S. Department of Health and Human Services
http://www.mentalhealth.samhsa.gov/cmhs

Office for Victims of Crime (OVC)
U.S. Department of Justice
www.ovc.gov

Office for Victims of Crime Resource Center (OVCRC)
www.ncjrs.org

Office for Victims of Crime Training and Technical Assistance Center (OVCTTAC)
www.ovcttac.org



Contact Information for State Crime Victim Assistance and Compensation Programs

Information on all assistance and compensation programs can be found online. The National Association of VOCA Assistance Administrators provides information about crime victim assistance at www.navaa.org. The National Association of Crime Victim Compensation Boards provides information about crime victim compensation programs at www.nacvcb.org. OVC provides state contact information for crime victim assistance and compensation programs at www.ovc.gov/help/links.htm.



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Responding to Victims of Terrorism and Mass Violence Crimes: Coordination and Collaboration Between American Red Cross Workers and Crime Victim Service Providers

This document is available in electronic form only.
For additional information, please contact

OVC Resource Center
P.O. Box 6000
Rockville, MD 20849–6000
Telephone: 1–800–851–3420 or 301–519–5500
(TTY 1–877–712–9279)
www.ncjrs.org

Or order OVC publications online at *http://puborder.ncjrs.org.*
Submit your questions to Ask OVC at *http://ovc.ncjrs.org/askovc.*
Send your feedback on this service via *http://tellncjrs.ncjrs.org.*

Refer to publication number NCJ 209681.

For information on training and technical assistance available from OVC, please contact

OVC Training and Technical Assistance Center
10530 Rosehaven Street, Suite 400
Fairfax, VA 22030
Telephone: 1–866–OVC–TTAC (1–866–682–8822)
(TTY 1–866–682–8880)
www.ovcttac.org

12f-000795

Department of Justice

MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS

On January 9, 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. The review team they assembled traveled to nearly 20 Immigration Courts and the Board, conducted more than 200 interviews of stakeholders, administered an online survey to hundreds of participants, and analyzed thousands of pages of material in an effort to assess the strengths and weaknesses of the immigration court system. The Deputy Attorney General and the Associate Attorney General have now briefed the Attorney General on the review team's findings and have provided him with their recommendations for reform.

Based on that advice, the Attorney General is directing the implementation of the following measures.

1. *Performance Evaluations*

With the assistance of the Director of the Executive Office for Immigration Review (EOIR), the Deputy Attorney General will develop and implement a process to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals. Just as performance appraisal records are used elsewhere in the Department to assess the work of personnel at all levels, EOIR performance evaluations will allow for identification of areas where an immigration judge or Board member may need improvement while fully respecting his or her role as an adjudicator. Given the size and structure of the immigration court system, a formal process to allow supervisors within EOIR to evaluate and improve the work of its adjudicators is appropriate at this time.

2. *Evaluation During Two-Year Trial Period*

Like many other Department employees, newly appointed immigration judges and Board members have a two-year trial period of employment. The Director of EOIR will use that period both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed. In addition, the Director of EOIR will provide a short report to the Deputy Attorney General on the temperament and skills of each newly appointed immigration judge or Board member roughly four months prior to the expiration of the two-year trial period. The assessment will be done in a way that fully respects the adjudicator's role.

3. *Examination on Immigration Law*

Immigration judges and Board members should be proficient in the principles of immigration law. To ensure that is true, all immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key principles of immigration law before they begin to adjudicate matters. The Director of EOIR will develop such an immigration law exam and submit it to the Deputy Attorney General. The Director may consider the appropriateness of a training course prior to the administration of the examination.

4. *Improved Training for Immigration Judges and Board Members*

It is important that training for immigration judges and Board members be comprehensive and up to date. The Director of EOIR will conduct a review of EOIR's current training programs for immigration judges and Board members, develop a plan based on that review to strengthen training, and submit the plan to the Deputy Attorney General. The plan will address, among other things, (i) whether expansion of the training program for new immigration judges and Board members is warranted, (ii) ways to ensure that immigration judges and Board members receive continuing education that is appropriate to their level of experience and instructive about current developments in the field of immigration law, and (iii) ways to ensure that immigration judges are trained on properly crafting and dictating oral decisions. The Director will consult the Director of the Federal Judicial Center with respect to this and other training-related measures.

5. *Improved Training and Guidance for EOIR Staff*

The Director of EOIR will conduct a review to assess how well Immigration Court and Board of Immigration Appeals staff are performing their functions and provide a plan for improvement, including any additional training the Director deems appropriate in areas such as case management. In particular, the Director's review will consider how well the Board's staff attorneys are performing their screening and drafting duties and develop a plan based on that review to strengthen these areas. The plan will address, among other things, ways to (i) improve the guidance and training provided to staff attorneys—especially on major recurring issues (*e.g.*, correct screening standards, proper standards of review, and how to craft effective draft opinions), and (ii) ensure that Board members provide staff attorneys with appropriate guidance in drafting decisions in individual cases, consistent with the policies and directives of the Director of EOIR and the Chairman of the Board of Immigration Appeals. The Director will submit the plan to the Deputy Attorney General.

6. *Improved On-Bench Reference Materials and Decision Templates*

Immigration judges should have available to them up-to-date reference materials and standard decision templates that conform to the law of the circuits in which they sit. The Director of EOIR is encouraged promptly to form a committee composed of immigration judges and other EOIR personnel to undertake the task of developing these materials.

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7. *Mechanisms To Detect Poor Conduct and Quality*

While most immigration judges and Board members perform their difficult duties with skill and dedication, as in any large organization, instances of poor conduct and quality can occur from time to time. To ensure that those instances are promptly detected, the Director of EOIR will establish regular procedures (1) for Board members and the Civil Division's Office of Immigration Litigation (OIL) to report adjudications that reflect immigration judge temperament problems or poor Immigration Court or Board quality to him and to the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals; and (2) for the Chief Immigration Judge and the Chairman of the Board to track and report to the Director statistics that may signal problems in temperament or quality (*e.g.*, unusually high reversal rates, unusually frequent or serious complaints, and unusually significant backlogs).

8. *Analysis and Recommendations Regarding Disparities in Asylum Grant Rates*

A recent study has highlighted apparent disparities among immigration judges in asylum grant rates. The Director of EOIR, in consultation with the Acting Chief Immigration Judge, will review this study and provide an analysis and, if appropriate, recommendations to the Deputy Attorney General with respect to this issue.

9. *Pilot Program To Deploy Supervisors to Regional Offices*

To test whether the Immigration Courts would benefit from having Assistant Chief Immigration Judges assigned regionally rather than at EOIR headquarters, the Acting Chief Immigration Judge will consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees, on a pilot basis. After the conclusion of this assignment, the Chief Immigration Judge will report to the Deputy Attorney General and the Director of EOIR on whether the assignment improved managerial contact and oversight in those courts. The Acting Chief Immigration Judge will also consider piloting other mechanisms for improving the management of the Immigration Courts.

10. *Code of Conduct*

The Director of EOIR will draft a Code of Conduct specifically applicable to immigration judges and Board members and, after consultation with the Counsel for Professional Responsibility and the Director of the Office of Attorney Recruitment and Management, submit it to the Deputy Attorney General. Thereafter, it will be available online to counsel and litigants who appear before the Immigration Courts and the Board.

11. *Complaint Procedures*

The Department takes seriously complaints of inappropriate conduct by its adjudicators. Procedures already exist within EOIR, the Office of Professional Responsibility (OPR), and the Office of the Inspector General (OIG) to address them. In

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light of the serious and sometimes sensitive nature of these complaints, the following additional measures will be taken to improve the quality and speed of the Department's complaint-handling processes. The Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, will conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and will develop a plan based on that review to (i) standardize complaint intake procedures; (ii) create a clearance process that will clearly define the roles of EOIR, OPR, and OIG in the handling of any particular complaint; and (iii) ensure a timely and proportionate response. The Director of EOIR will conduct the review and submit a plan to the Deputy Attorney General.

12. *Improvements to the Streamlining Reforms*

Much commentary has been directed at the reforms that the Department instituted in 1999 and then expanded in 2002 to streamline the Board of Immigration Appeals' procedures for hearing appeals. Critics believe that these reforms have led the Board of Immigration Appeals to dedicate insufficient review to some matters and to produce too few published precedential decisions. Proponents of these reforms, on the other hand, have observed that streamlining brought much-needed efficiency to the review process, enabling the Board to eliminate a large backlog and to provide respondents with a final, reviewable administrative action in a reasonable amount of time. Having carefully considered the existing and predicted caseload, the existing resources, the need to review respondents' claims adequately, and the need to provide respondents with a final decision in a timely fashion, the Department has concluded that it is neither necessary nor feasible to return to three-member review of all cases without recreating unacceptable backlogs. Some adjustments to streamlining, however, are appropriate to allow the Board to improve and better explain its reasoning in certain cases. Accordingly, the following adjustments will be made to the Board's rules.

- The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification; and (ii) allow the limited use of three-member written opinions—as opposed to one-member written opinions—to provide greater legal analysis in a small class of particularly complex cases. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board members votes to publish the opinion, or if the Attorney General directs publication. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Assistant Attorney General for Legal Policy, in consultation with EOIR and the Civil Division, will draft a proposed rule that would return cases to the Board for

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reconsideration when OIL identifies a case that has been filed in federal court and, in OIL's view, warrants reconsideration.

From time to time, the streamlining rules may need to be adjusted to meet the exigencies and needs of the Board and the parties who litigate before it. Accordingly, the Deputy Attorney General and the Director of EOIR will monitor the effect of these adjustments closely to ensure that they are appropriate in light of the Board's changing workload, and the Deputy Attorney General will reevaluate the effectiveness of these adjustments after they have been in effect for two years.

13. *Practice Manual*

The immigration judges, and the counsel and litigants who appear before them, would benefit from having a Practice Manual that describes a set of best practices for the Immigration Courts. Working with the immigration judges, the Director of EOIR will draft such a Manual and submit it to the Deputy Attorney General. It will be available online to counsel and litigants who appear before the Immigration Courts.

14. *Updated and Well-Supervised Sanction Authorities for Immigration Judges for Frivolous or False Submissions and Egregious Misconduct*

Immigration judges should have the tools necessary to control their courtrooms and to protect the adjudicatory system from fraud and abuse. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct, *see* 8 C.F.R. 1003.101–109, and will draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority. Because the authority to impose a civil monetary sanction exists only for conduct "in contempt of an immigration judge's proper exercise of authority" (8 U.S.C. 1229a(b)(1)), its use will require substantial oversight (*e.g.*, approval by the Director of EOIR or another overseeing body), and one would anticipate it would be used sparingly. The Director, after consultation with the Counsel for Professional Responsibility, will submit proposed rules to the Assistant Attorney General for Legal Policy.

15. *Updated Sanctions Power for the Board*

Likewise, the Board of Immigration Appeals should have the ability to sanction effectively litigants and counsel for strictly defined categories of gross misconduct. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority to the Board. I ask the Director, after consultation with the Counsel for Professional Responsibility, to submit any proposed revisions to the Assistant Attorney General for Legal Policy.

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16. *Seek Budget Increases*

With its workload having increased significantly in recent years and still further increases in caseload being anticipated, EOIR has demonstrated a need for additional resources. The Deputy Attorney General and the Director of EOIR will prepare a plan as soon as possible to seek budget increases, starting in FY 2008, for (i) the hiring of more immigration judges and judicial law clerks, focusing on those Immigration Courts where the need is greatest; and (ii) the hiring of more staff attorneys to support the Board of Immigration Appeals.

17. *Increase in Size of the Board*

The Director of EOIR will draft and submit to the Assistant Attorney General for Legal Policy a proposed rule to increase the size of the Board of Immigration Appeals from 11 to 15, by adding four permanent members. In addition, the Director is encouraged to continue the use of temporary Board members to fulfill the needs of the Board of Immigration Appeals.

18. *Updated Recording System and Other Technologies*

For some time, EOIR has been considering the need to replace the Immigration Courts' tape recording system with a digital recording system. The Director will provide the Deputy Attorney General with a plan and timeline for accomplishing this project. The plan and timeline will include the steps necessary to begin piloting a digital audio recording system during the next fiscal year, and to begin nationwide implementation of that system as soon as feasible.

In general, it is important to ensure that EOIR's use of technology—from the digital recording system to an electronic docket management system—is efficient, innovative, and compatible with the information management systems of users of EOIR's systems.

19. *Improved Transcription Services*

The Director of EOIR will conduct a review of EOIR's current transcription services and develop a plan based on that review to strengthen the transcription of oral decisions, including improving the timeliness of transcription to the extent feasible. The Director will submit the plan to the Deputy Attorney General.

20. *Improved Interpreter Selection*

Likewise, the Director of EOIR will conduct a review of its current interpreter selection process and develop a plan based on that review to strengthen interpreter selection. The plan will address, among other things, (i) ways to improve the screening, hiring, certification, and evaluation of staff interpreters, and (ii) ways to ensure that contract interpreters meet similar standards of quality. The Director will submit the plan to the Deputy Attorney General.

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21. *Referral of Immigration Fraud and Abuse*

The Director of EOIR, in consultation with the Director of the Executive Office for United States Attorneys, will develop a procedure by which immigration judges and Board members may refer cases of immigration fraud and abuse to the appropriate investigative body for appropriate action, including possible future referral to and prosecution by the U.S. Attorney's Offices. The Director will notify the immigration judges and Board members of that procedure.

22. *Expanded and Improved EOIR-sponsored* Pro Bono *Programs*

The Director of EOIR will consider forming a committee to oversee the expansion and improvement of EOIR's *pro bono* programs. Such a committee will be composed of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar, and any other participants whom the Director deems necessary.

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Assessment of U.S. Government Efforts to Combat Trafficking in Persons

September 2006

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Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2005

September 2006

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I. Introduction

Human trafficking is an offense against human dignity, a crime in which human beings, many of them teenagers and young children, are bought and sold and often sexually abused by violent criminals. Our nation is determined to fight and end this modern form of slavery.

--President George W. Bush, January 2006

Trafficking in persons ("TIP") is a regrettably widespread form of modern-day slavery. The United States is among the nations leading the fight against this terrible crime. At the center of U.S. Government efforts is the Trafficking Victims Protection Act of 2000 ("TVPA"), Pub. L. 106-386, signed into law on October 28, 2000. The TVPA enhanced three aspects of federal government activity to combat TIP: protection, prosecution, and prevention. The TVPA provided for a range of new protections and assistance for victims of trafficking in persons; it expanded the crimes and enhanced the penalties available to federal investigators and prosecutors pursuing traffickers; and it expanded the U.S. Government's activities internationally to prevent victims from being trafficked.

The Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA 2003"), Pub. L. 108-193, signed into law by President Bush on December 19, 2003, reauthorized the TVPA and added responsibilities to the U.S. Government's anti-trafficking portfolio. In particular, the TVPRA 2003 mandated new information campaigns to combat sex tourism, added refinements to the federal criminal law, created a new civil action that allows trafficking victims to sue their traffickers in federal district court, established the Senior Policy Operating Group ("SPOG") on Trafficking in Persons, and required a yearly report from the Attorney General to Congress on the U.S. Government's activities to combat TIP.

On January 10, 2006, President Bush signed into law the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA 2005"), Pub. L. 109-164. The TVPRA 2005 reauthorized the TVPA and created new anti-trafficking resources, including grant programs to assist state and local law enforcement efforts in combating TIP and to expand victim assistance programs to U.S. citizens or resident aliens subjected to trafficking; pilot programs to establish residential rehabilitative facilities for trafficking victims, including one program aimed at juveniles; and extraterritorial jurisdiction over trafficking offenses committed overseas by persons employed by or accompanying the federal government.

This Assessment is the fourth in four years that analyzes the practical effect of U.S. Government activities to combat trafficking in persons. Previous Assessments were published in August 2003, June 2004, and September 2005. The Assessment is separate from the annual Attorney General's Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons, which was submitted to Congress in May 2004, July 2005, and June 2006 and is available on the Department of Justice ("DOJ") website at http://www.usdoj.gov/trafficking.htm. It is also separate from the annual Trafficking in

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Persons Report issued by the Department of State ("DOS") and available at http://www.state.gov/g/tip.[1]

In the September 2005 Assessment, four recommendations were made for improving the U.S. Government's efforts to combat TIP:

- The U.S. Government, its state and local partners, and nongovernmental organizations ("NGOs") need to improve their ability to find and rescue victims.

- The U.S. Government should conduct more research to determine an accurate estimate of the scope of the trafficking problem in the United States, including both domestic and foreign victims.

- The U.S. Government should attempt to measure the impact of its anti-trafficking activities both domestically and internationally, including, for example, enhancing U.S. embassies' abilities to monitor and evaluate anti-trafficking projects, requiring grantees to provide self-assessments of their anti-trafficking projects, and conducting more site visits.

- The U.S. Government should ensure that its Task Forces are well-functioning and should encourage states to adopt and aggressively implement their own anti-trafficking laws.

The following sections of this Assessment describe U.S. Government successes, evaluate progress on the recommendations outlined in the September 2005 Assessment, and suggest ways that the U.S. Government can improve its efforts. As described in more detail below, many of the U.S. Government FY 2005 accomplishments addressed the recommendations in the September 2005 Assessment, including:

- The number of DOJ anti-trafficking task forces increased from 22 at the end of FY 2004 to 32 at the end of FY 2005. The task forces bring together state, local, and federal law enforcement with partners from NGOs to collaborate on interdisciplinary solutions to human trafficking in their areas. For example, in Houston, the task force has helped rescue and provide assistance to almost 100 victims of trafficking, and 10 defendants have been convicted on trafficking charges in cases involving forced prostitution and forced labor.

- During FY 2005, attorneys in the Civil Rights Division at DOJ spoke over 107 times at public events or training sessions on the issue of TIP. This included approximately 62 presentations to federal, state, and local law enforcement officers; 31 presentations to international audiences; and 14 educational presentations.

[1] This Assessment is also separate from the recently issued GAO *Human Trafficking Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad.* The major domestic recommendations in that study are covered in this Assessment.

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- The National Institute of Justice ("NIJ") is undertaking research that focuses on developing an empirically credible method which, given available data, may be used to generate transparent and reproducible estimates of the prevalence of human trafficking into the United States.

- In FY 2005, the Civil Rights Division and United States Attorneys' Offices more than doubled the number of initiated trafficking prosecutions from 47 to 95.

- The Bureau of International Labor Affairs ("ILAB") at the Department of Labor ("DOL"), which provided over $38 million to 13 projects in 18 countries in FY 2005, actively measures the impact of its anti-trafficking grants, keeps Embassy staff informed about its projects, requires grantees to monitor their projects through regular progress reports, and strives to conduct site visits of DOL-funded projects by ILAB or Embassy staff.

- As of September 2006, 22 states have passed anti-trafficking legislation and seven more states are considering anti-trafficking legislation.

- The U.S. government has worked on identifying TIP victims by focusing on particular work sectors or first responders, for example the travel industry, faith-based communities, and victim service providers.

- In FY 2005, the Immigration and Customs Enforcement's Human Smuggling and Trafficking Unit opened 328 human trafficking investigations, which has increased from 220 in the previous fiscal year.

II. Benefits and Services Given Domestically to Trafficking Victims

The success of U.S. Government efforts to combat trafficking in persons domestically hinges on pursuing a victim-centered approach. All U.S. Government agencies are therefore committed to providing victims access to the services and benefits provided by the TVPA. Because government benefits are typically tied to a person's immigration status, the TVPA created a mechanism for allowing certain non-citizens trafficking victims access to benefits and services from which they might otherwise be barred. Under §§ 107(b)(1) and (b)(2) of the TVPA, various federal agencies must extend some of existing benefits to trafficking victims and are authorized to provide grants to effectuate such assistance. This section reviews the activities of the Department of Health and Human Services ("HHS"), the Department of Justice ("DOJ"), the Department of Homeland Security ("DHS"), the Department of State ("DOS"), the Department of Labor ("DOL"), and the Legal Services Corporation ("LSC") to implement §§ 107(b) and 107(c) of the TVPA.

A. Department of Health and Human Services

1. Certification and Eligibility Letters

The TVPA authorizes the "certification" of adult victims to receive certain federally-funded or -administered benefits and services, such as cash assistance, medical care, food stamps, and housing. In FY 2005, HHS's Office of Refugee Resettlement ("ORR") issued

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196 certifications to adults and 34 eligibility letters to minors, a total of 230 certifications – a marked increase from previous fiscal years, as shown in the chart below. This makes 841 total letters issued during the first five fiscal years in which the program has operated.

FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
198	99	151	161	230

To assist HHS with its certification responsibilities, DHS's U.S. Immigration and Custom Enforcement ("ICE") modified the Continued Presence application package to include an optional statement regarding cooperation with law enforcement. This modification allows HHS to prove victim cooperation, which is a requirement under § 107(b) of the TVPA.

The FY 2005 certification letters were sent to victims or their representatives in 19 states, with the largest concentrations in California, New York, and Texas. The countries of origin for reported victims were Albania, Bangladesh, Bolivia, Cambodia, Cameroon, Colombia, Chad, Czech Republic, Ecuador, El Salvador, Eritrea, Estonia, Ethiopia, Guatemala, Guyana, Honduras, Hungary, Indonesia, Ivory Coast, Jamaica, Kenya, Korea, Latvia, Malaysia, Mexico, Mongolia, Nepal, Nigeria, Paraguay, Peru, Russia, Sri Lanka, Thailand, and Western Samoa. The highest populations of victims originated in Korea (23.5%), Thailand (11.7%), Peru (10.0%), and Mexico (9.6%).

2. Service Grants

ORR, working closely with DOJ's Office for Victims of Crime ("OVC"), has utilized discretionary grants to create a network of service organizations available to assist victims of trafficking. ORR and OVC meet regularly to review the status of the national service delivery mechanism. In the case of minors who are victims of trafficking, the policy of HHS is to enroll them in the Unaccompanied Refugee Minor program in order to provide care and services (even though they are not refugees as defined in statute). This enrollment can be accomplished very rapidly, usually within 24 hours of ORR being made aware of a victim. Participation in the program is voluntary.

Since the inception of its trafficking program in FY 2001, ORR has awarded discretionary grants to 28 organizations. During FY 2001, ORR awarded $1.25 million in grants to eight organizations for an eighteen-month period. The purpose of these grants was to assist victims and promote awareness of trafficking by hosting training and media activities.

In FY 2002 and FY 2003, all trafficking grant awards were for a one-year period, renewable annually for an additional two years. ORR awarded these service grants in two categories: (1) Category One grants fund projects that raise awareness of trafficking in persons and/or provide case management and direct services to victims,[2] such as

[2] Under the TVPA as originally enacted, grantees could not use HHS-funded assistance for pre-certified adult or minor victims of trafficking. Depending on case circumstances, the prohibition frequently created a federal assistance gap between the time the victim was identified (whether by law enforcement or by NGOs) and the time of certification and eligibility for benefits. During that time period, grantees

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establishing nationwide networks of non-governmental organizations and service providers; and (2) Category Two grants fund technical assistance projects that provide training and technical expertise to law enforcement agencies, social service providers, faith-based organizations, and professional associations. To complete the final year of direct services, approximately $3.2 million was granted to the FY 2003 grantees in FY 2005.

In FY 2005, ORR did not award any new Category One or Two grants; rather, it awarded only Street Outreach grants (see Section VI.D.2).

3. Efforts to Improve Services

HHS is taking several steps to improve federal services for victims. In FY 2006, HHS will be shifting to a per capita payment system for providing services to victims of trafficking. It will be instituting a new comprehensive victim services model in order to more readily respond to the needs of victims anywhere in the country and to more successfully encourage victims to come forward and to seek certification under the TVPA. Currently, the geographic coverage of trafficking grants (meaning the locations in which a victim can receive services) is limited to the collective service areas of existing grantees. Under the new model, a victim of human trafficking anywhere in the country would receive services funded through financial support from ORR, and funds would be deployed to the provider of the services only in relation to the size of the case load of victims actually being served. This more direct relationship between ORR and the provider of the services will better achieve the objectives of the TVPA to provide services to these victims.

B. Department of Justice

OVC funds a total of 25 direct services projects for victims, one project that provides technical assistance to OVC trafficking grantees, and one that focuses on building shelter capacity for trafficking victims. During Calendar Year 2005 (OVC's reporting period), OVC's grantees provided services to 682 victims, up from 357 in the previous calendar year, bringing the number of victims served since the inception of the program to 1,184.[3]

Examples of OVC grantees include the International Institute of Connecticut, which provides comprehensive services to pre-certified victims identified in Connecticut; the Coalition to Abolish Slavery and Trafficking, which is working with the Los Angeles Anti-Trafficking Task Force to build effective community service networks to identify victims and respond to their needs; and the Asian Pacific Islander Legal Outreach, which works with community partners in the San Francisco Bay area, such as the Asian

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attempted to identify other sources of funds and assistance. For nonentitlement programs, the TVPRA 2005 now authorizes HHS to provide benefits and services to assist potential victims in achieving certification.

[3] Some victims were served by more than one service provider. This occurs when large numbers of victims are identified in a single raid/episode and the local service provider lacks the capacity to provide ongoing services to large numbers of victims.

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Women's Shelter, the Donaldina Cameron House, and Narika (an organization committed to ending domestic violence) to provide services that are culturally and linguistically appropriate to pre-certified trafficking victims. OVC has also provided Federal Crime Victim Assistance Funds that can be used to provide emergency housing and other services. A list of all OVC funded projects can be found at: http://www.ojp.usdoj.gov/ovc/help/traffickingmatrix.htm.

C. Department of Homeland Security

With funding from OVC, U.S. Immigration and Customs Enforcement's ("ICE") Victim-Witness Assistance Program operates a Federal Crime Victim Assistance Fund ("Fund") that is available to assist Special Agents in Charge ("SACs") with emergency services for victims of crime, including trafficking and related crimes, until they can be safely transferred to NGOs. In FY 2005, ICE utilized the Fund to provide emergency housing, food, and incidentals for 17 Korean victims of sex trafficking in San Francisco; 10 Honduran victims (including juveniles) of sex trafficking in Newark; four Ukrainian victims of sex trafficking in Detroit; and Mexican sex trafficking victims in Baltimore, New York City, Newark, and Tampa. The Fund was also utilized to provide clothing and personal items for a victim rescued from a home in Colorado where she had been kept captive; health assessments for two child victims in Boston, Massachusetts; costs associated with the Center for Disease Control's tuberculosis testing for victims in San Francisco; and food for 100 potential victims in San Francisco.

Other services DHS provides to victims include supplying clothing, translators, and other items. For example, rescued victims frequently have only the clothing they are wearing when rescued. ICE has therefore prepared packets of clothing and essential hygiene items that are sent to field offices for investigations when large numbers of victims are to be rescued. Among other things, victim assistance staff must also be prepared to provide appropriate translation services, culturally appropriate food, and clothing. In one case, ICE arranged for a Catholic priest to provide mass for victims at a secure location because the traffickers had not allowed the victims to attend church. ICE has also developed an operational model to assist victim assistance staff, in the case of large raids, in determining who is a victim and who may be a trafficker. Under this model, potential victims are detained at hotels or other sites and provided services while ICE staff conducts interviews and its investigation.

Finally, to improve the process of identifying victims and disseminating information to victims, ICE employees drafted 28 C.F.R. § 1100, "Protection and Assistance for Victims of Trafficking." The regulation articulates government responsibilities for providing information to trafficking victims and for the training of federal staff in identifying victims and providing services. ICE is responsible for the publication of the regulation as a Final Rule and the Departments of Justice and State will jointly publish the Final Rule with DHS, which will include a new requirement provided in TVPRA 2005 that states "to the extent practicable, victims of a severe form of trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking."[4]

[4] 22 U.S.C. § 7105(c)

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D. Department of State

DOS's services to victims in the U.S. are provided through the Bureau of Population, Refugees, and Migration ("PRM"). In FY 2005, PRM launched the Return, Reintegration, and Family Reunification Program for Victims of Trafficking in the United States, which reunites eligible family members with trafficked persons in the United States and assists victims who choose to return to their home country. This project was developed at PRM's request as part of the U.S. government's efforts in support of the TVPA, including its provisions of legal nonimmigrant status granted to TIP victims in the United States. The project is implemented by the International Organization for Migration ("IOM"), PRM's primary implementing partner in anti-TIP activities. IOM works collaboratively with NGOs, law enforcement agencies, the faith-based community, and U.S. Government agencies to assist the families of T visa recipients by providing financial and logistical support for travel of immediate family members through pre-departure assistance with travel documents, transportation arrangements, airport assistance, and escorts for children. For trafficked persons who elect to return to their home countries, the program provides safe return and reintegration assistance back to home communities. This may include pre-departure assistance, travel documentation, transportation, reception upon arrival by IOM partners on the ground, temporary shelter, health care, training and education, and small grants for income-generating activities. As of August 2006, this program assisted five trafficking victims who wished to return to their country of origin, and facilitated the family reunification of 33 family members with victims in the United States.

E. Department of Labor

DOL's Employment and Training Administration (ETA) utilizes existing job training and employment programs to make services available to rescued TIP victims in establishing a career, provided that they meet the eligibility requirements established under the Workforce Investment Act of 1998. ETA operates One-Stop Career Centers that offer a wide array of job training, education, and employment services to assist job seekers and employers. Services consist of job search and placement assistance; labor market information; skills assessment; career counseling, and access to training services. The Career Centers also offer an array of support services, including transportation, child care, housing, dependent care, emergency medical care, food stamps, and referrals to other workforce and social service organizations in the community. Unemployment compensation and services to migrant and seasonal farm workers can also be accessed through the Career Centers. These services are offered in accordance with the Guidance issued by ETA after the passage of the TVPA. The Guidance informs Career Centers about federal resources for victims of trafficking and notes that no state may deny services available to victims of severe forms of trafficking based on their immigration status.

DOL's Job Corps program assists eligible youth in obtaining a high school diploma or GED certificate, and offers vocational training and life skills programs. The program aims to increase participants' employability, independence, and ability to secure meaningful employment or further education. TIP victims would be eligible if they meet

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the program requirements, which include certain low-income criteria, U.S. citizenship or permanent resident status, aged between 16 – 24, and in need of additional education and/or vocational training.

F. Legal Services Corporation

LSC is a private, non-profit corporation established by Congress that funds legal aid programs around the nation to help poor Americans gain access to the civil justice system. Under § 107(b) of the TVPA, LSC must make legal assistance available to trafficking victims, who often need assistance with immigration and other matters. LSC has issued guidance to all LSC program directors describing LSC's obligation to provide legal services to trafficking victims. In FY 2005, 11 LSC grantees assisted 141 trafficking victims. Additionally, the Legal Aid Foundation of Los Angeles served 127 derivative applicants (family members of those trafficked).

G. How Can Services to Victims Be Improved?

1. Continued Action on September 2005 Assessment Recommendations

In order to improve victim access to U.S. Government services, the U.S. Government must continue to work on its ability to identify victims. Acting on the recommendations in the September 2005 Assessment, the U.S. Government has improved its capacity to find and rescue trafficking victims by focusing on particular work sectors or first responders, such as the work sector, victim service providers, the travel industry, and the faith-based community. For example:

- DOJ has directed training and technical assistance efforts to extend the ability of "traditional" victim service providers, such as those who serve victims of domestic violence or sexual assault, to identify and respond to trafficking victims.

- DOS's Office to Monitor and Combat Trafficking in Persons has developed an educational CD-ROM on child sex tourism for use with the travel and tourism community. The CD-ROM includes public service announcements, posters, fact sheets, and examples of "best practices" taken by the travel industry.

- HHS is working on general outreach through its 17 trafficking coalitions. In an effort to improve its efficiency, HHS is changing to an incentive structure to find and identify TIP victims. HHS resources will go to places where victims are identified versus their estimated location.

- HHS's Administration for Children and Families is hosting a conference on survivors of human trafficking on September 28, 2006.

- DOJ will hold a national conference in October 2006 with a special focus on advancing the Government's knowledge base about human trafficking and on improving access to actionable research to better target law enforcement resources in finding and rescuing victims.

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- ICE has created database files for Continued Presence applications to assist in program planning and training. The database files are used for archiving relevant information about victim nationalities, location of victims, the type of trafficking, and the manner of entry.

- NIJ has funded research projects to examine how trafficking victims have had their personal and criminal situations resolved, to identify effective ways to secure victim/witness cooperation, and to evaluate victims' medical and legal needs.

2. Recommendations for FY 2006

Once victims are identified, the U.S. Government must improve its efforts to coordinate victim services offered by federal agencies and grant recipients. Although the U.S. Government has improved interagency coordination on TIP issues, increased coordination could improve victim access to services and assistance. For example:

- HHS and OVC should inform DOL's Employment and Training Administration ("ETA") when grants assisting trafficking victims in specific areas are awarded. This would facilitate connections between the grantee and the local workforce investment area to ensure that trafficking victims served by these grants are aware of the employment and training services in their respective areas.

- ORR should provide information regarding employment and training services offered by ETA when issuing certification letters to trafficking victims. This could be accomplished by simply including the number 1-877-US2-JOBS or ETA's website www.servicelocator.org that provides information on the nearest One-Stop Career Center in their area and the types of services available

- DOJ, DHS, and HHS should continue to improve coordination on tracking rescued victims' cases and the support that they receive.

- DOJ, DHS, and HHS should continue their efforts to gather, share, and analyze TIP information, for example, information about victims, traffickers, and the trafficking routes.

- The U.S. Government should expand the work sector approach to the public health sector, the education community, and faith leaders.

III. Immigration Benefits Given to Trafficking Victims: Continued Presence and T Non-immigrant Status

Trafficking victims in the United States are eligible to receive two types of immigration relief – T nonimmigrant status, also known as a "T visa," and Continued Presence ("CP").

DHS's U.S. Citizenship and Immigration Services ("CIS") awards T visas, which are available to minor victims or to victims over the age of 18 who have complied with reasonable requests for assistance in the investigation and prosecution of acts of

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trafficking. A victim who receives a T visa may remain in the United States for an initial period of up to four years, with extensions available upon certification from a law enforcement agency that the victim's presence in the United States is necessary to assist in the investigation and prosecution. Subject to certain statutory criteria, victims awarded T visas may apply for lawful permanent residency after three years.

Number of persons who applied for, were granted, or were denied a T visa:

	FY 2005	FY 2004
Victims		
Applied	229	302
Approved*	112	136
Denied**	213	292
Family of Victims		
Applied	124	177
Approved*	114	216
Denied**	18	25

* Some approvals are from prior fiscal year(s) filings.

** Some applicants have been denied twice (i.e., filed once, were denied, filed again), and 170 denials stemmed from one case in which it was determined that the applicants did not qualify as victims of trafficking under TVPA.

The Secretary of Homeland Security has delegated authority to the Parole and Humanitarian Assistance Branch ("PHAB"), within ICE's Office of International Affairs, to grant CP to victims of severe forms of trafficking who are potential witnesses in the investigation or prosecution. CP must be requested by a federal law enforcement agency on behalf of the potential witness. When the PHAB authorizes CP, the approved application is forwarded to the Vermont Service Center within CIS for production of an employment authorization document and an I-94, Arrival/Departure Record. CP is initially authorized for a period of one year; however, an extension (re-parole) of CP may be authorized for a longer period if the investigation is ongoing.

In FY 2005, PHAB received 160 requests for CP. Of these, 158 requests were granted and two requests were withdrawn by the requesting federal law enforcement agencies due to insufficient evidence available to substantiate the individuals were trafficking victims. ICE also received 92 requests for extensions to existing CP, and all the extensions were granted. The majority of extensions represent an ICE investigation in Long Island involving Peruvian victims of forced labor.

Requests for CP in FY 2005	**Number Awarded**	**Number Withdrawn**	**Countries Represented**	**Cities – Most CP Requests**
160	158	2	29 (Most victims from Korea, Peru, Honduras)	New York San Francisco Newark
Request for Extensions 92	**Extensions Authorized** 92			New York

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IV. Investigations and Prosecutions of Trafficking in Persons

A. Investigations

1. Federal Bureau of Investigation

Special agents in the Civil Rights Unit ("CRU") at FBI Headquarters and in field offices around the country investigate trafficking in the United States. In addition, FBI agents in the CRU coordinate with agents in the Organized Crime and Crimes Against Children Units to ensure that cases initially identified as smuggling cases, Internet crimes against children, and/or sex tourism are also identified for potential human trafficking elements. In FY 2005, the FBI made significant advances in investigating TIP through its Human Trafficking Initiative and the Innocence Lost Initiative.

Under the Human Trafficking Initiative, started in FY 2005, FBI's field offices determine, via a threat assessment, the existence and scope of the trafficking problem in their region, participate in an anti-trafficking task force, establish and maintain relationships with local NGOs and community organizations, conduct victim-centered investigations, and report significant case developments to the CRU. In FY 2005, the FBI opened 130 trafficking investigations and made 50 arrests.

The Innocence Lost Initiative is a collaborative effort with the Child Exploitation and Obscenity Section ("CEOS") of DOJ's Criminal Division and the National Center for Missing and Exploited Children ("NCMEC") to address the growing problem of child prostitution. Initially, the FBI identified 14 field offices in areas with a high incidence of child prostitution. In FY 2005 and through the first quarter of FY 2006, an additional 10 field offices were identified as areas in which these criminal enterprises were operating. As shown in the chart below, the number of investigations, arrests, complaints, indictments, and convictions under the Innocence Lost Initiative increased, sometimes dramatically, in FY 2005.

Innocence Lost Initiative

FY	Investigations	Arrests	Complaints	Indictments	Convictions
2005	72	387	49	44	45
2004	67	118	11	26	22
Total	**139**	**505**	**60**	**70**	**67**

2. Immigration and Customs Enforcement

Within ICE, oversight of the enforcement of trafficking cases lies with the Human Smuggling and Trafficking Unit ("HSTU") in the Office of Investigations. The responsibility for human trafficking investigations is under the purview of ICE domestic field offices and attaché offices overseas. In addition, the Cyber Crimes Center is responsible for worldwide oversight and management of child sex tourism investigations. In FY 2005, ICE opened 328 human trafficking investigations (86 investigations of forced labor and 188 investigations of commercial sexual exploitation), which is an

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increase from 220 investigations in FY 2004. ICE also made 167 arrests (146 for sex trafficking and 21 for forced labor), which is a decrease from the 379 arrests in FY 2004.[5]

ICE is also actively involved in investigating the sexual exploitation of children overseas and safeguarding children from foreign national sex offenders, international sex tourists, Internet child pornographers, and human traffickers through "Operation Predator." In FY 2005, ICE made 2,380 Operation Predator arrests, bringing the total number of arrests since 2003 to over 7,000. Under the international component to Operation Predator, leads developed by domestic ICE offices are shared with ICE Attaché offices overseas and foreign law enforcement for action. This information sharing has contributed to more than 1,000 arrests overseas. With regard to sex tourism, since the PROTECT Act was enacted in 2003, ICE has conducted over 190 investigations of U.S. citizens traveling abroad for the purpose of sexually exploiting children. In FY 2005, ICE agents arrested 15 individuals for child sex tourism violations.

3. Human Smuggling and Trafficking Center

The interagency Human Smuggling and Trafficking Center ("HSTC") was created in July 2004 as a joint DOS, DHS, and DOJ project, and subsequently established by statute under § 7202 of the Intelligence Reform and Terrorism Prevention Act ("IRTPA") of 2004. The HSTC provides a mechanism to bring together federal agency representatives from the policy, law enforcement, intelligence and diplomatic areas to work together on a full-time basis to achieve increased effectiveness and to convert intelligence into effective law enforcement and other action. The HSTC serves as an information clearinghouse to ensure that all community members receive all useful information and foster a collaborative environment through sharing tactical, operational, and strategic intelligence.

In FY 2005, the HSTC made progress in its anti-trafficking efforts, providing intelligence products and support for a number of U.S. Government agencies. On a limited basis, it is disseminating intelligence, producing strategic assessments, and assisting in the dismantling of significant criminal organizations.

There remains, however, considerable work to be done for the HSTC to become capable of fulfilling the totality of its responsibilities under the interagency charter and IRTPA. This additional work generally falls into the areas of assuring adequate staffing, data connectivity, establishing a firm administrative infrastructure, and delegating certain legal authorities to the HSTC's Director and staff. Currently, the HSTC is staffed by desk officers and analysts detailed from the participating departments, agencies, and the intelligence communities. To these ends, the Administration is actively working to establish staffing requirements and sources, and a viable, long-term funding mechanism. Until these issues are resolved its functionality is limited.

[5] Due to the nexus between human smuggling and human trafficking and the misuse of the term "trafficking," case category codes were utilized inappropriately and caused a discrepancy in the FY 2004 statistics. In October 2004, in an effort to standardize case categories in human smuggling and trafficking investigations and assist SAC offices in categorizing cases, ICE implemented a new case category and sub-categories for trafficking and smuggling cases.

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The HSTC's clearinghouse function required by the IRTPA necessitates appropriate access to a significant number of agency data systems. Significant progress has been made in developing connectivity to several of these data systems. However, the HSTC and participating agencies are still working on obtaining access to certain key databases. The HSTC may also explore the creation of a centralized U.S. Government database to store relevant information related to illicit travel facilitators, as no such database currently exists. The HSTC developed a detailed plan to establish administrative and information-sharing support structures and procedures to accomplish its work that was presented to the HSTC Steering Group.

4. Department of Labor

DOL participates in law enforcement efforts to investigate trafficking in persons by continuing to increase its emphasis on compliance with labor standards laws, such as the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, in low-wage industries like garment manufacturing and agriculture through the work of Wage and Hour Division ("WHD") investigators. In the conduct of their investigations, WHD investigators have been trained to recognize situations where workers have been intimidated, threatened, or held against their will. WHD investigators also review payroll records, inspect migrant farm worker housing, and make inquiries into the transportation of migrant farm workers. This "on the ground" investigative presence allows WHD investigators to quickly identify and report instances of suspected human trafficking.

Additionally, criminal enforcement agents from DOL's Office of the Inspector General have worked with their FBI and ICE counterparts on a growing number of criminal investigations, particularly those involving organized crime groups.

B. Prosecutions

The Criminal Section of DOJ's Civil Rights Division, in collaboration with U.S. Attorneys' Offices nationwide, has principal responsibility for prosecuting human trafficking crimes, except for cases involving trafficking in children, which is a specialization of CEOS.

From 2001 to 2005, the number of trafficking investigations has more than doubled. In FY 2005, the Civil Rights Division and United States Attorneys' Offices initiated prosecutions against 95 defendants, 87 percent of whom were charged with violations under the TVPA. More than twice the number of defendants were charged in 2005 than had been prosecuted in 2004, the highest number prosecuted in a single year.

The following two charts list the numbers of defendants charged, prosecuted, and convicted of trafficking offenses and offenses under the TVPA since FY 2001. Defendants charged in FY 2005 with a trafficking offense are not necessarily the same defendants convicted and sentenced in FY 2005. (These figures do not include CEOS prosecutions of child trafficking and sex tourism.)

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All Trafficking Prosecutions[6]	2001	2002	2003	2004	2005
Investigations – Total	**63**	**65**	**82**	**129**	**139**
Cases Filed					
Labor	6	3	6	6	8
Sex	4	7	8	23	26
Total	**10**	**10**	**11**	**26**	**34**
Defendants Charged					
Labor	9	17	6	7	20
Sex	26	27	21	40	75
Total	**35**	**41**	**27**	**47**	**95**
Convictions					
Labor	8	5	5	3	10
Sex	15	23	16	30	25
Total	**23**	**28**	**21**	**33**	**35**

TVPA Prosecutions	2001	2002	2003	2004	2005
Cases Filed					
Labor	3	2	3	1	8
Sex	2	5	7	9	19
Total	**5**	**7**	**10**	**10**	**27**
Defendants Charged					
Labor	5	8	6	5	19
Sex	6	13	20	19	64
Total	**11**	**21**	**26**	**24**	**83**
Convictions					
Labor	2	0	5	2	8
Sex	3	6	13	13	18
Total	**5**	**6**	**18**	**15**	**26**

In addition to these trafficking cases, under the provisions of the PROTECT Act, there have been roughly 60 investigations (many still pending) of individuals who traveled abroad to exploit children, known as "sex tourism" cases. Since 2003, there have been approximately 50 sex tourism indictments and 29 convictions (although these indictments and convictions reflect conduct that occurred both before and after the passage of the PROTECT Act).

[6] Many of the TIP cases contain both labor and sex elements, making it difficult to categorize the cases. DOJ is continuing to discuss the best method for addressing this problem.

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C. Sentences

In order to present data regarding sentences, DOJ's Bureau of Justice Statistics reviewed the Administrative Office of the U.S. Courts ("AOUSC") criminal case database to make a preliminary calculation of the average length of sentence for cases completed in FY 2005 that involved the trafficking offenses of 18 U.S.C. §§ 1581 (peonage), 1583 (enticement for slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to peonage/slavery/involuntary servitude/forced labor), 1591 (sex trafficking of children or by force, fraud or coercion), 1592 (unlawful conduct with respect to documents in furtherance of trafficking), and 1594 (general provisions). This calculation differs from the case statistics presented in the preceding charts, because the AOUSC database tracks the statutes involved in a court case rather than the underlying facts of each case. As a result, the AOUSC database search was unable to determine sentences in trafficking prosecutions in which defendants pleaded guilty to non-trafficking offenses such as immigration violations or visa fraud. In addition, the AOUSC database chronicles only the top five offenses charged, and not the full scope of charges brought.

Of the 25 defendants convicted under one the statutes listed in the TVRPA as required to be reported by the Attorney General, 23 received a prison-only term, one received both prison and supervised release, and one received a probation-only sentence. The average prison term imposed for the 23 defendants was 103 months and prison terms ranged from 14-270 months. Ten received a prison sentence from 1-5 years, five received terms from 5-10 years, and eight received a prison term of more than 10 years. One defendant received a probation-only term of 12 months and one defendant received a split sentence of 37 months prison and 36 months probation.

D. What Can Be Done to Obtain a Better Estimate of the Number of Victims?

The number of federal investigations and prosecutions of trafficking has increased significantly since the passage of the TVPA. Nevertheless, as noted in the September 2005 Assessment, some observers have suggested that U.S. prosecutions are not numerous enough, given past estimates of victims that may be trafficked into the United States each year. The difficulty of developing accurate estimates reflects the challenges of quantifying the extent of victimization in a crime whose perpetrators go to great lengths to keep it hidden. Nonetheless, the U.S. Government needs to undertake efforts to estimate more reliably the number of trafficking victims in the United States so that the Government can evaluate whether efforts to combat trafficking in persons is producing the results it seeks, to wit reducing the number of victims.

Further research is underway to try to determine more accurate information on the nature of trafficking, although actual figures of TIP victims will never be precise due to the hidden nature of the crime. DOJ spearheaded the formation of a U.S. TIP statistics research subcommittee of the Senior Policy Operating Group ("SPOG") to study and improve the knowledge base about where victims are located in the United States and to improve the quality of volume estimates. Efforts should continue to obtain more accurate

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information, but the emphasis should be on "actionable research" that informs anti-trafficking policy on how best to free victims and successfully prosecute traffickers.

NIJ is conducting several studies to assist the U.S. Government in understanding the nature and extent of the trafficking problem. One study will focus on developing a methodology that will generate credible and reproducible estimates of the prevalence of human trafficking in the United States. Specifically, this project will: (1) describe the stages of trafficking from countries of origin into the United States; (2) identify potential data sources for assessing each stage; (3) determine gaps in data and suggest means to fill the gaps; (4) produce a methodology to estimate the magnitude of human trafficking; and (5) given available complete and accurate data, test the method to create a preliminary estimate of human trafficking from Central America across the southwest United States border. The first phase of the project should be completed and reviewed in time for the October Conference.

E. What More Can Be Done to Prosecute Trafficking Crimes?

In absolute numbers, it is true that the prosecution figures pale in comparison to the estimated scope of the problem. This incongruity, however, may be a result of the disparity between estimates of the number of victims and those actually found. Furthermore, law enforcement statistics show that in FY 2005 the U.S. Government increased sometimes dramatically, its efforts to combat TIP. From FY 2004 to FY 2005, the number of arrests under the Innocence Lost Initiative more than tripled and the number of convictions more than doubled. Both the FBI and ICE also saw an increase in the number of investigations in FY 2005. From FYs 2001-2005, the Civil Rights Division and United States Attorneys' Offices have:

- Prosecuted 248 defendants compared to 80 defendants charged during the prior five years, representing more than a 200% increase;

- Secured 140 convictions and guilty pleas, a 109% increase over the 67 obtained over the previous five years; and

- Opened 480 new investigations, about 325% more than the 113 opened in the previous five years.

Additionally, the number of anti-trafficking task forces increased from 22 in FY 2004 to 32 in FY 2005, with an additional 10 anticipated by the end of FY 2006.

Internationally, the number of trafficking-related convictions worldwide increased to 4,700 in FY 2005 from about 3,000 the previous year. These numbers are likely to increase in the next year due to the passage of new anti-trafficking legislation in 41 countries during FY 2005.

The U.S. Government recognizes, however, that more needs to be done to increase the number of investigations and prosecutions. It has taken several steps to do so, primarily by involving state and local authorities in the anti-trafficking fight.

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To improve the U.S. Government's ability to investigate and prosecute traffickers, NIJ is conducting research on the best methods for detecting and investigating traffickers and the legal challenges the U.S. Government encounters in prosecuting traffickers. These projects include: surveys of local law enforcement responses to TIP, surveys of federal and state attorneys, analysis of domestic and international TIP legislation, and surveys of law enforcement agencies to determine local definitions of TIP and the number and type of investigations conducted. This research will assist in identifying best methods for combating TIP at the state and local level.

In an effort to reduce and prevent domestic human trafficking, TVPRA 2005, § 201(a), directed the Department of Justice to hold an annual conference in FY 2006-2008 (and biennially thereafter) to address severe forms of TIP and commercial sex acts that occur within the United States. The first conference is scheduled for October 3-5, 2006, in New Orleans and will bring together officials from DOJ, HHS, DHS, DOL, and DOS, as well as members of the DOJ multidisciplinary task forces, NGOs, and other state and local law enforcement officials. The conference will include an evaluation of recent statistical research on TIP in the United States and disseminate best methods and practices for training state and local law enforcement personnel in enforcing anti-trafficking laws, investigating and prosecuting traffickers, and collaborating with NGOs and social service providers.

In FY 2005, several states enacted anti-trafficking legislation, following the 2004 drafting of the Model State Anti-Trafficking Statute by the Civil Rights Division and the Office of Legal Policy. The model statute is based on the TVPA and federal experience prosecuting trafficking cases. It seeks to expand anti-trafficking authority to the states to harness the almost one million state and local law enforcement officers who might come into contact with trafficking victims. In FY 2005, Attorney General Gonzales wrote to the governors and legislative leaders of all 50 states and U.S. territories and commonwealths to encourage them to adopt the model law to promote enforcement uniformity and as part of a national strategy to combat human trafficking. Twenty-two states have enacted anti-trafficking statutes and seven more states are considering the issue of human trafficking. The states that have enacted such statutes include Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, South Carolina, Texas, and Washington. States that are considering such anti-trafficking laws include Connecticut, Hawaii, Maine, Massachusetts, New York, North Carolina, and Oregon.

Finally, the U.S. Return, Reintegration, and Family Reunification Program was an important step taken by the U.S. Government to maximize the role that protection and assistance for victims can have in furthering prosecution.

V. International Programs

A. U.S. Government International Programs

Through the DOS, DOL's Bureau of International Labor Affairs ("ILAB"), and the U.S. Agency for International Development ("USAID"), the U.S. Government gives a

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substantial amount of international assistance aimed at preventing trafficking in persons, protecting victims, and prosecuting traffickers abroad. In FY 2005, the U.S. Government supported 266 international anti-trafficking programs, totaling approximately $95 million and benefiting 101 countries, which represents an increase of 16 percent in international programs funding over FY 2004 and a 27 percent increase over FY 2003 funding. The funding increase can partly be explained by the one-time Presidential Anti-Trafficking Initiative, which transferred almost $50 million to eight countries: Brazil, Cambodia, India, Indonesia, Mexico, Moldova, Sierra Leone, and Tanzania. The majority of ILAB's funding comes from annual Congressional appropriations for ILAB's International Child Labor Program.

Examples of projects funded in FY 2005 include:

- In Albania, USAID supports the Terre des hommes Transnational Action against Child Trafficking project, which is focused on identifying at-risk children, providing social and educational assistance to families, and reintegrating trafficked children.

- In Sierra Leone and Liberia, DOL provided funding for a project that assists children who are victims of, or at-risk of, trafficking for purposes of sexual exploitation and forced labor in diamond mines. The project will remove children from the worst forms of child labor, strengthen national and local systems for monitoring education and eliminating exploitive child labor, and assist local partners with developing individual child-tracking and project-monitoring systems.

- In Morocco, DOS provided funding to a project by the NGO Bayti to rescue and rehabilitate child maids, provide them with education or vocational training, and attempt reintegration with their families. The project included a residential shelter facility and drop-in center that provides access to information and basic out-patient-like services.

- In Uganda, DOS provided funding to the International Rescue Committee ("IRC") to enhance reunification and follow up interventions for trafficking victims abducted by the Lord's Resistance Army in Northern Uganda. IRC accompanies former abductees and ensures their safety during reunification with a team of social workers. The social workers collaborate with families and communities to ensure reunification and reintegration for formerly abducted children and young adults.

- Worldwide, with DOS support, the IOM Global Emergency Fund provides for the protection, return, and reintegration for victims of trafficking. This program has assisted 418 trafficking victims return home from various parts of the world. It provides global referral, assessment, and rapid assistance to trafficked migrant men, women, and children who are stranded outside their home countries and require immediate assistance for voluntary return. Assistance packages include pre- and post-return assistance as well as tailored reintegration support. IOM field offices throughout the world are implementing this project with oversight

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and overall project management by the Counter-Trafficking Service at IOM Headquarters.

In awarding funds, DOS and USAID focus their program funding primarily on countries identified in the annual DOS report as needing to improve their efforts to combat TIP, while DOL uses the TIP report as one of several criteria when awarding funds. The DOS report has focused considerable diplomatic and political attention on the issue of trafficking in persons. It rates countries in tiers (Tier 1, Tier 2, Tier 2 Watch List, or Tier 3) according to their efforts to combat trafficking and is used by DOS to encourage reform of laws and practices to more effectively combat trafficking.

B. Increasing the Effectiveness of International Programs

To increase the effectiveness of the grant programs, the September 2005 Assessment recommended the U.S. Government attempt to measure the impact of its anti-trafficking activities both domestically and internationally, including, for example enhancing U.S. embassies' abilities to monitor and evaluate anti-trafficking projects, requiring recipients to provide self-assessments of their anti-trafficking projects, and conducting more site visits. The paragraphs below provide examples of how DOL, USAID, and DOS have instituted measurement tools and will continue to refine these tools in FY 2006.

The DOL ILAB carries out a range of activities to measure, monitor, and evaluate the impact of its grant program. First, ILAB measures the impact of anti-trafficking activities in a number of ways, which include (1) reporting on selected goals and outcome indicators for Government Performance and Results Act ("GPRA"), (2) conducting mid-term and final evaluations of projects, and (3) developing and utilizing tracker/tracer and impact assessment methodologies to measure impact of DOL-funded international projects. Second, ILAB personnel conduct annual training for DOS Labor Officers and other key personnel that carry out labor reporting functions, prior to their U.S. Embassy postings, to ensure that U.S. Embassy personnel are aware of DOL's research and reporting requirements. Third, grantees of DOL-funded international projects are required to continuously monitor their anti-trafficking projects and submit this information to ILAB every six months in technical progress reports. Additionally, ILAB's International Child Labor Program ("ICLP") hosts an annual workshop in which grantees from around the world come together to share with each other proven methodologies that are achieving positive results, and to enhance their understanding of measuring and reporting results. Fourth, ILAB personnel strive to carry out site visits of DOL-funded international projects by ILAB or Embassy personnel for the duration of a project.

USAID collects performance information on anti-trafficking activities as part of its annual performance and accountability reporting. USAID's FY 2005 Performance and Accountability Report ("PAR") provides performance results and audited financial statements that enable Congress, the President, and the public to assess the performance of the Agency in achieving its mission and stewardship of its resources. Data on anti-trafficking activities is included in the Addendum to the FY 2005 report. USAID Missions in the field manage most of the agency's anti-trafficking activities and provide

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regular on the ground oversight. USAID is placing increased emphasis on evaluations and assessments of its anti-trafficking activities. Assessments were planned for early 2006 in Albania and Cambodia.

DOS's efforts to measure the success and impact of its programs occur at several levels. In 2003 PRM initiated discussions with IOM and provided funds in 2004 to develop a performance indicators module to assess the impact of anti-trafficking programs. Since FY 2005, all PRM-funded anti-trafficking projects have been required to include performance indicators in project proposals and to report against them in quarterly progress reports. In addition, the U.S. Government is looking for a coordinated way to measure the results of the President's Anti-Trafficking Initiative. The Office to Monitor and Combat Trafficking in Persons ("G/TIP") has developed a list of program indicators for assessing measurable outcomes of G/TIP-funded projects, including activities related to public awareness and prevention, protection and assistance to victims, investigation and prosecution, and training of professionals. G/TIP shared this list with PRM and the IOM, and has begun applying the indicators to new grant projects. Further, G/TIP has set aside FY 2006 funds for projects to support establishing a foundation for evaluation of G/TIP-funded programs.

VI. Training and Outreach

A. Domestic Law Enforcement Training

1. Department of Justice

a. Civil Rights Division

In FY 2005, the Civil Rights Division continued to build upon the July 2004 national conference that brought together federal, state, and local law enforcement officials to establish anti-trafficking task forces throughout the United States. In February 2005, in Houston, Texas, Civil Rights Division attorneys participated in training sponsored by DOJ's Bureau of Justice Assistance ("BJA") for state and local law enforcement using the national curriculum on human trafficking developed in FY 2004. The training brought together multi-disciplinary teams from 20 anti-trafficking task forces.

In May 2005, the Office of Justice Programs ("OJP"), BJA, and OVC issued a joint call for concept papers from state and local law enforcement agencies and victim service agencies as a preliminary step to applying for federal funds to (1) form collaborative human trafficking task forces or (2) supplement current trafficking victim service provider funding in areas where a BJA-funded task force already existed. Through this solicitation, BJA funded 10 additional anti-human trafficking task forces. In all, DOJ has formed, and funded with $13 million, 32 task forces in 21 states and territories and all of the task forces have OVC funded trafficking victim services.

The Civil Rights Division has supplemented task force training with a "train the trainer" curriculum that is available to the task forces through the 27 locations of the Office of Community Oriented Policing's Regional Community Policing Institutes.

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This training is designed to improve the skills of each component of the trafficking team, and it provides advice on interagency collaboration. Task force training emphasizes proactive investigations, victim safety and restoration, and the importance of conducting investigations across state and international borders. BJA delivered the "train the trainer" program to 113 law enforcement trainers.

In addition, Civil Rights Division attorneys and victim-witness staff conducted more than 70 training programs for federal and local law enforcement agencies, non-governmental and health care organizations, and business leaders and legal practitioners. Also, the Executive Office for U.S. Attorneys' Office of Legal Education hosted several comprehensive training sessions for federal agents, prosecutors, and victim-witness coordinators at DOJ's National Advocacy Center. The Civil Rights Division actively participates in human trafficking training at U.S. Attorneys' Offices and as part of the regular curricula of the FBI, ICE, and DOS's Diplomatic Security Service.

Finally, the Civil Rights Division's victim-witness staff contributed a chapter on human trafficking victims as part of the 2005 revision to the *Attorney General's Guidelines for Victim and Witness Assistance.* Civil Rights Division staff also trained federal victim coordinators and attorneys on those Guidelines.

b. Criminal Division, Child Exploitation and Obscenity Section

CEOS conducted its annual Advanced Child Exploitation course for federal prosecutors and agents at the National Advocacy Center in March 2005. The course covered topics relevant to the investigation and prosecution of child exploitation crimes involving the Internet and included training on addressing the needs of child prostitution victims as well as effectively investigating and prosecuting child prostitution cases. Further, in conjunction with the Innocence Lost Initiative, CEOS partnered with the FBI and NCMEC to develop an intensive week-long training seminar, solely dedicated to the investigation and prosecution of cases involving child prostitution. The ongoing program brings state and federal law enforcement agencies, prosecutors, and social service providers to NCMEC, where the group is trained together. The training, which has extended into 2006, has trained approximately 350 key personnel.

CEOS also trained FBI agents working on the Innocence Lost Initiative at a conference in March 2005; trained FBI agents on child exploitation crimes in general, including sex tourism and child prostitution in June 2005; and presented training as part of the Civil Rights Division's Human Trafficking Conference concerning the Innocence Lost Initiative and child sex trafficking in August 2005.

In addition, CEOS provides numerous publications to prosecutors across the country, including a quarterly newsletter prepared and distributed to each U.S. Attorney's Office containing practical tips and analysis of the most current legal issues and cases. In FY 2005, many articles in the quarterly newsletter focused on sex trafficking cases. CEOS attorneys also participated in the development of the 2005 revision to the *Attorney General's Guidelines for Victim and Witness Assistance*, most notably with respect to the

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chapter on guidelines for child victims and witnesses. Additionally, CEOS attorneys trained federal prosecutors and victim witness coordinators on those guidelines.

c. Federal Bureau of Investigation

During FY 2005, at the request the Civil Rights Division, the FBI participated in training of federal, state and local investigators, prosecutors and non-government organizations, and victim advocacy groups in 16 cities. In addition, the FBI focused on training its agents on trafficking issues. Training was given to new special agents of the FBI at the FBI National Academy and to FBI supervisory special agents from 54 field offices at a civil rights training conference in May 2005. All special agents in field offices specializing in civil rights were given training in advanced human trafficking investigation, prosecution procedures, and best practices from June through September 2005. FBI special agents assigned as legal attaches to more than 30 various foreign country posts were also given anti-trafficking training.

2. Department of Homeland Security

Three components of DHS conducted anti-TIP training either for their own officers or for state and local law enforcement officers in FY 2005.

a. Immigration and Customs Enforcement

ICE's focus on its statutory responsibility to train its own agents has resulted in over 4,000 agents completing a comprehensive TIP training course called "Stop Trafficking" as part of ICE's Virtual University. The ICE Training Division documented completion by individual and location. The Federal Law Enforcement Training Center is currently revising ICE's intranet human trafficking course to fit a CD format.

In FY 2005, ICE staff participated in, or hosted over 45 training sessions on trafficking for international, federal, state, and local groups, with the goals of increasing public awareness, improving the ability to find and rescue victims, providing information about the difference between smuggling and trafficking, and urging collaboration. For example, ICE conducted an ICE Victim-Witness Staff's one-day training for all officers and detectives from Montgomery County, Maryland, and trained FBI staff on the difference between smuggling and trafficking and procedures for interviewing large numbers of potential witnesses. In addition, ICE staff provided training on the impact of human trafficking on juveniles in the United States for the National Juvenile Justice Coordinating Council in September 2005.

ICE also participated in developing the "train the trainer" curriculum. ICE staff designed the course on immigration issues and victim assistance for the training curriculum. This course is now being provided nationwide and has provided a forum for state and federal law enforcement agency coordination.

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b. Customs and Border Protection

In FY 2005, U.S. Customs and Border Protection ("CBP") provided training to all incoming CBP law enforcement personnel on how to identify and respond to cases of human trafficking. The training taught CBP law enforcement personnel how to identify victims and perpetrators of human trafficking and provided information about the non-immigrant visa classifications available to allow victims of human trafficking to remain in the United States to facilitate prosecution of human traffickers and/or protect the victims from extreme hardships they may experience if removed from the United States. A mandatory immigration law review course provided similar training for CBP agents and officers already deployed to the field.

c. Citizenship and Immigration Services

In FY 2005, CIS participated in several training sessions hosted by other federal agencies to provide training to service providers and law enforcement officers on immigration relief for crime victims, including the eligibility requirements for T nonimmigrant status, training regarding human trafficking, and continued presence. Examples of training sessions in which CIS has participated include presentations at the Trafficking Grantees Meeting co-sponsored by OVC and ORR, the Fourth National Symposium on Victims of Federal Crime offered by OVC, and the DHS Seminar for Victim-Witness Coordinators.

CIS has offered ongoing and advanced training to its personnel on identifying trafficking victims and on the statutory requirements to provide such victims with information regarding available services and assistance. T visa adjudicators, officers from the Administrative Appeals Office, Asylum Officers, Supervisory Asylum Officers, and Immigration Information Officers all received in-person instruction on victim identification through a series of training courses involving CIS personnel, as well as federal law enforcement officials. Additional CIS personnel were trained using the "Stop Trafficking" web-based course described above.

The USCIS Vermont Service Center T visa unit attended and participated in training with both NGOs and other government agencies. The unit participated in the "Freedom Network Annual Conference" held in Los Angeles in March 2005. The VSC unit was also a part of the Trafficking in Women and Children conference in Seattle, WA, sponsored by DHS and hosted by the Seattle ICE Office of Chief Counsel in June 2005.

Furthermore, CIS held advanced training for its T visa adjudicators and Administrative Appeals Office officers. The training covered substantive training on human trafficking, T visa eligibility requirements, waivers of inadmissibility, the psychological dynamics of trafficking, trafficking prosecutions, and cultural awareness. CIS personnel, representatives of local law enforcement, federal law enforcement agencies, and national advocacy groups offered presentations at the training.

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3. Human Smuggling and Trafficking Center

During FY 2005, HSTC staff presented at a number of law enforcement trafficking conferences and workshops. The Center also gave a presentation at a trafficking oriented intelligence conference hosted by US SOUTHCOM. The HSTC regularly provides trafficking training at the State Department's National Foreign Affairs Training Center as part of the Consular Fraud Prevention Manager course. A HSTC guide on identifying the differences between smuggling and trafficking is used by U.S. federal law enforcement, state law enforcement, and the Royal Canadian Mounted Police in their trafficking training courses.

B. International Law Enforcement Outreach and Training

In FY 2005, U.S. Government personnel conducted international outreach and offered training programs aboard and to foreign visitors and officials visiting the United States.

1. Department of Justice

In FY 2005, the Civil Rights Division provided training and technical assistance to foreign officials both in the United States and abroad. In Washington, D.C., Civil Rights Division personnel met with officials from Japan, Uzbekistan, Kazakhstan, Ukraine, Brazil, Colombia, Peru, Taiwan, Guinea, Poland, China, Kenya, and Macedonia. Civil Rights Division personnel also traveled on outreach missions to Cambodia, Singapore, Malaysia, Austria, Mexico, India, Tanzania, Thailand, Germany, and El Salvador, and assisted in the drafting of national anti-trafficking legislation in Azerbaijan, Georgia, and Mexico. Finally, Civil Rights Division attorneys are detailed to Moldova and Colombia to assist the host governments in their efforts to combat human trafficking.

In September 2005, DOJ's team implementing President Bush's Initiative to combat trafficking made a "best practices" presentation to the Mexican government that resulted in a Letter of Agreement and an implementation plan to exchange intelligence and produce collaborative efforts to combat trafficking through Central America, Mexico, and the United States. Even prior to the letter agreement, DOJ and ICE worked with Mexican officials to prosecute traffickers. In *United States v. Carreto*, ICE agents, coordinating with their ICE counterparts in Mexico and with Mexican law enforcement agents, identified two co-conspirators in Mexico who had aided and abetted the traffickers apprehended in the United States. The co-conspirators were arrested on Mexican federal charges related to the sex trafficking operation, and were indicted in the U.S. as co-conspirators of the lead defendants. The Mexican trial court has granted the extradition request as to one defendant, and the order is on appeal before the Mexican appellate court. The U.S. Return, Reintegration, and Family Reunification Program facilitated the victims' cooperation with law enforcement by allowing the victims' children to be reunited with their mothers in the United States.

During FY 2005, CEOS attorneys traveled at least 14 times overseas to such countries as Costa Rica, the Czech Republic, Suriname, Honduras, Brazil, Guatemala, El Salvador, Indonesia, Romania, Bulgaria, and Russia to train international law

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enforcement to address child sex trafficking effectively. In addition, CEOS provided training to foreign officials from 35 countries concerning child sex trafficking when those officials were in Washington, D.C.

DOJ's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) prepares foreign counterparts to cooperate more fully and effectively with the United States in combating transnational crimes, including human trafficking, by encouraging legislative and judicial reform in countries with inadequate laws, by improving the skills of foreign prosecutors and judges, and by promoting the rule of law and regard for human rights. With funding provided by DOS and USAID, OPDAT conducted 62 anti-TIP programs in FY 2005 in 19 countries: Azerbaijan, Bangladesh, Bulgaria, Costa Rica, El Salvador, Georgia, Guatemala, Honduras, Kazakhstan, Kosovo, Macedonia, Moldova, Nicaragua, Panama, Romania, Russia, Serbia-Montenegro, Suriname, and Thailand.

DOJ's International Criminal Investigative Training Assistance Program ("ICITAP") reaches out to and trains foreign law enforcement officials on methods to combat trafficking in persons by focusing on the development of police forces and the improvement of capabilities of existing police forces in emerging democracies. During FY 2005, with funding provided by DOS and USAID, ICITAP operated TIP programs in Albania, Azerbaijan, Bosnia, Costa Rica, Croatia, Kazakhstan, Indonesia, Macedonia, and Ukraine.

An example of DOJ's international training efforts is the collaborative effort of OPDAT and ICITAP to develop an anti-child sexual exploitation program in Costa Rica funded by DOS. During FY 2005, Costa Rican police and prosecutors, who were trained by DOJ in the previous year, served as instructors during training programs. In addition, DOJ brought in several experts to train 40 Costa Rican judges, prosecutors, investigators, social workers, NGO representatives, and psychologists on the best methods for interviewing child victims.

2. Department of Homeland Security

In FY 2005, ICE provided training to both foreign dignitaries visiting the United States and to international law enforcement. The ICE training sessions for foreign dignitaries covered the following topics: the TVPA, smuggling and trafficking investigations, child sex tourism and child exploitation, victim assistance, and options for immigration relief. ICE conducted a total of 16 sessions that were attended by dignitaries from 64 countries.

ICE training of international law enforcement officers was conducted through the International Law Enforcement Academies ("ILEA"). ICE staff provided nine human trafficking trainings at the ILEAs for 361 law enforcement personnel from 28 countries. Training modules included: investigation methodologies in human trafficking cases, human trafficking indicators, global networks, victim interviews, victim services, and task force methodology. Officials from the following countries attended the training: Brunei, Indonesia, Philippines, Cambodia, Singapore, China, Macao, Thailand, Hong Kong, Malaysia, Vietnam, Kazakhstan, Kyrgyzstan, Uzbekistan, Hungary, Romania,

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Croatia, Macedonia, Bulgaria, Bosnia & Herzegovina, Slovenia, Georgia, Ukraine, Colombia, Dominican Republic, and El Salvador. The ICE Cyber Crimes Center ("C3") also participated in ILEA training by conducting Child Sex Tourism Investigations training classes at the ILEAs in Bangkok, Thailand, and Budapest, Hungary.

In addition to ILEA training, ICE worked to train foreign law enforcement officials on the provisions of the Protect Act of 2003 relating to U.S. citizens traveling abroad to sexually exploit children. ICE is working with Mexico as part of the DOS program and has provided training to the Mexican Federal Police ("PFP") on Child Sex Tourism Investigations and ICE's ability to assist in their investigations. ICE is assisting the PFP with establishing their own Child Exploitation Unit modeled after the ICE C3 and the National Center for Missing and Exploited Children. The C3 is currently developing a computer forensic training course for foreign law enforcement that will be provided to Mexico when it is completed.

Finally, as part of the President's Initiative, ICE is providing technical assistance in training and on-site law enforcement expertise through the ICE Attaché offices in Brazil and India. In Mexico, an ICE Project Coordinator arrived at the U.S. Embassy in Mexico City to serve a one-year temporary detail to the project. The Project Coordinator has initiated regular meetings between ICE and the PFP in order to implement the initiative and to define Mexican training, technical assistance, and equipment needs. Through these projects, ICE anticipates the development of cooperative investigative efforts between Mexican, Brazilian, and Indian law enforcement that will lead to successful prosecution of TIP violations, both in those countries and in the United States.

3. Human Smuggling and Trafficking Center

In June 2005, the Center sponsored a bilateral meeting between U.S. and Russian prosecutors and law enforcement officers that focused on transnational human trafficking and allowed both sides to explore respective TIP legislation and other issues. Delegates from the United States included representatives from DOJ's Organized Crime and Racketeering Section, CEOS, the Asset Forfeiture and Money Laundering Section, the Office of International Affairs, and OPDAT, along with FBI, ICE, and DOS's Bureau of Diplomatic Security. The Center is organizing a second meeting planned for 2006.

The Center participated in, and gave presentations at, a number of international law enforcement trafficking conferences and workshops. These included workshops sponsored by the INTERPOL and the Australian Federal Police.

4. Department of State

With PRM support, the IOM has developed the *Counter-Trafficking Training Modules* series in response to the need for practical, "how to" training materials for NGOs, government officials (including law enforcement), and other IOM partners engaged in counter-trafficking activities around the world. Designed to enhance understanding of some of the key elements necessary in building a comprehensive counter-trafficking strategy, the *Modules* series provides an introduction to essential components of a comprehensive counter-trafficking response, and is being translated into

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several languages. The *Modules* trainings were developed through a participatory, field-based approach involving IOM missions around the world and include training on: Information Campaigns, Return and Reintegration Assistance, and Victim Identification and Interviewing Techniques. These Modules were tested in 2005 in the Caribbean and have since been used in IOM programs in Indonesia, Japan, Cambodia, and South Africa.

5. Federal Bureau of Investigation

During FY 2005, FBI conducted training in Washington, D.C., for visiting officials from Australia, Italy, the People's Republic of China, Suriname, and the United Kingdom, and for a contingent of representatives from more than 31 different countries, including South Africa, Senegal, Sweden, the Dominican Republic, and Israel.

C. Training of Non-Governmental Organizations

The U.S. Government collaborates routinely with NGOs that provide victims with direct services and who have been instrumental in helping to identify trafficking cases and victims. Outreach activities include presentations to corporate associations, academic groups, and local agencies. Outreach addresses multi-jurisdictional issues, collaborative activities, and problems of distinguishing between trafficking in persons and migrant smuggling. The following paragraphs provide examples of the U.S. Government's efforts to train NGOs in FY 2005.

In June 2005, ICE victim assistance staff provided training on human trafficking at a national conference sponsored by the National Center for Victims of Crime attended by over 1,000 participants representing victim services agencies throughout the nation. In October 2005, ICE staff joined with Catholic Charities to provide a one-day training session on trafficking at Marywood University in Scranton, Pennsylvania. In addition, ICE and NGOs such as World Vision have established partnerships to enhance the effectiveness of ICE's child sex tourism investigations program. ICE has worked closely with World Vision, which is running public service announcements paid for by DOS and HHS, to educate the tourism industry and international traveling public on the child sex tourism issue.

In FY 2005, HHS participated in more than 25 speaking engagements before NGOs and other public service organizations, including: health care organizations, such as the American Academy of Family Physicians; social services organizations, such as the U.S. Conference of Catholic Bishops; ethnic affinity organizations, such as the League of United Latin American Citizens and the Ethiopian Development Community Council; child welfare organizations, such as the National Center for Missing & Exploited Children; and the legal community, such as the American Immigration Lawyers Association, the Louisiana District Attorneys Association, and the National Council of Juvenile and Family Court Judges.

To address the issue of sex tourism, DOS funded NGOs to further enhance awareness about crimes against children, strengthen law enforcement and consular training, and encourage private sector support for a global *Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism*. By the end of

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FY 2005, 200 travel companies from 21 countries had signed the Code. In implementing the Code, Carlson Companies – which includes Carlson Wagonlit Travel, the world's second largest travel company – developed training materials for worldwide hotel staff. The impact of this initiative means there will be thousands of employees around the world trained to recognize the signs of child sex tourism.

D. Department of Health and Human Services Public Awareness Campaign and Outreach Grants

1. *Rescue and Restore Victims of Human Trafficking* Public Awareness Campaign

FY 2005 encompassed months seven through eighteen of the HHS public awareness campaign, *Rescue and Restore Victims of Human Trafficking*. The second year of the campaign targeted intermediaries – those persons or entities who are most likely to come into contact with victims, such as local law enforcement officials (particularly vice squads), social service providers, health care professionals, faith-based organizations, domestic violence groups, ethnic organizations, refugee assistance professionals, homeless assistance professionals, drug rehabilitation organizations, child protective services officials, juvenile court officials, educational organizations, and legal assistance organizations. Outreach efforts included development of local coalitions, local and national media outreach, distribution of original campaign materials, and development of national partnerships.

a. Media Outreach

By the end of FY 2005, nearly 4000 calls were made to the campaign hotline resulting in more than 120 case leads. Nearly 20 percent of calls were referred to local organizations for help to potential victims. In addition, local and national media outreach efforts have resulted in more than 173.3 million media impressions.

By the end of FY 2005, 17 cities had established HHS anti-trafficking coalitions aimed at enlisting local community organizations in the task of combating trafficking within their communities and more than 900 local and national organizations have formally partnered with the *Rescue and Restore Victims of Human Trafficking* public awareness campaign. The campaign's ten launches in FY 2005 – Chicago, Las Vegas, Long Island, Los Angeles, Miami, Milwaukee, Minneapolis, Portland, St. Louis, and Seattle – generated a significant amount of media coverage, resulting in increased community awareness of trafficking and services available for victims. By the end of this fiscal year, media impressions surrounding Year Two launches totaled more than 22.5 million.

In addition to media outreach efforts in advance of city launch events, HHS worked with media in different regions to encourage coverage of local coalition and campaign-related activities. In FY 2005, the HHS public affairs team contacted local wire, print, and broadcast reporters prior to many task force training events. In Arizona, Illinois, and Washington these contacts resulted in local media coverage.

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The HHS public affairs team also explored additional national media angles and capitalized on celebrity partnerships with, for example, singer Ricky Martin, to help raise awareness of human trafficking. HHS worked with Mr. Martin to produce television and radio public service announcements ("PSAs") in English and Spanish that were distributed across the country. Distribution of the PSAs garnered more than 66 million radio placements and 750,000 impressions for television placements both in English and Spanish media. The English radio PSA aired a total of 1,605 times in nine of the nation's top-10 media markets and in 48 of the top 50. The Spanish radio PSA generated a total of 167 airings in seven of the nation's top-10 media markets and in 28 of the top 50 markets. The television and radio PSAs were both played in seven of the top-10 markets throughout the county with total media impressions estimated to be more than 67 million.

In addition to the PSAs, HHS distributed a press release and pitched key national and Hispanic media outlets on the *Rescue & Restore* partnership with the Ricky Martin Foundation that generated extensive media coverage, with print and broadcast stories in more than 30 news outlets, including the Associated Press, *People en Espanol*, Telemundo, Univision, Yahoo! En Espanol, *Washington Hispanic*, and *El Diario*.

b. Distribution of Materials

Nearly one million *Rescue & Restore* materials were distributed through the campaign's more than 900 national and local partners. The materials can be previewed on the HHS website, www.acf.hhs.gov/trafficking. In addition, HHS produced a 10-minute video to help train intermediaries on how to recognize cases of human trafficking and learn how to initiate support services for those victims, as well as the resources available to help victims rebuild their lives. The video was distributed in August 2005 to the then-more than 800 *Rescue & Restore* coalition members across the country. It is also promoted via the campaign website, www.rescueandrestore.org; *Rescue & Restore* training sessions; booth exhibits; and speaking engagements, as well as in campaign mailings to media and intermediary groups. The www.rescueandrestore.org website address is used as a campaign resource since it can be easily remembered; however, it serves as a placeholder site that directs visitors to the official campaign site, www.acf.hhs.gov/trafficking, for more information. The number of visitors to the *Rescue & Restore* website in FY 2005 tripled over the previous year.

c. Developing Partnerships

In FY 2005, HHS focused on the expansion of current national partnerships and the development of new relationships to increase the level of awareness among these intermediary groups. Recent successful partnerships include: providing speakers to participate in law enforcement trainings and internal staff meetings to educate National Center for Missing & Exploited Children staff on the issue of human trafficking; partnering with recording artist Natalie Grant to record a radio PSA for distribution to mainstream and Christian music stations; developing articles for publication in National Consumer League, American Medical Association, National Association of School Nurses, Forensic Nurse Association, American College of Emergency Physicians, and the National Association of Urban Hospitals; presenting at the National Sheriffs' Association

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mid-winter conference and annual conference; and expanding the number of organizations involved in *Rescue & Restore*.

2. Street Outreach

In FY 2005, ORR awarded 18 grants for street outreach to organizations to help identify victims of trafficking among populations within which they are already operating and have already built a level of trust. Some of the vulnerable population groups to which the grantees provide outreach are homeless and at-risk youth, girls exploited through commercial sex, migrant farm workers, prostitutes, and women exploited by forced labor in beauty parlors and nail salons. The grants support direct, person-to-person contact, information sharing, counseling, and other communication between agents of the grant recipient and members of a specified target population. The box below lists the FY 2005 grantees.

Catholic Charities, Inc.
City of Homestead
Good Shepherd Corporation of Atlanta
Crisis House, Inc.
Refugee Women's Alliance
Breaking Free, Inc.
Catholic Social Services of Central and Northern Arizona
Farmworker Legal Services of New York, Inc.
Girls Educational & Mentoring Services
West Care Nevada, Inc.
Catholic Charities of the Archdiocese of Milwaukee
Georgia Legal Services Program, Inc.
The Salvation Army
Rural Opportunities, Inc.
The Door - A Center of Alternatives, Inc.
Colorado Legal Services
Coalition to Abolish Slavery and Trafficking
U.S. Conference of Catholic Bishops

E. Outreach to Foreign Governments

The annual TIP Report produced by G/TIP spotlights modern-day slavery, encourages the work of the civil sector, and is the U.S. Government's principal diplomatic tool used to engage foreign governments. Secretary of State Condoleezza Rice released the 2006 TIP Report on June 5, 2006. It provides an analysis of human trafficking and government efforts to combat it in 149 countries, a net increase of seven ranked countries over the previous year, while the 2005 TIP Report was expanded from 131 to 142 ranked countries. The 2005 TIP Report also included detailed information on U.S. Government policy covering prostitution, child sex tourism, child soldiers, involuntary servitude, and corruption. Each country's ranking is determined solely on the government's actions against trafficking in persons. The goal of the report is to stimulate action; the State Department works throughout the year to engage governments to

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strengthen their commitment to ending this abuse. In the twelve-month period leading up to the 2005 TIP Report, G/TIP visited 66 countries to engage foreign governments on issues raised by the TIP Report.

Organized on the basis of the "Three-P" paradigm – prevention, protection, and prosecution – diplomatic engagement surrounding the report is having a positive impact: convictions worldwide have increased to over 4,700 for trafficking-related crimes in 2005 increasing from about 3,000 the year before; new anti-human trafficking legislation was approved in 41 countries; and scores of new survivor shelters were set up.

Several countries on Tier 1 in the 2005 TIP Report showed anti-trafficking in persons leadership through strong policies and implementation of laws during the 2005 TIP Report season.

- South Korea launched an initiative to close down outlets for commercial sexual exploitation and trafficking, arresting over 500 people and rescuing over 1,000 victims.

- Morocco has led efforts to hold accountable United Nations (UN) peacekeepers guilty of sexual abuse of minors in areas of UN deployment.

There were also countries initially rated as tier 3, when the 2005 TIP Report was released in June that took significant action to improve anti-TIP efforts thereby warranting an upgrade in September 2005.

- The United Arab Emirates embarked on a program to rescue and repatriate an estimated 2,000 child camel jockeys being exploited in the Emirates.

- The Government of Qatar took greater steps to protect victims of trafficking, including opening a shelter for foreign domestic servants who have been victims of forced labor or other abuses.

- Jamaica significantly improved its anti-trafficking law enforcement efforts, primarily through its creation of a police anti-trafficking unit which conducted a number of effective operations and arrests in the months following the TIP Report's release.

Increasingly, by bringing to bear resources from the three main functional divisions of G/TIP (reports, programs, and public outreach), the U.S. Government is able to help spur an anti-slavery approach in countries heretofore unengaged. In Japan, for example, after finding itself in Tier 2 Watch List in 2004, the country scrutinized its visa system and reduced the number of visas awarded for "entertainers" – often a cover for human trafficking schemes. As a result, Japan was raised to Tier 2 in 2005. In the Near East, G/TIP is increasingly directing its effort at stopping forced labor of migrants, particularly domestic servitude of young women.

Additional outreach to foreign governments occurs in regional migration dialogues. For example, the U.S. Government, led by DOS/PRM, participates in the

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Regional Conference on Migration (RCM); the Intergovernmental Consultations on Asylum, Refugee, and Migration Policies (IGC); and the People Smuggling, Trafficking in Persons and Related Transnational Crime (the "Bali Process"). PRM provides annual contributions to each of these regional processes and to those in other regions, such as southern Africa. The U.S. has undertaken joint initiatives through the RCM to establish guidelines that aim to provide member countries with guidance for carrying out the safe and prompt repatriation of child victims of trafficking in a manner that respects their rights, takes into account their opinions, and keeps their best interests in mind.

VII. Senior Policy Operating Group

Congress authorized the creation of the SPOG in TVPRA 2003 to coordinate the implementation of the TVPA and address emerging interagency policy, grants, and planning issues. The SPOG reports to the President's Interagency Trafficking Task Force to Monitor and Combat Trafficking in Persons and is chaired by the DOS G/TIP director.

The SPOG meets quarterly and includes representatives from DOS, DOJ, DHS, HHS, DOL, DOD, USAID, the Office of the Director of National Intelligence, and most recently, the Office of the U.S. Global AIDS Coordinator. The National Security Council, the Domestic Policy Council, the Office of Management and Budget, the Department of Veterans Affairs, and the Department of Education also participate in SPOG meetings. In FY 2005, the President's Interagency Task Force met once and the SPOG met three times. Several subcommittees have been established underneath the SPOG to further its work, including, the Subcommittees on Regulations and Statistics, chaired by DOJ, and the Subcommittees on Grant-Making, Research, and Public Affairs, chaired by DOS.

In FY 2005, the SPOG helped identify weaknesses in interagency coordination and initiated action to address these weaknesses, such as involving the Office of the U.S. Global AIDS Coordinator in SPOG activities in order to better link TIP and HIV/AIDS policies and creating a Subcommittee on Domestic Trafficking in Persons to address concerns about the treatment of TIP victims. The SPOG Subcommittee on Public Affairs improved coordination efforts on domestic media by identifying media strategies. Outlets such as *Lifetime*, *GQ* magazine, and *The Oprah Winfrey Show* publicized the global crime of trafficking to a wider domestic audience. The SPOG Subcommittee on TIP Research helped convene an international seminar on TIP research and compile a matrix of all U.S. government-funded TIP research projects for FYs 2002 to 2005 to show where research has been conducted and identify gaps. This document is posted on the G/TIP web site at www.state.gov/g/tip. In FY 2005, DOS also promulgated a rule in the Federal Register on *Sharing of Information and Coordination of Activities* to reinforce the current mechanism for effective exchange of information on agency policies and programs. This rule implements § 105 of the TVPA, as amended by the TVPRA 2003.

The SPOG continued its coordination of the President's $50 million initiative to combat trafficking. As described earlier, this multi-agency effort provided funding through DOS, DOJ, DOL, HHS, DHS, and USAID to eight foreign countries. Highlights of the initiative include:

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- Brazil launched a public information campaign in collaboration with World Vision, to reach would-be U.S. sex tourists. Catholic Relief Services established support centers for vulnerable workers and human trafficking survivors and trained 600 youth and local community leaders to raise awareness on human trafficking for forced labor.

- Cambodia launched a project to help survivors of human trafficking reintegrate that provides shelter; counseling; health services; and literacy, life, and vocational training.

- Indonesia and IOM opened the first medical recovery center for victims of human trafficking, which helped 646 victims between March 2005 and January 2006.

- In Mexico, the Bilateral Safety Corridor Commission (BSCC) was funded to address the pubic health implications of human trafficking in Mexico's northern border region.

VIII. Recommendations for Action

Taking into account the successes and areas for improvement described above, the U.S. Government recognizes that it should take the following action:

- The U.S. Government, its state and local partners, and NGOs need to improve coordination of services to victims. This includes increased efforts to find victims, track the support they receive from the U.S. Government and U.S. Government grantees, and coordinate efforts to effectively provide services to the victims.

- The U.S. Government needs to enhance its efforts to monitor and combat labor trafficking both domestically and internationally, especially in light of the new mandate in the 2005 TVPRA concerning forced labor and child labor.

- The U.S. Government should continue research efforts to obtain more accurate information, including estimates of trafficking victims in the United States, but the emphasis should be on "actionable research" that enhances the U.S. Government's ability to combat trafficking. Further research should increase our understanding of the nature and scope of trafficking in the United States and improve our ability to free victims and prosecute traffickers.

- The U.S. Government should increase efforts to identify victims, particularly through expanding the work sector approach to the public health sector, the education community, faith leaders, and other work sectors or first responders.

IX. Conclusion

In his first policy address as Attorney General, Alberto Gonzales called trafficking "one of the most pernicious moral evils in the world today." As Attorney

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General Gonzales stated, “This abomination does not exist only in other lands; it exists right here, on our shores. Today its victims are usually aliens, many of them women and children, smuggled into our country and held in bondage, treated as commodities, stripped of their humanity.”

Yet as this Assessment and the 2006 Annual Report show, the U.S. Government and its domestic and international partners have made significant progress in combating this crime. In a speech at the Freedom Network USA Conference, Attorney General Gonzales stated that the 2006 Annual Report “tells the story of an aggressive, proactive, and victim-centered approach to prevention, investigations and prosecutions. We’ve deployed a comprehensive strategy that includes federal and State lawmakers, dedicated investigators, tough prosecutors, the international community, and the partnership of federally-supported victim services and outreach programs.” Attorney General Gonzales praised the work of victim support groups, like the Freedom Network USA, for its efforts to “rescue victims and help restore their human dignity . . . [, to] take care of them with the comfort of a counselor, the knowledge of an educator, the spirit of an advisor, the strength of an attorney, and the sympathy of someone who understands – sometimes all at once . . . [, and to] help them re-enter a world that seems newly welcoming and dangerous at the same time.”

Through continued cooperation with state and local officials, NGOs and service providers, faith-based organizations, and the international community, the U.S. Government will continue its commitment to combating this moral evil with all the resources available to it. The fight against human trafficking is one of our highest priorities for ensuring justice in the United States and around the world.

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U.S. Department of Justice

Hurricane Katrina Fraud Task Force



First Year Report to the Attorney General

September 2006

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LETTER FROM ASSISTANT ATTORNEY GENERAL ALICE S. FISHER TO THE ATTORNEY GENERAL

The Honorable Alberto R. Gonzales
Attorney General

Dear Attorney General Gonzales:

I am pleased to submit the First Year Report of the Hurricane Katrina Fraud Task Force. Having recently passed the first year anniversary of your creation of the Task Force, the Task Force's mission remains the detection, deterrence, prevention and punishment of fraud related to the devastation caused by Hurricanes Katrina, and later Rita and Wilma. Although we have realized great success this year, after recently visiting the affected areas again I know that there is still considerable work to be done. I pledge that the Task Force will continue to investigate and prosecute fraud wherever we find it.

The dedication of all the Task Force members and United States Attorney's Offices across the country to the mission of the Task Force is demonstrated by the Task Force's prosecutions. Since the establishment of the Task Force in September 2005, 30 United States Attorneys across the country have charged more than 400 people with various hurricane fraud-related crimes involving millions of dollars. These prosecutions have sent a powerful message of deterrence to those who might otherwise seek to benefit from these disasters. Indeed, since your formation of the Task Force, the Federal Emergency Management Agency (FEMA) and the Red Cross report that more than $18.2 million has been returned by recipients of individual-assistance benefits, a sign that our prosecutions are deterring fraud.

These prosecutions are made possible by the exemplary investigation and cooperation among federal law enforcement, Inspectors General from impacted agencies, and state and local law enforcement. Working through the Task Force's Joint Command Center, which is led by David Dugas, the United States Attorney for the Middle District of Louisiana, the Department of Justice, investigative agencies, and Inspectors General are coordinating and cooperating in a wide range of operational and investigative matters. In particular, I want to recognize the contributions of the FBI, under the direction of Chip Burrus, Assistant Director of the Criminal Investigative Division, and the Department of Homeland Security Inspector General's office, under the direction of Inspector General Richard Skinner, both of which have been instrumental in establishing the Command Center. The Command Center has reviewed and analyzed more than 6,800 fraud-related tips and complaints, and investigative agencies working through the Command Center are tracking the disbursement of disaster-related funds in the affected areas in an attempt to identify and disrupt fraudulent schemes as quickly as possible.

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The Task Force is also working hard to ensure that disaster resources will flow only to those who are entitled to receive them. Although considerable amounts of individual assistance have already been disbursed, significant funds – to repair homes and neighborhoods, foster small businesses, and rebuild infrastructure – will be disbursed in the months ahead. The Task Force, in partnership with state and local officials, is encouraging the implementation of fraud-prevention measures in connection with these programs.

The Task Force has also prepared a list of Best Practices to guide the law enforcement responses to future natural disasters. These Best Practices, which are included in this report, set out the most important lessons learned by law enforcement in responding to Hurricanes Katrina, Rita, and Wilma, and should be an invaluable tool to prevent fraud in the wake of future natural disasters.

Thank you for your leadership in forming and then setting clear objectives for the Task Force. It is my privilege to work with you and so many dedicated and resourceful law enforcement representatives, at all levels of government, in this important endeavor. On behalf of all of our law enforcement partners, I assure you that we will continue to carry out the vital mission you have entrusted to us.

Sincerely,



Alice S. Fisher
Chairman
Hurricane Katrina Fraud Task Force

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TASK FORCE MEMBERS

The Hurricane Katrina Fraud Task Force includes the following members:

- The Federal Bureau of Investigation (FBI);
- The Criminal Division of the Department of Justice;
- The Executive Office for United States Attorneys;
- United States Attorney's Offices in the Gulf Coast region and throughout the country;
- The Antitrust Division of the Department of Justice;
- The Civil Division of the Department of Justice;
- The Internal Revenue Service Criminal Investigation Division;
- The United States Postal Inspection Service;
- The United States Secret Service;
- The Department of Homeland Security (DHS);
- The Federal Trade Commission (FTC);
- The Securities and Exchange Commission (SEC);
- The President's Council on Integrity and Efficiency, the Executive Council on Integrity and Efficiency, and numerous Inspectors General, including –

    - the Department of Agriculture;
    - the Department of Commerce;
    - the Department of Defense;
    - the Department of Education;
    - the Department of Energy;
    - the Department of Health and Human Services;
    - the Department of Homeland Security;
    - the Department of Housing and Urban Development;
    - the Department of Justice;
    - the Department of Labor;
    - the Department of Transportation;
    - the Department of the Treasury (for Tax Administration);

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- the Environmental Protection Agency;
- the Federal Deposit Insurance Corporation (FDIC);
- the General Services Administration;
- the National Aeronautics and Space Administration;
- the Small Business Administration;
- the Social Security Administration;
- the United States Postal Service;
- the Veterans Administration; and

- Representatives of state and local law enforcement, including –

  - the National Association of Attorneys General; and
  - the National District Attorneys Association.

The Task Force also operates in close partnership with the American Red Cross and a variety of private-sector organizations that have been assisting law enforcement in identifying new hurricane-related fraud schemes.

I. TASK FORCE BACKGROUND AND MISSION STATEMENT



"To take advantage of the devastation and recovery efforts in the Gulf Coast is both shameful and illegal. We must ensure that the criminals who have exploited this time of human suffering are brought to justice, and that their crimes do not undermine the programs intended to rebuild the homes, businesses, and communities destroyed by Hurricanes Katrina, Rita and Wilma. The Department of Justice will continue to vigorously investigate and prosecute fraud, in whatever form it may take, and work with our partners to prevent fraud in the future."

Attorney General Alberto R. Gonzales

On September 8, 2005, in the immediate aftermath of Hurricane Katrina, United States Attorney General Alberto R. Gonzales established the Hurricane Katrina Fraud Task Force. The Task Force is charged with deterring, detecting, and prosecuting unscrupulous individuals who try to take advantage of the Katrina, Rita, and Wilma disasters. The overall goal is to stop people who seek to illegally take for themselves the money that is intended for the victims of the hurricanes and the rebuilding of the Gulf Coast region.

The Task Force has mobilized to send a strong message of deterrence by bringing prosecutions as quickly as possible. The Task Force tracks referrals of potential cases and complaints, coordinates with law enforcement agencies to initiate investigations, and works with the appropriate United States Attorney's Offices to ensure timely and effective prosecution of fraud cases related to Hurricanes Katrina, Rita, and Wilma. By casting a broad net and using the investigative assets of federal law enforcement agencies, federal Inspectors General, and state and local law enforcement – together with the prosecution resources of the 93 United States Attorney's Offices – the Task Force is positioned to act quickly and aggressively to bring to justice those who would further victimize the victims of these natural disasters.

Since Hurricane Katrina made landfall on August 29, 2005, vast numbers of people have needed help from government and private-sector entities. Throughout the Gulf Coast region, hundreds of thousands of people were displaced, hundreds of thousands of homes and other housing units were destroyed or damaged, and residents suffered tens of billions of dollars in

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losses because of storm damage.[1] As of August 17, 2006, FEMA had received more than 2.5 million applications for disaster assistance relating to Hurricanes Katrina and Rita.

The vast majority of these applicants have legitimate need for the assistance they are seeking. The Task Force's work to date, however, has shown that numerous people have committed fraud in seeking benefits to which they are not entitled. Disaster-relief organizations have reported to law enforcement that they have identified thousands of questionable or possibly fraudulent payments to purported hurricane victims. In addition, the Task Force is already prosecuting instances of contract fraud and public corruption.

The Task Force is combating all types of fraud relating to private-sector and government efforts to help victims of Hurricanes Katrina, Rita, and Wilma to rebuild their lives and their communities. The Task Force will adapt to combat whatever fraudulent schemes criminals may create to exploit the hurricanes' effects on the Gulf Coast region. The principal types of fraud on which the Task Force is now concentrating include:

- *Government-Contract and Procurement Fraud*: Cases in which individuals and companies engage in fraud relating to federal funds for the repair and restoration of infrastructure, businesses, and government agencies in the affected region;

- *Public Corruption*: Cases in which public officials participate in bribery, extortion, or fraud schemes involving federal funds for the repair and restoration of infrastructure, businesses, and government agencies in the affected region;

- *Government and Private-Sector Benefit Fraud*: Cases in which individuals file false applications seeking benefits to which they are not entitled, and file fraudulent claims for insurance;

- *Identity Theft*: Cases in which the identities of innocent victims are "stolen" and assumed by criminals who convert the funds of, or otherwise defraud, the victims; and

- *Fraudulent Charities*: Cases in which individuals falsely hold themselves out as agents of a legitimate charity or create a "charity" that is, in fact, a sham.

The Task Force has ongoing investigations and prosecutions in each of these areas.

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[1] *See* FEMA, Press Release, By the Numbers - One Year Later, August 2, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=29109.

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The Task Force is committed to ensuring the integrity of relief and reconstruction efforts and guarding against the unlawful diversion of federal and charitable funds intended to rebuild the region and help its residents. Task Force members are working to keep the public informed about fraudulent schemes, and to give them the information they need to avoid becoming victims of fraud. Similarly, the Task Force is widely publicizing its criminal prosecutions, so that would-be fraudsters think twice about engaging in this type of criminal activity.

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II. TRENDS AND PATTERNS IN HURRICANE-RELATED FRAUD

In the year since Hurricane Katrina made landfall, the Task Force's Joint Command Center has reviewed and analyzed more than 6,000 fraud-related tips and complaints. Federal authorities have charged more than 400 individuals in fraud cases related to Hurricanes Katrina, Rita, and Wilma. State and local authorities have prosecuted additional cases throughout the country. Based on the Task Force's investigative and prosecutive experience to date, certain trends and recurring patterns of disaster-related criminal activity appear evident.

A. Cycles of Fraud After Disasters

It is a truism among fraud investigators that "fraud follows the money." Criminals tend to pursue opportunities for fraud in any situation where they observe that there is a prospect of significant personal gain, particularly where they believe that the risk of successful prosecution is low. In the case of disaster-related fraud, recent experience has shown that there are several distinct cycles of fraud after any major disaster.

The first cycle of fraud – charity-fraud schemes – begins at (or even shortly before) the time that a disaster strikes. With Katrina and Rita, for example, criminals exploited the outpouring of private and public support for hurricane victims by obtaining domain names for websites and then establishing fraudulent websites to which they tried to persuade the public to send their charitable donations for hurricane victims. The lifecycle for these charity-fraud schemes extends from the onset of the disasters for four to six weeks thereafter.

The second cycle of fraud – emergency-assistance schemes – begins as soon as the public is informed that the federal government and private entities are providing emergency-assistance funds for disaster victims, as well as funds for damage to their homes and businesses. This period may extend from the first day or two after the disaster subsides for a period of several months or more, depending on the eligibility criteria that public and private agencies establish and the deadlines they select for applications. FEMA, for example, disbursed more than $6 billion directly to Hurricane Katrina victims for housing and other needs assistance through the Individuals and Households Assistance Program, approved nearly $975 million in Community Disaster Loans for municipalities in Louisiana and Mississippi to help local authorities maintain essential services, and paid $650 million for hotel and motel rooms to provide hotel and motel rooms to tens of thousands of families affected by Hurricanes Katrina and Rita who were in need of short-term sheltering.[2]

The third cycle of fraud – procurement and insurance fraud – begins as soon as the public

[2] *See* FEMA, Press Release, By the Numbers - One Year Later, August 2, 2006, *available at* http://www.fema.gov/news/newsrelease.fema?id=29109.

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is informed that funds are being made available for recovery and reconstruction of the affected areas. Even in the initial phases of recovery, such as debris removal (see Figure 1 below), criminals seek to develop opportunities for fraud. Just last month, for example, four individuals were indicted in the Southern District of Mississippi for conspiracy to defraud the United States in connection with the creation and submission of fraudulent debris removal load slips in the amount of $716,677. In this case, the load tickets were submitted even though the trucks at issue were not being used on the roadways or at the dumps indicated. In another case, the Task Force saw similar conduct when another debris hauler submitted falsified load tickets for trucks that were actually in another state at the time. Public corruption is often associated with procurement fraud, as schemes by contractors to submit false or fraudulent invoices or documentation often succeed only because they bribe or compromise the public employees and officials whose oversight is essential for the conduct of the program.

Figure 1 - Hydraulic Excavator Filling Debris-Removal Truck in Pass Christian, Mississippi



[Source: Mark Wolfe/FEMA]

B. Exploitation of Systemic Weaknesses

The Task Force prosecutions have shown that with disaster-related fraud, as with other types of fraud, criminals often seek out and exploit any perceived systemic weaknesses in oversight or internal controls associated with disaster relief programs. In a number of cases throughout the country, initial prosecutions of individuals who filed a single fraudulent claim for disaster relief soon led to evidence that individuals were filing multiple fraudulent claims for benefits, and in some cases even recruited neighbors, friends, and family members to participate

in the scheme. This trend has held true in federally funded disaster relief programs, as well as private charitable relief programs. The experience gained by the Task Force member agencies over the past year, and the unprecedented information-sharing among those agencies, have enabled investigators to better identify and investigate these fraud rings.

C. Exploitation by Insiders

A particularly distressing pattern of criminal activity has involved individuals who use their positions with governmental agencies and charitable organizations to exploit the disaster relief programs that they are supposed to protect. The Task Force is prosecuting employees or contractors of FEMA, the Army Corps of Engineers, the Louisiana Department of Labor, and the American Red Cross for fraud committed by those individuals against the very programs that they were entrusted to administer.

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III. Suggested Best Practices for Law Enforcement After Future Disasters

The past year has provided Task Force members with numerous challenges in their efforts to combat disaster related fraud arising from Hurricanes Katrina, Rita, and Wilma. The Task Force has overcome those challenges through the implementation of innovative practices and techniques, through unprecedented inter-agency cooperation and through the sheer hard work and dedication of the members of the Task Force. This section is intended to memorialize some of the lessons learned by the Hurricane Katrina Fraud Task Force. It is not intended as an exhaustive statement of all potential anti-fraud measures that should be taken following a disaster.

Depending on the size and scope of the disaster, federal law enforcement and relief agencies will be faced with some or all of the following challenges. First, numerous federal agencies and private charities will respond with an outpouring of disaster relief aid. Fraudsters will exploit any weaknesses in disaster relief programs. Relief agencies will be faced with the challenge of providing assistance in a timely manner while adequately verifying eligibility and entitlement.

Second, the relief response will involve programs and procedures with which most United States Attorney's Offices (USAOs) and federal law enforcement agency field offices (Field Offices) have little or no experience. In order to deal with the fraud that will likely accompany the relief efforts, it will be necessary for supervisory and line personnel to quickly gain an understanding of how these relief programs work, the eligibility requirements for the programs, the legal and regulatory framework of the programs, the types of fraud typically associated with the programs, the evidence that will be needed to investigate and prosecute that fraud, and how that evidence can best be located and collected.

Third, the USAOs and the Field Offices impacted by the disaster will be the front line of the anti-fraud effort. Experience teaches that disaster related fraud begins even before the effects of the disaster itself begin to subside. The affected federal law enforcement offices will be faced with responding to that fraud while still recovering from the effect of the disaster on their offices and districts.

Fourth, auditors and investigators from various Inspectors General offices (OIG) will flood into the area and begin conducting audits and investigations. Most will be unfamiliar with the affected area and will not previously have dealt with the USAOs, the federal law enforcement field offices or the state and local law enforcement authorities in the area. They will be unaware of pending public corruption or other white collar crime investigations and will have little knowledge of how federal, state and local law enforcement historically interacts in the affected area. Their activities must be integrated into the pre-existing law enforcement structure in the affected area to avoid conflicting or redundant investigations.

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Finally, if the disaster is large enough, it will attract the attention and interest of criminals across the nation and even around the world. Information sharing, data gathering and coordination at the national level may be required.

To deal with these challenges, the following best practices should be considered:

A. Pre-Disaster Preparation

Assistance Pre-planning

- Best Practice: Disaster relief agencies should establish clear standards for assistance eligibility with verification procedures, including certification, where possible.

- Best Practice: Disaster relief agencies should establish protocols for coordination to avoid duplication of benefits.

Standardized Training

- Best Practice: The Department of Justice and other agencies with expertise in disaster-related fraud investigation should participate in training at the new OIG Institute.

- Best Practice: The Office of Legal Education should present disaster fraud training for Assistant United States Attorneys (AUSAs) at the National Advocacy Center. The training should be designed in coordination with the Criminal Division Fraud Section and the President's Counsel on Integrity and Efficiency (PCIE) Homeland Security Roundtable.

Pre-Packaged Training Modules

- Best Practice: The Office of Legal Education and the Criminal Division should work with the PCIE Homeland Security Roundtable to design pre-packaged training modules (both hard-copy and digital) that can be delivered to federal law enforcement in the affected areas to familiarize USAOs and federal agents with disaster relief programs.

B. Post-Disaster District Level Response

Public Outreach to Prevent and Deter Fraud

- Best Practice: The U.S. Attorney, Field Office supervisors, and OIG representatives should immediately conduct press conferences and press interviews to caution the public about post-disaster fraud and to establish a visible law enforcement response to potential fraudulent activity.

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Creation of District Anti-Fraud Working Group

- Best Practice: The U.S. Attorney should immediately establish a district anti-fraud working group. At a minimum, the working group should include representatives from any of the following federal agencies present in the district:

  - Federal Bureau of Investigation;
  - Department of Homeland Security, Office of Inspector General (DHS-OIG);
  - United States Secret Service;
  - Social Security Administration, OIG;
  - Department of Housing and Urban Development, OIG;
  - Department of Labor, OIG;
  - U.S. Postal Inspection Service;
  - U.S. Postal Inspection Service, OIG;
  - Internal Revenue Service, Criminal Investigative Division;
  - Treasury Inspector General for Tax Administration;
  - Department of Health and Human Services, OIG;
  - Environmental Protection Agency, OIG;
  - Environmental Protection Agency, Criminal Investigative Division;
  - Department of Agriculture, OIG;
  - Department of Commerce, OIG;
  - Department of Defense (OIG and Defense Criminal Investigative Service);
  - Department of Energy, OIG;
  - Department of Transportation, OIG;
  - General Services Administration, OIG; and
  - Small Business Administration, OIG.

The working group, once established, should consider the inclusion of representatives from state and local law enforcement agencies (and major charitable organizations such as the American Red Cross), and determine how best to coordinate activities with those agencies and organizations in order to ensure a cooperative and coordinated attack on disaster related fraud at all levels.

Establishment of Protocol for Data Access by the Working Group

- Best Practice: The District Working Group should, through the OIG representatives on the Working Group, contact all federal agencies providing relief services in the affected area and agree on protocols for the Working Group to obtain information on disaster relief programs and other information that will be useful in the investigation and prosecution of disaster related fraud. Similar outreach should be conducted by the USAO or FBI with charitable organizations and other non-governmental organizations operating in the affected area.

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Devising of Data Management System

- Best Practice: The District Working Group should devise a data management system that will hold and manage all disaster fraud information gathered by the Working Group and make that information available to members of the Working Group. Such a data management system will be particularly important to manage tips and leads provided by the public or gathered by investigative agencies and will also be needed to de-conflict law enforcement anti-fraud efforts.

C. Post-Disaster Multi-District or National Response

National Task Force

- Best Practice: If the post-disaster fraud is likely to be national in scope, the Attorney General may decide to establish a national task force similar to the Hurricane Katrina Fraud Task Force. If the disaster affects more than one district, but does not warrant the creation of a national task force, then the U.S. Attorneys in the affected districts should confer to decide whether a multi-district task force is warranted.

- Best Practice: Because local conditions in the affected areas may vary following a disaster, the U.S. Attorney and the local working group is best situated to determine how state and local law enforcement authorities should be integrated into the disaster fraud working group. If a national task force is established, then the Attorney General for each state affected by the disaster, the National Association of Attorneys General, the National District Attorneys Association, and other national and state level law enforcement associations should be asked to participate in those activities of the Task Force that will affect state and local law enforcement authorities.

Hotlines and Complaint Referral Procedure

- Best Practice: The public can be an excellent source of tips and leads about fraudulent activity, particularly if fraud is widespread following a disaster. Hotlines, if properly managed, can be useful in gathering information from the public. However, because fraud following a disaster will likely involve multiple disaster relief programs, a single hotline will not be effective unless the agency operating the hotline has the ability to refer hotline complaints to all agencies with jurisdiction over disaster related fraud. If referrals are made to multiple agencies, then the agency operating the hotline should maintain a record of the nature of each complaint and the agency to which the complaint has been referred.

- Best Practice: The Department of Justice should conduct outreach with the nonprofit sector, especially headquarters of charitable organizations most likely to be providing emergency assistance on a continuing basis in the affected region, to facilitate coordination and establish protocols for referral of possible criminal violations to law

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enforcement.

Referral and Deconfliction Database

- Best Practice: To properly log hotline complaints and track their referral, a standard complaint referral form should be used by hotline operators and the information recorded in the complaint referral form should be entered into a single database that can be used to de-conflict complaint referrals and maintain a record of complaint referrals for tracking purposes. This database should be accessible by law enforcement officers nationwide.

Command Center

- Best Practice: The Hurricane Katrina Fraud Task Force Joint Command Center has provided a centralized data-gathering, information-sharing, deconfliction, and coordination mechanism for the Task Force. Because of the number of agencies and programs involved in disaster relief, future national disaster fraud task forces should establish a joint command center with the ability to receive, screen, de-conflict and refer all complaints and leads related to disaster fraud.

Analytical Resources

- Best Practice: If a joint command center is established, then the command center can serve as a central collection point for information on disaster relief programs and data on potential fraudulent activity. If the command center is used for that purpose, then those agencies with primary jurisdiction over significant disaster related crimes should assign analysts or auditors to the command center in order to analyze the data to detect patterns or trends that may point investigators to evidence of fraudulent conduct.

- Best Practice: Because local conditions in the affected areas may vary following a disaster, the U.S. Attorney and the local working group is best situated to determine how state and local law enforcement authorities should be integrated into the disaster fraud working group. If a national task force is established, then the Attorney General for each state affected by the disaster, the National District Attorneys Association and other national and state level law enforcement associations should be asked to participate in those activities of the Task Force that will affect state and local law enforcement authorities.

D. Prosecution

Information-Sharing

- Best Practice: Access to disaster relief agencies files and databases is critical to investigation of disaster related fraud offenses. FEMA has provided law enforcement access to the National Emergency Management Information System database which has

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proven vital. Disaster relief agencies should provide a standard protocol for law enforcement to obtain information from the agencies and their files/databases.

Preservation of Evidence

- Best Practice: Disaster relief computer programs should be saved and protected. This is particularly important if the programs are upgraded or otherwise changed.

Standardization of Practices

- Best Practice: The Department of Justice should establish a comprehensive brief bank of indictments and other legal documents pertaining to all types of disaster fraud.

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IV. Accomplishments of the Task Force

A. Summary of Accomplishments

1. Prosecution and Enforcement

As of September 1, 2006, the Task Force has prosecuted more than 400 individuals in 30 districts throughout the country, and additional state and local prosecutions for disaster-related fraud have been brought.

2. Deterrence and Returned Funds

In the past year, FEMA and the American Red Cross (ARC) have had a total of more than $18.2 million in funds returned by recipients of individual-assistance benefits. FEMA received a total of $15.82 million, and ARC more than $2.4 million, in returned funds.

3. Increased Coordination

Investigative agencies and federal Inspectors General have expanded their cooperation and coordination on hurricane-related investigations. A vital component of coordination has been the Task Force's Joint Command Center, which has been in full operation in Baton Rouge, Louisiana for a number of months. The Command Center, to which the FBI has provided personnel and logistical support, has proved to be a major source of support for hurricane-related investigative efforts throughout the country. The Department of Justice and investigative agencies are making sound use of the Command Center for receipt, deconfliction, and referral of complaints; review and analysis of potentially fraudulent applications for disaster-related benefits; and timely information-sharing with relevant law enforcement agencies. The Department is also working closely with federal Offices of Inspectors General to advise them of systemic weaknesses and vulnerabilities that agents are identifying through their criminal investigations.

4. Training and Proactive Detection

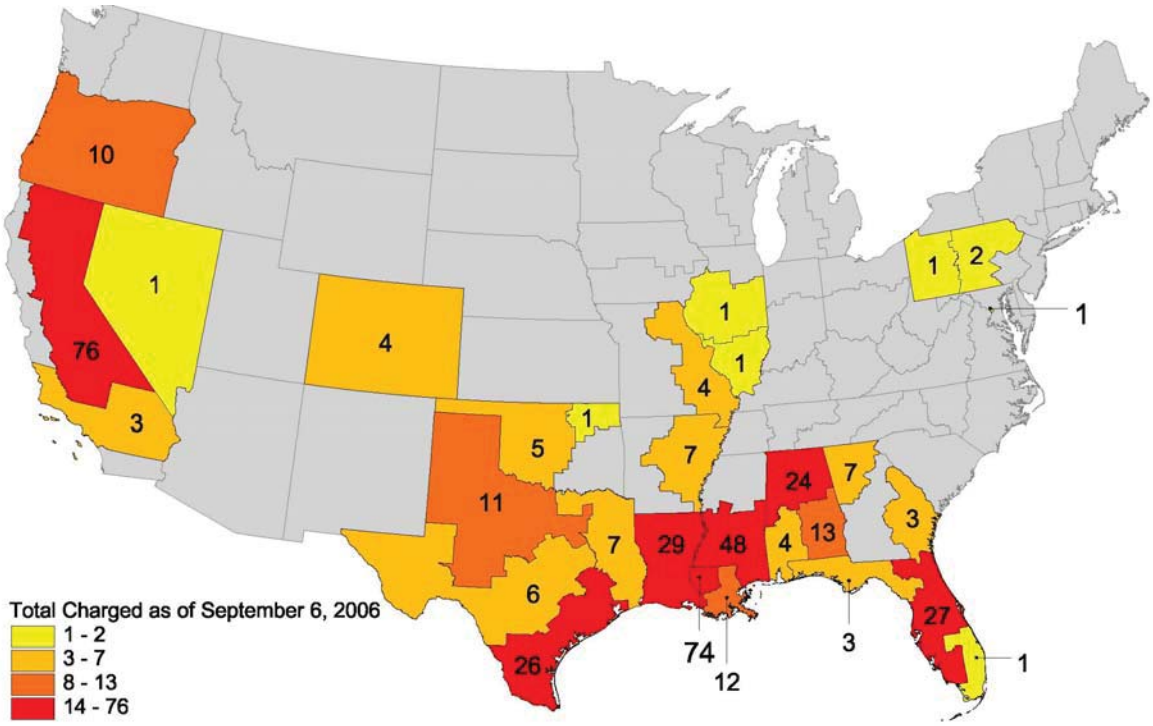
The Command Center has continued to host training by Department of Justice prosecutors for federal agencies, and has conducted more extensive training for Gulf Coast-based Assistant United States Attorneys and other agencies at the Command Center. It continues to play a significant role in proactively identifying patterns of potentially fraudulent activity in applications for disaster-related benefits. The Department of Justice is also planning to publish a disaster-fraud manual for federal prosecutors.

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B. Prosecution and Enforcement

The most tangible proof of their commitment is the dramatic increase in the number of prosecutions stemming from Hurricanes Katrina and Rita. As of October 17, 2005, the date of the first progress report, the Task Force had charged 36 people in 17 separate cases with hurricane-related fraud. As of September 6, 2006, more than 400 people have been federally charged with hurricane-related fraud. (See Figure 2 below.)

Figure 2 - Federal Criminal Prosecutions, September 1, 2005 - September 6, 2006



NOTE: Totals represent 412 persons charged in 30 districts.
[Source: U.S. Department of Justice]

These prosecutions span 30 federal districts in all regions of the United States. State and local prosecutors' offices have also continued to bring criminal cases involving hurricane-related fraud.

While the majority of Task Force prosecutions in the past year still involve fraud to obtain individual assistance benefits from FEMA and the American Red Cross, the Task Force is seeing more cases involving identity theft, procurement fraud, and public corruption. The following summaries of recent disaster fraud-related cases from a variety of United States Attorney's Offices are offered as a sample of the fraudulent schemes being successfully

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investigated and prosecuted.

Alabama - Middle District (United States Attorney Leura Garrett Canary)
[13 Persons Charged]

- On March 1, 2006, a federal grand jury indicted a woman for fraudulently obtaining disaster assistance from FEMA in the wake of Hurricane Katrina and then threatening a witness who was to testify against her about her FEMA claims. The defendant is also charged with using a gun while threatening the witness.[3]

Alabama - Northern District (United States Attorney Alice H. Martin)
[24 Persons Charged]

- On August 28, 2006, a federal grand jury indicted 15 individuals on charges relating to filing false claims with FEMA. Six of the defendants, for example, filed with FEMA, claiming to be residents of Texas during the landfall of Hurricane Rita. They reported property damage on their claims for emergency relief funds. A $2,000 U.S. Treasury check was issued to each individual based on the fraudulent information provided. The defendants allegedly cashed the checks knowing the information they provided was false.[4]

- On August 17, 2006, a defendant was sentenced to 19 months imprisonment for defrauding FEMA, after posing as a Hurricane Katrina evacuee, stealing another woman's identity, and forging that woman's name to obtain $2,000 in disaster relief funds.[5]

Alabama - Southern District (United States Attorney Deborah J. Rhodes)
[4 Persons Charged]

- On July 27, 2006, a federal grand jury indicted a woman in an 66-count indictment alleging mail fraud, wire fraud and aggravated identity theft. The indictment alleges that from September 8, 2005 through May 11, 2006, the defendant applied for disaster

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[3] *See* United States Attorney's Office, Middle District of Alabama, Press Release, March 6, 2006, *available at* http://www.usdoj.gov/usao/alm/Press/willis_indictment.html.

[4] *See* United States Attorney's Office, Northern District of Alabama, Press Release, August 29, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-29-06USAO_ALN.pdf.

[5] *See* United States Attorney's Office, Northern District of Alabama, Press Release, August 17, 2006, *available at* http://www.usdoj.gov/usao/aln/Docs/August%202006/AUGUST%2017,%202006%20IMPRISONMENT%20GIVEN%20IN%20FEMA%20FRAUD%20CASE.html.

benefits from FEMA using false Social Security numbers and variations of her name and address. As a result of the fraudulent claims, the defendant allegedly received from FEMA a total of $277,377, which she used to purchase real estate, a mobile home, automobiles, electronics and other personal property. The defendant allegedly lived in Jackson, Mississippi at the time of Hurricane Katrina. DHS-OIG, the FBI, and the U.S. Postal Inspection Service investigated the case.[6]

Arkansas - Eastern District (United States Attorney Bud Cummins)
[7 Persons Charged]

- On May 2, 2006, a federal grand jury returned a seventeen-count indictment against a defendant, alleging that the defendant, while entitled to lodging for himself, rented 17 hotel rooms and sublet them to other individuals. The defendant then allegedly caused 17 false claims to be submitted to FEMA. The FBI investigated the case.[7]

California - Eastern District (United States Attorney McGregor W. Scott)
[76 Persons Charged]

- The United States Attorney's Office for the Eastern District of California and the FBI have aggressively continued their ongoing investigation into a scheme to defraud the American Red Cross of funds intended for Hurricane Katrina victims by submitting or causing others to submit a fraudulent claim through the American Red Cross call center located in Bakersfield. To date, 72 persons have been federally charged in this investigation, 64 of those defendants have pleaded guilty (all to felonies), and 54 have been sentenced. According to the indictments, when a person contacted the call center to request assistance, call-center employees allegedly verified their personal information, including an address within the area affected by the hurricane. Once that information was verified, the caller was given instructions on how to obtain financial assistance from the American Red Cross and, on approval of financial assistance, how to obtain that assistance at the closest Western Union branch. The indictments further allege that a number of temporary contract employees at the Bakersfield call center, and some close associates of those temporary contract employees, obtained false claim information and, using that information, obtained payment from Western Union.[8] In a separate case, one

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[6] *See* United States Attorney's Office, Southern District of Alabama, Press Release, July 27, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jul/07-27-06_ALS.pdf.

[7] *See* United States Attorney's Office, Eastern District of Arkansas, Press Release, May 2, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/may/05-02-06andersonindicted.pdf.

[8] *See, e.g.,* United States Attorney's Office, Eastern District of California, Press Release, October 27, 2005, *available at* http://www.usdoj.gov/usao/cae/PRESS/pdf_2005/

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defendant was charged with fraudulently applying for and receiving thousands of dollars in hurricane assistance from the American Red Cross and other organizations. The FBI investigated the cases.

District of Columbia (United States Attorney Kenneth Wainstein)
[1 Person Charged]

- On August 28, 2006, a man pleaded guilty to charges of bank fraud, mail fraud, and money laundering from September to December of 2005, relating to a scheme to defraud FEMA of more than $100,000 in relief funds intended for victims of Hurricanes Katrina and Rita. According to the government's evidence, between about September 13, 2005, and about December 31, 2005, the defendant applied for emergency FEMA funds using the names, birth dates, and Social Security numbers of other individuals, none of whom had given him permission to apply for such benefits on their behalf. He obtained most of this information through the Martindale-Hubbell legal directory and various other public databases, as well as through his previous job at a construction company. The defendant admitted that on the portion of the application that asked for the address of a property damaged by Hurricane Katrina or Hurricane Rita, he would fill in addresses that he found on the Internet or that he made up.

  As a result of this scheme, FEMA mailed 38 United States Treasury checks, made out to the individuals the defendant specified, to motels where he was staying or private mailboxes that he had rented in the names of other individuals, using false identification in the names of those individuals, but bearing his own photograph. He then forged the signatures of the payees and deposited the checks into bank accounts that he had opened in the names of other people without their permission, but that he controlled. In particular, the defendant opened an account at an E*Trade Financial Corporation Branch in Northwest Washington, D.C., into which he deposited five of the fraudulently obtained checks, intending to withdraw the money and convert it to his own use at a later date. The U.S. Secret Service, the Postal Inspection Service, the Treasury Office of Inspector General, FEMA, and DHS-OIG investigated the case.[9]

10-27-05katrinarelease.pdf, Press Release, February 2, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/2-2-06USAOEDCA.pdf.

[9] *See* United States Attorney's Office, District of Columbia, Press Release, August 28, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-28-06Rothschild.pdf.

Florida - Middle District (United States Attorney Paul I. Perez)
[27 Persons Charged]

- In May 2006, a total of 26 individuals were charged in 23 separate indictments and one information in connection with fraudulent claims for hurricane assistance. The 26 individuals charged allegedly submitted fraudulent claims to FEMA totaling more than $170,000. Of that amount, they were successful in obtaining more than $150,000 in FEMA funds. The U.S. Secret Service, the Postal Inspection Service, and DHS-OIG (with assistance from the U.S. Marshals Service) investigated the cases.[10]

Florida - Southern District (United States Attorney R. Alexander Acosta)
[1 Person Charged]

- On May 7, 2006, a defendant who had pleaded guilty to wire fraud in connection with his fraudulent solicitation of charitable donations supposedly intended for Hurricane Katrina relief was sentenced to 21 months imprisonment. According to the indictment, the defendant falsely claimed in conversations on the Internet, and ultimately via the website www.AirKatrina.com, that he was piloting flights to Louisiana to provide medical supplies to the areas affected by Hurricane Katrina and to evacuate children and others in critical medical condition. He further claimed that he had organized a group of Florida pilots to assist him in his supposed relief efforts. In just two days, the defendant received almost $40,000 in donations from 48 different victims from around the world. The FBI investigated the case.[11]

Illinois - Southern District (United States Attorney Randy Massey)
[1 Person Charged]

- On June 22, 2006, an indictment was unsealed against a defendant charged with various fraud offenses and aggravated identity theft. The indictment alleges that the defendant defrauded FEMA by claiming that she was displaced, even though she was residing in Belleville, Illinois at the time of Hurricane Katrina. The indictment further alleges that the defendant sent correspondence to FEMA representing that her two daughters, who did not exist, had died during the flooding in New Orleans and that she had seen them float away. The defendant allegedly represented that she would need burial money upon

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[10] *See* United States Attorney's Office, Middle District of Florida, Press Release, May 25, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/may/05-25-06FEMAOrlandopressrelease.pdf.

[11] *See* United States Attorney's Office, Southern District of Florida, Press Release, May 8, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/may/USAO_FLS_05082006.pdf, and Press Release, January 30, 2006, *available at* http://www.usdoj.gov/usao/fls/060130-01.html.

finding her daughters and needed to be reimbursed for counseling, due to the loss of her daughters. The Postal Inspection Service, the U.S. Department of Labor Office of Inspector General, the Social Security Administration Office of Inspector General, the U.S. Department of Agriculture Office of Inspector General, the U.S. Department of Housing and Urban Development Office of Inspector General, the U.S. Department of Health and Human Services Office of Inspector General, the State of Illinois Healthcare and Family Services Office of Inspector General – Bureau of Investigations, DHS-OIG, and the Illinois State Police Medicaid Fraud Bureau investigated the case.[12]

Louisiana - Eastern District (United States Attorney Jim Letten)
[12 Persons Charged]

- On August 30, 2006, two FEMA officials working in New Orleans were sentenced to 21 months imprisonment and fined $20,000 for their roles in soliciting bribes as public officials. According to the criminal complaint by which they were first charged on January 27, 2006, the two officials approached a local contractor and solicited a bribe from the contractor in exchange for inflating the headcount for a $1 million meal service contract at the Algiers, Louisiana base camp. During this meeting, the two officials allegedly told the contractor that they could inflate the "headcount" for meals served and that they would require the contractor to kick back to them (the two FEMA officials) $20,000. During a subsequent meeting on January 19, 2006, one of the FEMA officials demanded $20,000 from the contractor to be split evenly between him and the other FEMA official, and indicated that the other official would continue to intentionally inflate the occupancy number at the base camp falsely.

  During a subsequent meeting on January 24, 2006, the $20,000 bribe that had been demanded was further discussed, and during the same meeting, the two officials allegedly discussed various ways and means that the contractor could use to inflate the meal service count. During the same meeting and a subsequent one on the same day, both charged defendants allegedly continued to discuss various ways and means to inflate the invoices for meal service counts, and made a further bribery demand for $2,500 per week for each of them. Finally, on the morning of January 27, 2006, the officials each took one envelope containing $10,000 from the contractor, after confirming that these two payments were for the inflated meal service count from December 3, 2005 through January 15, 2006. Thereafter, according to the complaint, both defendants and the contractor continued to discuss the mechanics of how to continue to fraudulently inflate

[12] *See* United States Attorney's Office, Southern District of Illinois, Press Release, June 22, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jun/06-22-06-WinstonCharged.pdf.

the meal service count numbers. Federal agents arrested both immediately thereafter on the scene. The FBI and the DHS-OIG investigated the case.[13]

Louisiana - Middle District (United States Attorney David R. Dugas)
[74 Persons Charged]

- On July 17, 2006, an employee of a contractor pleaded guilty to a bill of information charging him with extortion under color of official right. The bill of information alleges that the defendant, at all times relevant, was working as an employee of IIF Data Solutions, Inc., a company contracted by the Louisiana National Guard to service the needs of the Guard, Reserve, and active duty personnel, and to screen people applying with the Louisiana Department of Labor (LDOL) for financial assistance for potential recruits to the National Guard. In this capacity, the defendant was assigned to assist people who came into the LDOL office in Baton Rouge seeking employment and unemployment assistance. According to the bill of information, the defendant allegedly facilitated numerous fraudulent claims for Disaster Unemployment Assistance (DUA) benefits, which are intended to provide financial assistance to individuals whose employment has been lost or interrupted as a result of a major disaster declared by the President of the United States. The bill of information alleges that the defendant unlawfully obtained money not due him from people whose false and fraudulent DUA claims were presented. This money was obtained with the person's consent, which was induced under color of official right.[14] To date, a total of 74 persons have been charged in the Middle District of Louisiana on charges relating to Hurricane Katrina relief funds.

Louisiana - Western District (United States Attorney Donald W. Washington)
[29 Persons Charged]

- On August 25, 2006, a federal grand jury indicted a federal correctional officer on charges of wire fraud and theft of public funds for claiming to be a hurricane victim in order to fraudulently obtain FEMA relief funds. The indictment alleges that in September 2005, the defendant applied for federal disaster relief, falsely claiming that due to Hurricane Katrina, his primary residence which he was purportedly renting in New Orleans, had been damaged and that his automobile had been damaged and could not be driven. He allegedly also falsely claimed in his application for federal disaster relief that

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[13] *See* United States Attorney's Office, Eastern District of Louisiana, Press Release, August 30, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-30-06twosent.pdf, and Press Release, January 27, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_PressRoom/1-27-06USAOEDLA.pdf.

[14] *See* United States Attorney's Office, Middle District of Louisiana, Press Release, July 17, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jul/07-17-06FEMAFraud-GuiltyPlea-Lawless.pdf

he had lost work due to Hurricane Katrina. Based on the information provided to FEMA, the defendant allegedly received a wire transfer in the amount of $10,391. The indictment further alleges that in December 2005, the defendant falsely informed FEMA that he had spent all or part of the rental assistance which had been provided by FEMA on essential needs and he lacked sufficient additional funding to address those needs. Based on his request for additional funds from FEMA, he allegedly received a wire transfer of funds from FEMA in the amount of $2,028. The U.S. Department of Justice's Office of Inspector General and DHS-OIG investigated the case.[15]

- On April 26, 2006, a woman was sentenced to spend 3 months in prison and fined $1,000 and was ordered to pay restitution in the amount of $4,358. The defendant met an evacuee at a rescue shelter following Hurricane Katrina and gave that individual permission to use her address to receive mail. The defendant signed for a package to the evacuee using a fake name and then opened the mail, which contained two FEMA relief checks totaling $4,358. The defendant cashed one check and used the other one to purchase a car. The FBI and the U.S. Department of Homeland Security jointly investigated the case.

Mississippi - Southern District (United States Attorney Dunn Lampton)
[48 Persons Charged]

- On August 24, 2006, a federal grand jury indicted four individuals for conspiracy to defraud the United States involving the creation and submission of fraudulent debris removal load slips in the amount of $716,677. One of the defendants allegedly owned and operated a debris removal contracting company working as a sub-contractor in Pearl River County, Mississippi, and the other three defendants worked for a debris removal monitoring company operating in Pearl River County. Two of the defendants who were debris removal monitors allegedly signed false debris load slips misrepresenting that debris was loaded onto trucks on the roadway when they were not present at the loading site and, in most instances, created and signed the false load slips at their residences. The false debris load slips misrepresented that certain trucks, belonging to and under the control of the contractor defendant, were hauling loads of debris at a time when the trucks identified on the debris load slips were not in operation on the roadway or at the dump site listed on the load slips. The false debris load slips also misrepresented that loads of debris were delivered to a designated dump site in Pearl River County, Mississippi when in fact no debris was delivered to the dump site. The third debris-removal monitor defendant allegedly collected the false load slips from his co-conspirators and submitted them to the debris monitoring company who would, in turn, submit the false load slips to the prime contractor for payment to the contractor.

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[15] *See* United States Attorney's Office, Western District of Louisiana, Press Release, August 25, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-25-06pattersonindict.pdf.

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The indictment also charges that the contractor, in an effort to conceal the conspiracy, would deposit the funds obtained through the conspiracy into a bank account opened in the name of one of his employees and then write a check to an unindicted coconspirator who would then pay the contractor and one of the monitor defendants, who would then pay the other two defendants who were monitors for completing and signing the false load slips along with an extra amount of money for "hush money." The FBI and the U.S. Department of Homeland Security investigated this case.[16]

- On June 28, 2006, a U.S. Army Corps of Engineers (USACE) employee and a subcontractor were each sentenced to serve twelve months in prison and pay a $5,000 fine, followed by a two-year term of supervised release. Both defendants previously pleaded guilty to Conspiracy to Commit Bribery involving debris removal in Perry County, Mississippi. The USACE employee was a Quality Assurance Representative for the USACE, and the contractor was responsible for debris removal in Mississippi following Hurricane Katrina. The USACE employee accepted cash bribes in exchange for creating false loads that the contractor did not haul or dump.[17]

Missouri - Eastern District (United States Attorney Catherine L. Hanaway)
[4 Persons Charged]

- On May 22, 2006, a defendant pleaded guilty to filing a false claim with FEMA for hurricane relief funds. In September 2005, the defendant applied for and received two checks for $2,000 and $2,358 from FEMA for Katrina disaster relief, claiming an address in New Orleans. The defendant lives in St. Louis and never resided in New Orleans. In November 2005, the defendant assisted another defendant in the application which resulted in the receipt of $10,391 from FEMA. Neither of these defendants were victims of Katrina and were not entitled to any disaster assistance. The FBI investigated the case.[18]

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[16] *See* United States Attorney's Office, Southern District of Mississippi, Press Release, August 24, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-24-06-4indictjacksonmiss.pdf.

[17] *See* United States Attorney's Office, Southern District of Mississippi, Press Release, June 28, 2006.

[18] *See* United States Attorney's Office, Eastern District of Missouri, Press Release, May 22, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/may/05-22-06WomanPleadsGuilty.pdf.

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District of Nevada (United States Attorney Daniel G. Bogden)
[1 Person Charged]

- On April 26, 2006, a federal grand jury indicted an individual for making a false claim to FEMA in order to receive disaster assistance benefits. The defendant allegedly made and presented to FEMA a claim for funds for individuals displaced by Hurricane Katrina, claiming home damage and essential need for food, clothing and shelter, knowing that the claim was false. As a result, the defendant allegedly obtained rooms at seven different hotels in Las Vegas. The defendant did not stay in the rooms and instead, re-rented them to other individuals for the believed purposes of narcotics sales and prostitution. The DHS-OIG investigated the case.[19]

Oklahoma - Western District (United States Attorney John C. Richter)
[5 Persons Charged]

- On August 23, 2006, a defendant was sentenced to serve 24 months in prison, and to pay $18,000 in restitution to FEMA, for theft of FEMA Hurricane Katrina disaster relief funds. According to a superseding indictment filed on February 22, 2006, the defendant cashed a Hurricane Katrina disaster relief check made out in her name on September 16, 2005. When she entered a guilty plea on May 4, 2006, she admitted that she knew when she cashed the check that she was not entitled to any disaster relief money because she lived in Lawton at the time of Hurricane Katrina and did not live at the Louisiana address on her application for FEMA assistance. She has also admitted that she played a leadership role in the activities of others who received money from FEMA through fraud. The Oklahoma Economic Crime and Identity Theft Task Force, DHS-OIG, the U.S. Secret Service, and the U.S. Postal Inspection Service investigated the case.[20]

Oregon (United States Attorney Karin Immergut)
[10 Persons Charged]

- Between March 27, 2006 and April 6, 2006, eight Portland residents pleaded guilty in connection with the fraudulent receipt of Hurricane Katrina disaster relief funds. At his plea hearing, one of the defendants admitted that he recruited other people to allow their names to be used by himself and his girlfriend to apply for FEMA Katrina disaster relief checks, and that he would share in the proceeds of the FEMA checks. The girlfriend,

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[19] *See* United States Attorney's Office, District of Nevada, Press Release, April 26, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/apr/04-26-06hawkindict.pdf.

[20] *See* United States Attorney's Office, Western District of Oklahoma, Press Release, August 23, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-23-06perrysent.pdf.

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who also pleaded guilty, made similar admissions at her plea hearing. The other defendants each admitted to participating in the scheme and receiving the proceeds of at least one FEMA check knowing it was stolen.[21]

Texas - Eastern District (United States Attorney Matthew D. Orwig)
[7 Persons Charged]

- On August 7, 2006, a 64-year-old Texarkana hotel manager pleaded guilty to hurricane related fraud charges. According to the information in the case, the Red Cross entered into an agreement with the Ramada Inn in Texarkana and agreed to pay $54 per night for rooms provided to evacuees or their families. The defendant instructed employees to maintain evacuees for 14 days, whether they stayed that long or not. The Federal Bureau of Investigation investigated the case.[22]

- On June 16, 2006, a federal grand jury indicted a 68-year-old woman on charges relating to a false application to FEMA for disaster assistance related to Hurricanes Katrina and Rita. The defendant allegedly stated that she maintained her primary residence in Diberville, Mississippi, when Hurricane Katrina hit that area on August 29, 2005, when her primary residence on August 29, 2005 was in Gainsville, Texas, and not in any area affected by a hurricane.[23]

Texas - Northern District (United States Attorney Richard Roper)
[11 Persons Charged]

- On July 18, 2006, a federal jury in Fort Worth, Texas convicted a defendant for theft of government property and bank burglary, after only 90 minutes of deliberation. The government presented evidence at trial that the defendant opened a letter addressed to a hurricane evacuee that contained a check in the amount of $21,242.00. The defendant cashed the check without permission, depositing $10,000 into her daughter's account and

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[21] *See* United States Attorney's Office, District of Oregon, Press Release, April 7, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/apr/USAO_OR_04072006.pdf.

[22] *See* United States Attorney's Office, Eastern District of Texas, Press Release, August 7, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/aug/08-07-06fuselier_bryant_plea.pdf.

[23] *See* United States Attorney's Office, Eastern District of Texas, Press Release, June 16, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jun/06-16-06orangeindict.pdf.

the remainder into her own account. The U.S. Secret Service and the Fort Worth Police Department investigated the case.[24]

- On July 26, 2006, two defendants (a brother and sister), who had pleaded guilty to fraudulent use of an access device after stealing and using at least 80 Red Cross debit cards intended for hurricane evacuees, were sentenced. The brother was sentenced to 30 months imprisonment and was ordered to pay $202,984.12 in restitution. The sister was sentenced to 26 months in this case (and 15 months in an unrelated federal case) and was ordered to pay $23,240.00 in restitution. The U.S. Secret Service and the Postal Inspection Service investigated the case.[25]

Texas - Southern District (United States Attorney Donald J. DeGabrielle, Jr.)
[26 Persons Charged]

- On June 5, 2006, a federal grand jury returned a 22-count indictment charging a 25-year old Houston man with fraudulently obtaining thousands of dollars in Hurricane Katrina and Hurricane Rita disaster assistance. The defendant allegedly filed 18 separate fraudulent applications for disaster assistance, using 18 difference social security numbers and 18 unique "damaged addresses" in various areas. Based upon alleged misrepresentations, the defendant received 18 different checks in the amount of $2,000. The General Accounting Office, DHS-OIG, and the U.S. Postal Inspection Service, with assistance from the Social Security Administration Office of Inspector General and the Small Business Administration Office of Inspector General, jointly investigated the case.[26]

- On July 17, 2006, two Houston residents were charged with operating a fraudulent website to accept donations for Hurricane Katrina relief. The two were charged in an nine-count indictment that alleged that they had established the fraudulent website

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[24] *See* United States Attorney's Office, Northern District of Texas, Press Release, July 18, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jul/07-18-06sharrisconvict.pdf.

[25] *See* United States Attorney's Office, Northern District of Texas, Press Release, July 27, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jul/07-27-06hinesredcrossfraudKatrina.pdf.

[26] *See* United States Attorney's Office, Southern District of Texas, Press Release, June 5, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jun/06-05-06greenindict.pdf.

www.salvationarmyonline@yahoo.com. The defendants are accused of transferring more than $48,000 into their individual bank accounts. The FBI investigated the case.[27]

Other United States Attorney's Offices that have brought hurricane-related criminal prosecutions include: Central District of California (3); District of Colorado (4); Northern District of Florida (3); Northern District of Georgia (7); Central District of Illinois (1); Northern District of Oklahoma (1); Middle District of Pennsylvania (2); Western District of Pennsylvania (1); and Western District of Texas (6).

Examples of state and local prosecutions reported to the Task Force include the following:

Alabama

- On September 2, 2006, a contractor was reportedly arrested by the Baldwin County Sheriff's Office for allegedly bilking county residents out of about $500,000 in a series of construction-related frauds targeting the elderly, Hurricane Katrina victims, and others. The defendant allegedly made fraudulent construction deals and promised to do work, but never finished the jobs. He is charged with three counts of first-degree theft of property and two counts of second-degree theft of property.[28]

Florida

- The Florida Attorney General sued a company and its owner and president for increasing prices by as much as 300 percent after hurricanes; using high-pressured sales tactics and intimidation; not showing price lists or informing customers of costs; pressuring consumers into signing contracts without cancellation policies; bringing in extra equipment and leaving it in homes and billing customers for the devices; assuring consumers that costs would be covered by insurance when only a fraction of the inflated prices were covered; and placing liens on consumers' homes when consumers or the insurance companies did not pay the fees.[29]

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[27] *See* United States Attorney's Office, Southern District of Texas, Press Release, July 17, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/jul/07-17-06SDTX_FEMAFraud_Stephens.pdf.

[28] *See* Josh Bean, *Contractor charged with fraud*, Mobile Press-Register, September 6, 2006, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/1157534532221720.xml&coll=3.

[29] *See* Florida Attorney General, Press Release, June 23, 2006, *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/ED4C5CFA4CE25AF8852571960064456A.

Louisiana

- The Insurance Fraud Unit of the Louisiana State Police (LSP) reports that it is continuing its efforts to vigorously investigate and prosecute insurance fraud relating to Hurricanes Katrina and Rita. For example, on March 16, 2006, the Unit arrested a New Orleans couple on felony insurance fraud warrants. The couple is believed to have intentionally attempted to defraud their insurer by claiming Hurricane Katrina caused damage to their roof. The investigation revealed, however, that the couple purposely created damage to their roof to activate the mold endorsement of their homeowner's insurance policy. The couple was arrested and charged with one count of insurance fraud each and booked into a parish jail.[30]

Mississippi

- The Mississippi Attorney General announced the arrest of an individual on charges that he accepted payments from Hurricane Katrina victims for home repairs, but failed to either begin the work or complete the work as promised.[31]

Texas

- The Texas Attorney General settled with an individual and a company, resolving allegations that they promoted a Web-based scheme through seminars during which they fraudulently promised victims of last year's hurricanes and others that they could eliminate their debt in exchange for a $5,000 up-front deposit.[32]

C. Deterrence and Returned Funds

According to FEMA and the American Red Cross, a total of more than $18.2 million in disaster-assistance funds has been voluntarily returned to those organizations. As of August 24, 2006, FEMA had $15.82 million in disaster-assistance checks and money orders returned to it. As of September 1, 2006, the American Red Cross had received $2,471,350 in returned disaster-assistance funds, including $2,401,787 in checks, $50,021 in client-assistance cards, and $19,542 in gift cards. While some of these returns may be due to mistaken overpayments by these organizations rather than fraud by the applicants, there are continuing indications that many of

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[30] *See* Louisiana State Police Insurance Fraud Unit, http://www.lsp.org/ifu.html#news.

[31] *See* Mississippi Attorney General, Press Release, April 5, 2006, *available at* http://www.ago.state.ms.us/pressreleases/contractorarrest.pdf.

[32] *See* Texas Attorney General, News Release, July 20, 2006, *available at* http://www.oag.state.tx.us/oagnews/release.php?id=1660.

the recipients recognized that they were not entitled to the funds and wanted to avoid possible prosecution.

D. Increased Coordination

1. The 2006 New Orleans Conference

After a full year of vigorous activity, the Task Force has organized and scheduled its first annual conference to be held in New Orleans on September 13, 2006. The purpose of this conference will be to take stock of the year's activity, establish and review important lessons learned and discuss the future work of the Task Force. This conference will bring together close to 150 senior level and operational representatives of federal, state, and local law enforcement agencies including those represented last October and adding the offices of the Mississippi and Louisiana State Attorneys General, the Mississippi State Auditor's Office, the Louisiana Inspector General and other key state and local partners. The cross-cutting participation demonstrates the effectiveness of the Task Force's national response and its unprecedented effort in the fight against disaster-related assistance fraud.

2. The Joint Command Center

Since its creation in October 2005, the goal of the Joint Command Center has been to facilitate a fully integrated and coordinated nationwide law enforcement response to fraud and corruption associated with the unprecedented destruction of Hurricanes Katrina, Rita, and Wilma. The Joint Command Center operations, located at Louisiana State University in Baton Rouge, have steadily grown in scope and effectiveness, as federal law enforcement agencies and Inspectors General have dedicated investigative and analytical resources to the mission of the Task Force. [See Figure 3 below.] In this regard, the FBI, the DHS-OIG, the Department of Housing Office of Inspector General and the U.S. Postal Inspection Service deserve particular mention for their consistent provision of personnel and logistical support to the Command Center.

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Figure 3 - Federal Agents Confer at Joint Command Center, Baton Rouge



[Source: Lyman Thornton]

The following 33 agencies and Department of Justice components currently have representatives assigned to the Joint Command Center or designated as Points of Contact for the Joint Command Center:

- Department of Justice, Criminal Division;
- Department of Justice, Civil Division;
- Department of Justice, Antitrust Division;
- Department of Justice, Office of Inspector General;
- Federal Bureau of Investigation;
- DHS-OIG;
- United States Secret Service;
- Social Security Administration, Office of Inspector General;
- Department of Housing and Urban Development, Office of Inspector General;
- Department of Labor, Office of Inspector General;
- U.S. Postal Inspection Service;
- U.S. Postal Service, Office of Inspector General;

- Internal Revenue Service, Criminal Investigation
- Treasury Inspector General for Tax Administration;
- Department of Health and Human Services, Office of Inspector General;
- Environmental Protection Agency, Office of Inspector General;
- Environmental Protection Agency, Criminal Investigative Division;
- Department of Agriculture, Office of Inspector General;
- Department of Commerce, Office of Inspector General;
- Department of Defense, Office of Inspector General (DoD-OIG) and Defense Criminal Investigative Service (DCIS);
- Department of Energy, Office of Inspector General;
- Department of Transportation, Office of Inspector General;
- National Aeronautics and Space Administration, Office of Inspector General;
- General Services Administration, Office of Inspector General;
- Small Business Administration, Office of Inspector General;
- Department of Veterans Affairs, Office of Inspector General;
- United States Attorney's Office for the Eastern District of Louisiana;
- United States Attorney's Office for the Middle District of Louisiana;
- United States Attorney's Office for the Western District of Louisiana;
- United States Attorney's Office for the Eastern District of Texas;
- United States Attorney's Office for the Southern District of Texas;
- United States Attorney's Office for the Southern District of Mississippi; and
- United States Attorney's Office for the Southern District of Alabama.

Significant Joint Command Center operational developments during the first eleven months of operation include:

- United States Attorney David R. Dugas continues to serve as the Executive Director of the Joint Command Center. In addition, through a cooperative agreement between the Department of Justice and Louisiana State University, Ms. Kathleen Wylie, the Director of the FBI's LEO National Support Center, now serves as the Deputy Director of the Joint Command Center.

- The Command Center has consolidated two national hotlines, an e-mail address, a fax number and a Post Office Box used by the Task Force to receive complaints and allegations of fraud from across the nation. The Command Center is currently receiving approximately 200 calls per week on the national hotlines.

- There has been a significant increase in the operational capacity of the Command Center through full-time staffing of 17 agents, analysts, and other staff from the FBI, DHS-OIG, HUD-OIG, the Postal Inspection Service, and the Department of Transportation Office of Inspector General, and two data entry personnel.

- A Hurricane Katrina Fraud Task Force Special Interest Group (SIG) was established on the Law Enforcement Online (LEO) website. The Task Force SIG allows the Joint

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Command Center to collect information from, and disseminate information to, Task Force members around the country in a secure electronic environment. The Task Force SIG currently has 287 participating members from 43 federal, state, and local agencies and Inspectors General offices.

- A standard Task Force Complaint Referral Form was developed and is used to transmit fraud complaints and investigative leads to the Joint Command Center for screening, deconfliction, and referral to appropriate law enforcement agencies and Task Force working groups for investigation. The Complaint Referral form is accessible from the general membership section of LEO and may be used by any law enforcement officer in the country with access to LEO.

- An interagency complaint index has been deployed to collect, screen, deconflict, and refer the Task Force Complaint Referral forms received by the Joint Command Center. The information contained on the Complaint Referral forms is posted on the LEO HKFTF SIG and is accessible to designated agency representatives.

- More than 6,800 complaints and allegations of fraud have been received, screened, and referred by the Command Center to federal law enforcement agency field offices across the nation.

- An innovative Referral and Deconfliction Database (RADD) has been developed, in conjunction with Department of Justice Criminal Division and FBI technical personnel. RADD now allows automatic deconfliction of complaints and leads, merger of duplicate complaints, referral of complaints to appropriate agencies and working groups, and tracking of complaints and referrals.

- Command Center staff have done preliminary analysis of fraud trends revealed by the information contained in the complaints received by the Joint Command Center, and Task Force members have developed investigative information and shared it through their Joint Command Center representatives. This analysis has resulted in the independent generation of investigative leads by the Command Center analysts for referral to investigative agencies.

- Points of Contact have been established between the United States Attorney's Offices in the affected areas and the Joint Command Center to facilitate coordination of Joint Command Center operations with the Task Force working groups in the affected districts, as well as ongoing relationships with all 93 United States Attorney's Offices.

- Regular Joint Command Center meetings and day-to-day interaction of the Joint Command Center staff and agency representatives have produced the onsite interagency exchange of information and trends. This interaction has been particularly valuable in alerting participating agencies to fraud indicia revealed by ongoing investigations. In addition, agency representatives share information on the programs used by their

departments to disburse disaster relief assistance and discuss appropriate investigative methods to detect criminal activity related to those programs.

The LEO Support Center, located in the same building as the Joint Command Center, provides invaluable support and technical assistance to the Joint Command Center operations. For example, on August 24, 2006, the Chairman of the Task Force, Assistant Attorney General Alice S. Fisher, met with federal, state, and local members of the Southern Mississippi Working Group in Gulfport, Mississippi, to discuss ongoing enforcement activities and future plans for oversight of the disbursement of Community Development Block Grant (CDBG) funds in that state. [See Figure 4 below.]



Figure 4 - Southern Mississippi Working Group Meeting, August 24, 2006 [Left to Right: United States Attorney for the Southern District of Mississippi Dunn Lampton; Assistant Attorney General Alice S. Fisher; Criminal Division Chief for the Southern District of Mississippi John Dowdy; and Mississippi Attorney General Jim Hood]

3. Other Investigative Coordination and Assistance

a. Investigative Agencies

- **Federal Bureau of Investigation**

The FBI reports that to date, its field divisions have conducted more than 300 investigations involving fraud against the government and 24 public corruption investigations relating to Hurricanes Katrina, Rita, and Wilma. These investigations have resulted in more than 120 indictments and 30 convictions.

The FBI has played a leading role in the establishment and operation of the Hurricane Katrina Fraud Task Force's Joint Command Center in Baton Rouge, Louisiana. It has set aside more than $230,000 in support of the Command Center's Referral and Deconfliction Database and related systems. It has also provided additional funding to field offices for equipment and

other operating costs associated with hurricane fraud investigations. Since Hurricane Katrina, the FBI has continued to supplement Public Corruption and Governmental Fraud squads in the Jackson and New Orleans Divisions with Special Agents and support personnel to address the fraud and public-corruption matters associated with the hurricanes.

The New Orleans and Jackson field divisions have also developed working relationships with numerous federal and state agencies to conduct hurricane-related public corruption and fraud investigations. The Jackson Division initiated a Memorandum of Understanding with the Mississippi State Auditor's Office, which is using a $5 million appropriation from the Mississippi State Legislature to combat fraud associated with Community Development Block Grants.

In the past year, the FBI Cyber Division reviewed more than 5,000 website referrals from a variety of sources, including the American Red Cross, Internet Crime Complaint Center (IC3) complaints and listserv postings, Name Protect, the National Cyber Forensic and Training Alliance, and PayPal. Of these 5,000, IC3 sent out 95 referrals to FBI field offices and FBI Legal Attaches abroad. Sixty-four of these 95 referrals have been closed out to date. These 64 referrals resulted in the shutdown of 13 websites, reports by two websites that they were complying with a case-and-desist letter that the American Red Cross sent to them, and two prosecutions that resulted in guilty pleas.

- **Postal Inspection Service**

As a member of the Department of Justice's Hurricane Katrina Fraud Task Force, the U.S. Postal Inspection Service initiated a consumer education campaign, in conjunction with the Task Force, to inform the public of fraud schemes related to Hurricane Katrina relief efforts. During September and October 2005, full page advertisements were placed in 13 newspapers and five magazines nationwide, with a combined readership of more than 21 million.

The Houston Division opened a National Coordination Case due to the scope, complexity, and long-term commitment of the Postal Inspection Service to Hurricane Katrina fraud-related investigations. National coordination of these investigations has facilitated the tracking of cases and the resolution of any conflicting issues between the numerous agencies involved. This also provides a focal point for coordination with the Katrina task forces around the country and creates an effective process to interact with the Task Force in Baton Rouge.

The Postal Inspection Service has conducted 100 criminal investigations of individuals who submitted false claims to FEMA and state government agencies. The results to date include 98 indictments, 103 arrests, 73 convictions, and 13 defendants sentenced.

- **United States Secret Service**

The Secret Service continues to participate as a member of the Task Force. To date, Secret Service investigations throughout the country have contributed to more than 60 federal

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arrests, with a potential fraud loss exceeding more than $2.5 million. Its New Orleans Field Office has contributed significantly to these accomplishments. The majority of Secret Service cases involve fraud to obtain emergency benefits from FEMA and the American Red Cross. To date, the Secret Service's accomplishments in the Task Force include 22 open investigative cases and 67 arrests.

The Secret Service has continued to work in conjunction with the private sector to shut down numerous fictitious websites. With private sector assistance, the Secret Service was able to detect and effectively shut down websites that were victimizing Hurricane Katrina victims, the American Red Cross, and various donors. These shutdowns included 16 "phishing" websites (i.e., websites that purport to be operated by legitimate corporate or non-profit entities, but that are created to harvest personal data from individuals for identity theft and fraud).

- **Internal Revenue Service-Criminal Investigation (IRS-CI)**

IRS-CI continues to be an active participant in the Task Force, with agents assigned to the Baton Rouge, Louisiana, Covington, Louisiana, and Hattiesburg, Mississippi task forces. IRS-CI agents are working closely with representatives from local, state, and federal agencies and lending their expertise in analyzing suspicious financial transactions related to the recovery efforts. In addition, the agency has expedited the clean up efforts in the New Orleans Field Office and has returned to full staffing and operations.

b. Inspectors General

The federal Inspectors General community continues to make vital contributions to the work of the Task Force. Department of Justice representatives of the Task Force continue to attend the regular meetings of the PCIE Homeland Security Roundtable and the Roundtable's Contract Audit Task Force and Individual Assistance Subgroup, as well as special meetings with Inspectors General on specific issues, and to participate in review of the PCIE reports to Congress on the response to Hurricanes Katrina, Rita, and Wilma.

Various Inspectors General have reported the following fraud-related activities to the Task Force:

- **Department of Homeland Security Office of Inspector General (DHS-OIG)**

The DHS-OIG Office of Investigations reports that it has opened offices in Baton Rouge, Louisiana, Biloxi and Hattiesburg, Mississippi and Mobile, Alabama, to exclusively investigate Katrina-related cases. It is working cases involving Hurricanes Katrina, Rita, and Wilma in virtually all of its offices nationwide. Its joint partners include the FBI, the Postal Inspection Service, TIGTA, SSA OIG, HUD OIG, DCIS, Army CID and others, in addition to state and local law enforcement entities.

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Figure 5 - DHS-OIG Office of Investigations Accomplishments Concerning Hurricanes Katrina, Rita, and Wilma

Disaster	*Arrests*	*Indictments*	*Open Investigations*	*Closed Investigations*
Hurricane Katrina	206	229	1,690	2,869
Hurricane Rita	42	37	599	3
Hurricane Wilma	0	0	35	594

[Source: DHS-OIG]

As summarized above in Figure 5, DHS-OIG currently has a total of 2,324 open investigations relating to Hurricanes Katrina, Rita, and Wilma. It also has 206 arrests and 229 indictments relating to Katrina and 42 arrests and 37 indictments relating to Rita.

- **Department of Defense - Office of Inspector General (DoD-OIG)/Defense Criminal Investigative Service (DCIS)**

The Defense Criminal Investigative Service (DCIS), the criminal investigative arm of the Inspector General of the Department of Defense (DoD-OIG), reports that as of August 11, 2006, it has received 17 criminal allegations related to Hurricane Katrina. DCIS agents reviewed the allegations, and have opened seven cases dealing with bribery, kickbacks, and possible product substitution. One of the open cases has resulted in a successful judicial action.

As part of its mission to combat fraud and corruption, DCIS has conducted 40 mission and fraud awareness briefings at the U.S. Army Corps of Engineers (USACE) debris collection and Blue Roof distribution sites. DCIS briefed Corps and contractor employees on the deterrence of potential fraud, bribery, and kickback schemes by informing them that law enforcement officials would be monitoring illegal activity and giving them a point of contact to report suspected fraud.

In regard to the Hurricane Katrina Fraud Task Force, DCIS reports that it attends bi-weekly meetings at the Command Center to brief the other task force members on investigative efforts. DCIS also serves as the liaison between law enforcement and the USACE. DCIS is currently conducting proactive data mining with a FBI intelligence analyst assigned to the Task Force using the USACE debris mission database. The data mining will try to identify indicators of fraud and other criminal activity. DCIS has one agent assigned to the Hurricane Katrina Fraud Working Group at the FBI New Orleans office; another agent participates in a working group in Hattiesburg, Mississippi.

- **Environmental Protection Agency Office of Inspector General (EPA-OIG)**

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The EPA-OIG reports that since September 2005, it has deployed six Special Agents on several missions to the affected Gulf States to participate in Hurricane Katrina Fraud Task Force efforts, meet with EPA officials, government contractors, federal prosecutors, local and state law enforcement officials, and conduct a variety of investigative steps in addressing allegations of fraud. EPA-OIG Agents are participants at the Hurricane Katrina Fraud Task Force Joint Command Center. Special Agents have access to Task Force databases, intelligence, and staff for operational support during investigations conducted in the affected Gulf States, and are engaged in periodic meetings with Task Force members to discuss investigative operations.

The EPA-OIG Financial Fraud Directorate and EPA-OIG Agents met with EPA Region 4 Response Team members to observe clean up activities, brief on-site EPA and contractor staff regarding investigative objectives and priorities, and discussed lessons learned from this response, so that future investigative efforts involving response contracts can be efficiently focused. Information was also gathered from several team members about tracking contract costs, contractor clean-up methods and billing procedures, and other areas susceptible to contract fraud. EPA-OIG Agents from EPA Region 6 have continued in the pursuit of several ongoing investigations.

To date, investigative efforts by the EPA-OIG have addressed several allegations of labor and equipment cost mischarging and the impersonation of EPA officials in furtherance of a scheme or artifice to defraud. While some allegations have been disproven or are currently pending prosecution, others have successfully resulted in administrative suspensions (pending debarment), cease and desist letters for wrongful activity, and recommendations for financial adjustments. EPA-OIG continues to aggressively pursue tips and leads concerning allegations of fraud, and is actively supported by the Task Force.

- **Department of Housing and Urban Development Office of Inspector General (HUD-OIG)**

HUD-OIG Office of Investigation reports that it established two new divisions as a result of its responsibilities to combating waste, fraud, and abuse in the Gulf Coast States - the Disaster Relief Oversight Division (DROD) in Washington, DC and the Hurricane Katrina Fraud Task Force in New Orleans, Louisiana. DROD is primarily responsible for liaison; research, analysis, and recommendations; monitoring, reporting, and dissemination; and strategic planning and implementation of HUD-OIG Office of Investigation directives and initiatives associated with disaster assistance and recovery. The Task Force has personnel assigned in Baton Rouge, Louisiana, Arlington and Houston, Texas, and Hattiesburg, Mississippi to support all HUD program fraud investigations relating to the hurricane disasters.

The Office of Investigation has developed and currently participates in a far-reaching fraud prevention program in the affected states of the Gulf Coast Region sponsoring training courses and workshops in Louisiana, Mississippi, Alabama, Florida, and Texas. These presentations and workshops are designed to educate their state agencies, as well as federal,

state, and local law enforcement to identify fraud in Community Development Block Grant (CDBG) programs as well as other affected HUD-related programs.

To date, the Office of Investigation has opened 46 hurricane-related cases, which have resulted in 9 arrests, 9 indictments, and 3 convictions. In addition, the HUD-OIG Hotline has processed approximately 90 complaints related to the hurricanes. OIG forensic auditors have been assigned to review temporary housing programs and FEMA payments made to HUD-assisted housing residents. The Office of Investigation uses its forensic auditors to inspect and evaluate programs that have not been audited by the OIG Office of Audit.

The Office of Investigation created a "Suspicious Activity Report (SAR)" that will be given to HUD grantees, subgrantees, and others associated with the disbursement CDBG disaster recovery funding. The SAR was also used effectively early on in our efforts to detect fraud in the Katrina Housing Assistance Program with the dissemination to the FEMA and HUD Disaster Relief Centers. The SAR is a useful investigative tool to help notify HUD-OIG of suspected irregularities in the delivery of HUD program money.

The Office of Investigation sponsors meetings and training sessions with industry groups such as the Mortgage Bankers Association, the Public Housing Authorities Directors Association, the National Association of Housing and Redevelopment Officials, private insurance companies, multifamily owners, public housing executive directors, state governments, and economics development agencies. To date, the Office of Investigation has performed numerous significant outreach and liaison activities designed to detect and prevent waste, fraud, and abuse of HUD CDBG disaster recovery funding.

- **Department of Justice Office of Inspector General (DOJ-OIG)**

Since August 29, 2005, the Department of Justice Office of the Inspector General (DOJ-OIG) has opened seven cases concerning hurricane-related benefit fraud. Four of the cases have been referred to the appropriate United States Attorney's Offices and are pending a prosecution disposition. In the remaining three cases, either prosecution was declined or the case was closed because the allegations were not substantiated.

In addition, the DOJ-OIG has conducted oversight of the Department of Justice's expenditures related to hurricane recovery through three separate audits. In one case, involving a sole-source contract awarded by the Federal Bureau of Prisons to a construction company to repair or replace roofing damaged by Hurricane Rita, the DOJ-OIG found that the decision to use a sole-source contract was appropriate and that the BOP took adequate steps to ensure that the contract was fairly negotiated and reasonably priced. The DOJ-OIG also completed an audit concerning actions of the Bureau of Justice Assistance (BJA) in following internal control procedures in awarding disaster relief grants to state and local governments. The DOJ-OIG found that while BJA was proactive in providing additional grant funding to grantees in the Hurricane Katrina affected areas, it had no assurance that funding was going to the areas of greatest need. The DOJ-OIG is currently is performing an audit of the DOJ's purchase card

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expenditures related to hurricane relief and recovery efforts, to examine whether internal controls guard against improper and wasteful purchases.

- **Social Security Administration Office of Inspector General (SSA-OIG)**

The SSA-OIG Office of Audit (OA) reports that it has initiated a review to report on the status of SSA service delivery to individuals affected by Hurricanes Katrina and Rita. As part of this review, it will assess SSA's plans to ensure that payments made under emergency procedures were appropriate and properly safeguarded. As part of its immediate response to the disaster, SSA temporarily changed or eliminated several existing control procedures to ensure continued benefit payments in the affected area. SSA-OIG will assess SSA's plans to ensure that payments made are proper and that controls are sufficient to safeguard against fraud, waste, and mismanagement.

Since the establishment of the Katrina Task Force on August 29, 2005, the SSA-OIG Office of Investigations has opened 45 cases. There have been 16 indictments, 11 arrests, and 3 pleas/convictions. The pleas/convictions resulted in 3 sentencings. From August 29, 2005 to August 7, 2006, the SSA-OIG Office of Investigations Fraud Hotline has received 88 allegations of potential fraud related to Hurricanes Katrina and Rita.

Special agents from the Office of Investigations worked with local law enforcement in several additional capacities. For example, the agents, in preparation for setting up a temporary SSA office, accompanied SSA employees to the Houston Astrodome; escorted SSA employees to restricted areas to assess damage to SSA facilities; and, upon request from SSA, ascertained the status of SSA employees being temporarily housed after the hurricane. The Office of Investigations is actively pursuing allegations of fraud involving SSA's programs and operations, including allegations of Social Security number misuse.

- **Department of Transportation OIG (DoT-OIG)**

DoT-OIG addressed post-storm debris removal by developing pro-active complaints resulting in the arrested of a debris removal monitor contracted with the Department of Transportation and Development (DoTD). This person stopped work, demanded payments to approve work by signing load tickets, and was paid bribes by several truck drivers. His activities were discovered by his employer and he was removed from his position, only to return to the job site with the remaining load ticket books in his possession and then attempted to sell these books for $300. The books were given to a truck driver with the promise of payment and the driver turned the books over to another debris removal monitor. Had the ticket books been used to make claims for work, they could have been worth up to $22,000. Prosecution is pending in state court on state charges of theft and public bribery.

DoT-OIG and the Federal Highway Administration (FHWA) in Baton Rouge visited the Twin-Spans Bridge which crosses over Lake Pontchartrain from Slidell to New Orleans. It was heavily damaged during Hurricane Katrina and temporarily repaired pending a new bridge being

built. During the visit the contracted maintenance crew reported the steel bolts securing the temporary spans were breaking faster than they could be replaced and they feared a serious traffic accident would soon occur. Some of the questioned bolts were recovered and it was arranged to have these bolts tested by Louisiana DoTD labs. Subsequent testing revealed the sample bolts were found not to be defective. DoT then coordinated with FHWA and the Federal Motor Carrier Safety Administration to have the Louisiana State Highway Patrol enforce speed and weight restrictions on the bridge. FHWA also agreed to pay the Highway Patrol overtime in support of their efforts. Subsequent maintenance efforts have revealed a substantial reduction in breakage of bolts, thus preventing failure of the temporary spans, and a potentially serious traffic accident. The bridge is scheduled to be replaced in three years at a cost of $800 million.

In its efforts to assure the integrity of its Disaster Relief efforts, DoT-OIG cross-checked its list of DoT contractors against the FBI database of complaints and found no criminal complaints had been received against the contractors on its list. It also provided its list to Department of Labor to review for indicators of organized crime activities. Results of their review are pending.

DoT-OIG conducted liaison with dozens of local, state, and federal agencies involved in the Disaster Relief Efforts to monitor appropriate usage of DoT emergency funding. It conducted fraud awareness briefings to make the contracting community alert to some of the criminal schemes DoT-OIG traditionally investigates and in particular, criminal activities the Hurricane Katrina Fraud Task Force was observing as ongoing trends.

- **General Services Administration Office of Inspector General (GSA-OIG)**

The GSA-OIG has participated in the Hurricane Katrina Fraud Task Force since November 2005. The GSA-OIG has provided the task force with information regarding contracts that were facilitated by GSA, via GSA contracting officers on behalf of FEMA and on GSA contracts. The GSA-OIG special agents began their assignment on-site at the Task Force command center to ensure effective liaison with the task force, and since then have attended most task force meetings.

The GSA-OIG has received four allegations of contract fraud related to Hurricane Katrina and Rita. Based on these allegations, the GSA-OIG has opened three investigations, which have been conducted with other agencies of the Task Force. The contracts being investigated involved procurements made by GSA contracting officials for FEMA. The first investigation resulted in administrative recoveries by FEMA of approximately $1.5 million in billing errors by the contractor. The second investigation resulted in the filing of a civil compliant and the garnishment of approximately $1.4 million from the contractor. The third investigation is still being actively worked.

c. Other Agencies and Organizations

- **Department of Labor Wage & Hour Division**

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The Department of Labor's Employment Standards Administration's Wage & Hour Division (WHD) has been a member of the Department of Justice Hurricane Katrina Fraud Task Force since April 3, 2006. The WHD's mission is to "promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce." WHD enforces the labor standards contained in some of the most comprehensive and basic laws governing the employment relationship, including the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA) and the prevailing wage requirements of the Davis-Bacon Act (DBA) and the Service Contract Act (SCA).

Immediately after the Gulf Coast hurricanes, WHD became concerned about the opportunity for violations of federal wage payment laws. WHD anticipated an influx of new workers in the region due to the many debris removal and reconstruction projects. The potential for exploitation of these workers is high, particularly due to the fact that many of them are recent immigrants and/or do not speak English; they are easily susceptible to non-payment of wages. In addition, due to the fact that the cleanup and rebuilding efforts currently underway in the Gulf Coast are, in large part, being completed pursuant to federally-funded contracts, WHD expected a high degree of DBA and SCA coverage of employees. Moreover, many of the contractors employ multiple tiers of subcontractors, some of whom are inexperienced with and/or unknowledgeable about the wage payment requirements under federally-funded contracts and may want to seize upon the post-hurricane conditions to exploit the situation.

As a result, WHD set up an internal Gulf Coast Task Force to deal with the anticipated problems of non-payment and underpayment of wages to workers in the Gulf Coast. WHD provided assistance to its existing staff in the Gulf Coast region by detailing additional investigators to WHD's New Orleans, Louisiana, and Gulfport, Mississippi, offices on a rotating basis. Since January 2006, WHD has deployed up to 11 additional investigators and managers in the Gulf Coast area to supplement the approximately twenty-six (26) staff members assigned on a permanent basis to its Gulf Coast offices in Mobile, Alabama; New Orleans, Baton Rouge, and Lafayette, Louisiana; and Gulfport, Jackson, and Hattiesburg, Mississippi.

As a result of the efforts of WHD's Gulf Coast team, since August 29, 2005, WHD has investigated nearly 300 employers in hurricane-related investigations, potentially impacting over 8,600 employees. WHD has concluded 111 of these cases and has recovered nearly $1.4 million in back wages. WHD's efforts include the following.

In January 2006, WHD recovered $141,887 in back wages for 106 employees of a debris removal subcontractor at the Naval Construction Battalion Center in Gulfport, Mississippi, following an investigation under the SCA and the Contract Work Hours Safety Standards Act. In June 2006, WHD collected $362,673 in back wages for 680 employees of three companies involved in the clean-up and reconstruction of casinos along the Mississippi Gulf Coast. In July 2006, WHD recovered a total of $181,689 in back wages for 164 employees who performed debris removal for three different companies in the Gulf Coast region. These three lower-tiered

government subcontractors agreed to pay their workers back wages following investigations under the McNamara-O'Hara Service Contract Act.

In addition, WHD has requested that federal contracting agencies (e.g., FEMA, Army Corps of Engineers, Department of the Navy) withhold in excess of $2 million from federally-funded contracts, allowing WHD to ensure that employees of contractors and sub-contractors will be paid the wages they are due under the law. Finally, WHD has worked extensively to provide outreach and education about the laws it enforces to employers and employees of the Gulf Coast region to ensure employers are aware of their wage payment obligations and employees are aware of their rights.

- **Federal Trade Commission (FTC)**

As a member of the Task Force, the Federal Trade Commission reports that it continues to commit its expertise and resources to assist hurricane victims regain control of their financial lives and avoid scams, and to ensure that Americans' generous charitable donations are not siphoned off by bogus fundraisers. Since August 29, 2005, the Commission's principal contributions to the Task Force efforts have been: (1) to use its existing capabilities to provide a central repository for hurricane-related fraud and identity theft complaints, and making them available to state and federal criminal law enforcement agencies; and (2) to educate consumers on ways to avoid fraud and identity theft.

The Commission receives complaints through its toll-free hotline and online complaint forms, as well as from external database contributors. FTC staff has developed a code for hurricane-related complaints in Consumer Sentinel, its online fraud complaint database, to make it easy for FTC staff, Task Force members, and more than 1,400 other law enforcement agencies to identify these post-hurricane scam complaints. Between August 29, 2005 and July 20, 2006, the FTC has received 524 hurricane-related complaints. It also has received 777 identity theft complaints during this time period, the most common complaint relating to imposters applying for government benefits in the victim's name. To provide law enforcement with better access to the hurricane-related complaints, the FTC developed specialized data reports based on complaints related to post-hurricane scams and identity theft. It posted links to these custom reports on Consumer Sentinel, thus facilitating law enforcement access to these case leads. The FTC further reviews all complaints received to identify trends and possible targets for investigation or referral to criminal authorities.

When Hurricane Katrina hit, the FTC quickly drafted new education materials to address the many financial challenges faced by those affected by the storm, the heightened risk of identity theft, and the need for consumers to be on alert for scams involving, among other things: contractor and home repair, deceptive spam, job offers, rental listings, auto repair, and water treatment devices. Additionally, the FTC set up a Hurricane Recovery website. The website (in English and Spanish), created to provide important information to families and businesses affected by the hurricanes, has received more than 112,000 accesses since its launch in September. Agencies and organizations linking to the site include: MyMoney.gov; the Federal

Reserve Board; the Federal Deposit Insurance Corporation; Consumers Union; and the JumpStart Coalition for Personal Financial Literacy.

The FTC also distributed a series of live-read public service announcements ("PSAs") to radio stations across the country. These PSAs use the DOJ Hurricane Fraud Task Force name. Two sets of PSAs were distributed: one, e-mailed to 584 radio stations in the states affected by Hurricanes Katrina and Rita, included three messages in 30-second and 15-second formats, in both English and Spanish: 1) Beware of charity fraud; 2) Beware of home repair fraud; and 3) Protect yourself against identity theft. The second set of PSAs was mailed to 5,712 stations in the states that were not directly impacted by either Hurricane. This package contained 30-second and 15-second PSAs in English and Spanish cautioning consumers to beware of charity fraud.

Based on responses from radio stations as of January 5, 2006, there were more than 17,900 reported airings of the English-language spots. The average number of airings per station was 89; the total audience impressions exceeded 38 million. The Spanish-language spots saw more than 6,270 reported airings; the average number of airings per station was 118; the total audience impressions exceeded 11 million.

Finally, the University of Houston Law School's Center for Consumer Law sponsored a workshop for hurricane evacuees and the FTC sent 850 pre-stuffed bags of materials (hurricane-related fraud alerts) which were distributed to the evacuees.

- **American Red Cross**

As part of concerted efforts to address system weaknesses discovered during the hurricanes of 2005, the American Red Cross reports that it continues to implement vigorous internal controls that will assist it in the detection and prevention of fraud, waste and abuse. Key examples of these controls are:

- Requiring background checks for all staff and volunteers to better protect Red Cross assets and the safety of disaster shelter residents;
- Encouraging whistleblowers to bring forward allegations of potential fraud, waste, abuse and wrong-doing by enhancing awareness of the features of the Concern Connection hotline and by standardizing the training module that new volunteers and staff receive regarding how to access and use the hotline;
- Creating and deploying a new staff unit dedicated to ensure that on-site controls are properly established at the beginning of large operations and that compliance with these controls is monitored throughout the disaster response;
- Clarifying and disseminating eligibility standards for financial assistance;
- Requiring supervisors, using analytical tools, to liberally review and sample caseworkers' files to audit the casework;
- Increasing controls training for staff in charge of all Red Cross service centers and disaster operations centers of a certain size; and

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- Providing training to all chapters on the use of Client Assistance Cards and the appropriate controls.

The Office of Investigations, Compliance and Ethics reports that it currently is investigating 8,440 allegations of wrongdoing (95 percent of which are allegations of client financial assistance fraud). Of the 8,440 total allegations, 2,937 are under investigation by law enforcement agencies, 1,609 are in the process of being turned over to law enforcement, and 3,894 are currently under review and investigation by the Office of Investigation, Compliance and Ethics. To date, the fraud allegations constitute less than one half of one percent of the financial assistance provided to hurricane victims.

E. Training and Proactive Detection

The Task Force's first New Orleans Conference, in October 2005 (see Figure 6), provided the Task Force with its first opportunity to provide training to federal prosecutors and agents on investigating and prosecuting disaster fraud-related cases. Since then, the Task Force has provided additional training at the Command Center for federal agents, prosecutors, and auditors on legal and practical issues stemming from disaster-related fraud. Experienced Department of Justice prosecutors from the Criminal and Antitrust Divisions highlighted key criminal offenses that could be applied in various fraud schemes, and Postal Inspectors from the Postal Inspection Service and Special Agents from the FBI and the U.S. Secret Service offered practical guidance on how to investigate these offenses. In addition, the Command Center has conducted more extensive training for Gulf Coast-based Assistant United States Attorneys and



Figure 6 - Attorney General Alberto R. Gonzales Addresses Hurricane Katrina Fraud Task Force Conference, New Orleans, October 20, 2005 [Right: Assistant Attorney General Alice S. Fisher, Chairman of the Task Force]

other agencies at the Command Center. It continues to play a significant role in proactively identifying patterns of potentially fraudulent activity in applications for disaster-related benefits.

Recently, the Department of Justice's Office of Legal Education decided to issue a manual for federal prosecutors on disaster-related fraud. This manual will have chapters written

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by experienced federal prosecutors on all significant aspects of disaster-related fraud. The manual is expected to be published in late 2007.

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V. Future Plans and Responses

Figure 7 - Road in the Ninth Ward of New Orleans, Cleared of Debris After Hurricane Katrina



[Source: David Dugas]

Based on the Task Force's experience to date, it is clear that fraud will exist wherever significant funds are being distributed. Although considerable individual assistance funds have already been distributed, billions of dollars remain to be disbursed designed to repair damaged homes and rebuild infrastructure. When these amounts are disbursed, it is likely that many will attempt to obtain funds to which they are not entitled. Therefore, the Task Force has been working closely with administering agencies to ensure that adequate fraud-prevention measures are in place.

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A. CDBG Grants

In response to the devastation that last year's hurricanes caused for homeowners throughout the Gulf Coast Region (see Figure 8 below), Congress has authorized more than $15 billion in CDBG grants for the states affected by Hurricanes Katrina and Rita. The bulk of that money will go to Louisiana and Mississippi.

Figure 8 - Home in Waveland, Mississippi Destroyed by Hurricane Katrina



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The Hurricane Katrina Fraud Task Force, led by HUD-OIG and the U.S. Attorney's Offices in Louisiana and Mississippi, has used the experience gained through its investigations and prosecutions during the past year to provide advice to the Louisiana Recovery Authority and the Mississippi Development Authority to help design fraud prevention measures for the Community Development Block Grant (CDBG) programs that each state is implementing.

Both Louisiana and Mississippi have elected to spend approximately three-fourths of their CDBG grants to assist homeowners whose homes were destroyed or substantially damaged by the hurricanes. In each state, homeowners will be eligible for grants of up to $150,000. It is estimated that there are more than 130,000 eligible recipients in the two states. The potential for fraud in those programs is massive. However, each state has agreed to adopt anti-fraud measures recommended by the Task Force that should greatly reduce the fraud associated with those

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programs. In addition, each state has agreed to form anti-fraud task forces consisting of federal, state, and local prosecutors and investigators who will work together in conjunction with the Hurricane Katrina Fraud Task Force to investigate and prosecute any fraud that occurs.

The Task Force recognizes that, since fraud follows the money, successful anti-fraud measures that prevent theft or diversion of CDBG funds during the application and grant disbursement phases of the program will likely cause criminals to target the money after it is received by the individual grantees. To combat this, the Task Force is working with state authorities on public outreach and fraud awareness programs to educate grant recipients on how to protect themselves from these schemes. In addition, the Joint Command Center will track fraud complaints related to the CDBG programs and look for signs of consumer fraud related to the program.

B. Infrastructure Rebuilding and Public Assistance Grants

The Criminal Division of the Department of Justice is working closely with the FBI and with auditors and investigators of key Inspectors General offices to gather and analyze information on Infrastructure Rebuilding programs in order to detect, investigate and prosecute fraud and corruption related to those programs. The close collaboration of the member agencies of the Task Force will enable the Task Force to use the resources and expertise of each agency in a coordinated and effective manner for this purpose. In addition, the fraud exposed by Task Force investigations and prosecutions to date has led to closer scrutiny of grant applications and claims for reimbursement by both federal and state auditors and Inspectors General. In some cases, audits of invoices and claims for reimbursement are being conducted before payment is issued, rather than after payment has been made as has been the practice following previous disasters. The information gathered through these processes is being analyzed for indicia of fraud or corruption and any leads are referred for investigation by the appropriate agency field office and U.S. Attorney's Office.

C. SBA Loans

The SBA has approved more than $10 billion in disaster assistance loans to businesses and individuals affected by Hurricanes Katrina and Rita. SBA-OIG has actively participated in the Task Force work to date and will continue to work with the Task Force to investigate and prosecute fraud related to its disaster loans.

* * *

As each of these programs moves forward, the Task Force will continue its vigorous pursuit of procurement fraud, benefit fraud, and the other forms of disaster-related fraud that have consistently been the focus of its efforts.

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Reporting Hurricane-Related Fraud

- Government Fraud and Public Corruption:

  - Call the FBI's tipline at 1-800-CALL FBI (1-800-225-5324)
  - Call the Hurricane Fraud Hotline at 1-866-720-5721
  - Email HKFTF@leo.gov
  - Fax the Hurricane Fraud Hotline at 225-334-4707
  - Write to Hurricane Fraud Task Force, Baton Rouge, LA 70821-4909

- Charity Fraud, Emergency-Benefit Fraud, and Other Types of Consumer Fraud:

  - Call the FTC's Consumer Response Center, toll-free, at 1-877-FTC-HELP (1-877-382-4357), or
  - File an online complaint with the Internet Crime Complaint Center (a joint project of the FBI and the National White Collar Crime Center) at http://ic3.gov

- Identity Theft:

  - Call the FTC's Identity Theft Hotline, toll-free, at 1-877-ID-THEFT (1-877-438-4338), or
  - File an online complaint with the FTC at http://www.consumer.gov/idtheft/

* * *

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United States Department of Justice
Privacy and Civil Liberties Office
Initial and First Annual Report to Congress

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Attorney General Alberto R. Gonzales has appointed me the Department of Justice's first Chief Privacy and Civil Liberties Officer. In that capacity, I am pleased to submit this report to apprise you of our current efforts (it may also be obtained online at our website, http://www.usdoj.gov/pclo).

The Attorney General and the Department of Justice are emphatically committed to protecting the privacy and civil liberties of the American people. The new Privacy and Civil Liberties Office I lead helps to shape and refine Departmental policies and procedures affecting privacy and civil liberties, particularly in the context of the Department's counterterrorism and law enforcement efforts. I believe you will conclude from this report that our Office has been quite active in this mission.

I speak for myself, my Office and my Department when I say that we look forward to working together and with Congress to ensure that the nation is kept safe, that justice is served, and that privacy and civil liberties are respected in the process.

Jane C. Horvath
Chief Privacy and Civil Liberties Officer

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Mission

The fundamental mission of the Department's Privacy and Civil Liberties Office is to ensure that due consideration and regard for information privacy and civil liberties are given in the formulation and execution of Departmental programs and policies.

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Evolution of the Privacy and Civil Liberties Office

1998	Responding to concerns that "[i]ncreased computerization of Federal records [relating to individuals] permits this information to be used and analyzed in ways that could diminish individual safeguards in the absence of additional safeguards," President William J. Clinton directs each executive agency head to "designate a senior official within the agency to assume primary responsibility for privacy policy." Memorandum on Privacy and Personal Information in Federal Records, 34 Weekly Comp. Pres. Doc. 870 (May 14, 1998). Accordingly, the Department of Justice appoints a Privacy Officer in the Office of the Deputy Attorney General. The position is held by various Associate Deputy Attorneys General (each of whom held other duties beyond privacy protection), until Attorney General Alberto R. Gonzales appoints Jane C. Horvath as Chief Privacy and Civil Liberties Officer in February 2006.
2002	Intending to "provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws," Congress passes the E-Government Act of 2002 (Pub. L. No. 107-347), Section 208 of which requires federal agencies to prepare "Privacy Impact Assessments" before developing or procuring certain kinds of information technology that collect information in identifiable form.
2003	In the Committee Report (H.R. Rep. 108-221) accompanying H.R. 2799, the House Appropriations Committee directs the Attorney General "to designate a senior policy official to assume responsibility for developing appropriate civil rights safeguards specifically related to the war on terrorism and for coordinating the work of the Office of Inspector General, the Civil Rights Division, the U.S. Attorneys, and the various other Justice Department entities to ensure effective oversight of Departmental activities in this area."
2004 December 8	Congress approves the Conference Committee Report (H.R. Conf. Rep. No. 108-792) accompanying H.R. 4818, the Consolidated Appropriations Act, Fiscal Year 2005 (Pub. L. No. 108-447). In the Joint Explanatory Statement appended to the Report, the Conference Committee directs that not less than $690,000 for salaries and benefits be paid to an "Office of Privacy and Civil Liberties," with funding for two additional professional staff positions.

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2004 December 17	In Section 1062 of its sweeping reorganization of the intelligence community in the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-796), Congress declares its sense that "each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer."
2005 February 11	The Office of Management and Budget (OMB) issues Memorandum 05-08, which requires the head of each executive agency to identify to OMB a senior official with "overall agency-wide responsibility for information privacy issues."
2006 January 5	President George W. Bush signs into law H.R. 3402, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. No. 109-162), which directs the Attorney General "to designate a senior official in the Department of Justice to assume primary responsibility for privacy policy."
2006 February 21	Attorney General Alberto R. Gonzales appoints Jane C. Horvath as the Department's first Chief Privacy and Civil Liberties Officer.

Before the creation of the Privacy and Civil Liberties Office, several offices within the Department dealt with the various facets of privacy policy.

Office of Information and Privacy (OIP)

While its primary responsibilities were Freedom of Information Act matters, OIP also handled Privacy Act issues. OIP's Privacy Act functions and three staff attorneys have been transferred to the new Privacy and Civil Liberties Office, and the Department intends to rename OIP the "Office of Freedom of Information" to reflect its new role.

Justice Management Division (JMD)

Office of the General Counsel (JMD OGC). JMD OGC handled privacy issues as needed, generally in close consultation with OIP. JMD OGC will continue to work with the Privacy and Civil Liberties Office on certain privacy matters.

Office of the Chief Information Officer (JMD OCIO). JMD OCIO handled a variety of tasks with connections to privacy matters -- most specifically, responsibilities connected with Privacy Impact Assessments. JMD OCIO will continue to have review and reporting requirements relating to Privacy Impact Assessments.

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Civil Division

The Civil Division had and still has primary responsibility for litigating all privacy-related civil cases on behalf of the United States.

Federal Bureau of Investigation (FBI)

Office of the General Counsel. The Deputy General Counsel in FBI's Office of General Counsel served and still serves as the Bureau's Senior Privacy Officer (SPO).

Office of the Deputy Attorney General

Until the appointment of the Chief Privacy and Civil Liberties Officer in February 2006, past Chief Privacy Officers, as Associate Deputy Attorneys General, operated out of the Office of the Deputy Attorney General. The Privacy and Civil Liberties Office similarly operates out of the Office of the Deputy Attorney General.

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Office Structure

As currently constituted, the Privacy and Civil Liberties Office is comprised of five attorneys, who function as follows:

Chief Privacy and Civil Liberties Officer: The Chief Privacy and Civil Liberties Officer ensures that due consideration and regard for information privacy and civil liberties are given in the formulation and execution of Departmental programs and policies. She oversees the Privacy and Civil Liberties Office and chairs the Department's Privacy and Civil Liberties Board, comprised of representatives of certain Departmental components.

Deputy Chief Privacy and Civil Liberties Officer: The Deputy Chief Privacy and Civil Liberties Officer supports the Chief Officer in oversight of the Privacy and Civil Liberties Office.

Senior Counsel and Counsels to the Privacy and Civil Liberties Office

- *Privacy Act, Information Sharing, and Civil Liberties*: One Senior Counsel and one Counsel handle Privacy Act issues, including implementation, interpretation and guidance. They are also responsible for privacy and civil liberties issues raised by the Department's information sharing, law enforcement, and national security efforts.

- *E-Government, Federal Information Security Management Act, and Civil Liberties:* One Counsel handles E-Government issues, the privacy requirements of the Federal Information Security Management Act, and privacy and civil liberties issues relating to data collection, aggregation, and management.

Additionally, a Senior Counsel in the Office of the Deputy Attorney General assists the Privacy and Civil Liberties Office as needed.

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Duties of the Privacy and Civil Liberties Office

As to privacy issues, the delineated responsibilities of the Chief Privacy and Civil Liberties Officer are to advise the Attorney General regarding:

1) appropriate privacy protections, relating to the collection, storage, use, disclosure and security of personally identifiable information, with respect to the Department's existing or proposed information technology and information systems;
2) privacy implications of legislative and regulatory proposals affecting the Department and involving the collection, storage, use, disclosure and security of personally identifiable information;
3) implementation of policies and procedures, including appropriate training and auditing, to ensure the Department's compliance with privacy-related laws and policies, including section 552a of title 5, United States Code, and section 208 of the E-Government Act of 2002 (Pub. L. 107-347);
4) ensuring that adequate resources and staff are devoted to meeting the Department's privacy-related functions and obligations;
5) appropriate notifications regarding the Department's privacy policies and privacy-related inquiry and complaint procedures; and
6) privacy-related reports from the Department to Congress and the President.

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, section 1174.[1]

Toward these ends, the Privacy and Civil Liberties Office participates actively in Departmental policymaking, ensuring regard for privacy and civil liberties at the earliest stages of Departmental proposals.

One of the Privacy and Civil Liberties Office's first efforts was to launch a Departmental Privacy and Civil Liberties Board. Chaired by the Chief Privacy and Civil Liberties Officer, the Board consists of representatives at the Deputy or Assistant Director level (or equivalent) of the Federal Bureau of Investigation; Drug Enforcement Administration; Criminal Division; Civil Division; Civil Rights Division; Office of Legal Policy; Executive Office for United States Attorneys; Terrorist Screening Center; Office of Public Affairs; Bureau of Prisons; United States Marshals Service; Bureau of Alcohol, Tobacco, Firearms & Explosives; National Security Division; Office of Intelligence

[1] This law also provides that this initial report be submitted, as well as annual reports on "activities of the Department that affect privacy, including a summary of complaints of privacy violations, implementation of section 552a of title 5, United States Code, internal controls, and other relevant matters." *Id*. In order to provide you one comprehensive, efficient report, the Office has combined its interim report and first annual report into this document. Accordingly, please note, then, that no privacy violations have been reported to the Office, either by citizens or by the Departmental components.

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Policy and Review; Justice Management Division; Office of Information and Privacy; and Office of Intergovernmental and Public Liaison. The Board exists to:

1) examine the Department's activities to ensure that they fully protect the privacy and civil liberties of all Americans;

2) recommend policies, guidelines, and other administrative actions; and

3) refer credible information pertaining to possible privacy or civil liberties violations by any federal employee or official to the appropriate office for prompt investigation.

For assistance in fulfilling its responsibility to inform Departmental policy development, the Privacy and Civil Liberties Office engages in dialogue with the privacy community and facilitates contact between the privacy community and the Department of Justice. This includes meetings with representatives from groups such as the American Civil Liberties Union, the Center for Democracy and Technology, the Cato Institute and the Heritage Foundation. The Office also consults with experts in the field such as the former Chief Counselor for Privacy in the Office of Management and Budget, and the Executive Director of the Center for Information Policy Leadership at Hunton & Williams LLP. These meetings lead to more knowledgeable policymaking and help foster understanding between governmental agencies and the broader community.

The Privacy and Civil Liberties Office also works closely with the Presidentially appointed, Senate-confirmed Privacy and Civil Liberties Oversight Board, which was established by the Intelligence Reform and Terrorism Prevention Act of 2004 and advises the President and other senior executive branch officials regarding protection of privacy and civil liberties in the implementation of laws, regulations, and executive branch policies related to counterterrorism efforts.

The Privacy and Civil Liberties Office represents the Department through public speaking appearances and participation in various working groups. For example, Ms. Horvath recently made a presentation on the defense of civil liberties to two hundred attorneys at the National Law Enforcement Advisors Conference. The Privacy and Civil Liberties Office also recently sponsored (through the Department's Bureau of Justice Assistance) an intergovernmental focus group on privacy and civil liberties, participated in by representatives of states, localities and tribes, as well as by the Civil Liberties Protection Officer for the Director of National Intelligence, and the Privacy Office of the Department of Homeland Security. One interdepartmental issue of particular interest is redress for those misidentified on airline watch lists. The Office is working actively with the Department's Terrorist Screening Center, as well as the Office of the Director of National Intelligence, the Department of Homeland Security and the Privacy and Civil Liberties Oversight Board to address watch list redress issues.

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Activities of the Privacy and Civil Liberties Office

The Privacy Act

It is simply impossible for the government to function without a certain amount of information about individuals; yet with this reality comes the great responsibility of managing and protecting such information. The balance between the government's need to maintain information about individuals and the individual's right to be protected from unwarranted invasions of personal privacy is at the core of **the Privacy Act** of 1974, 5 U.S.C. § 552a. The Privacy Act establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies.

A system of records is a group of records under the control of a federal agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual. The Privacy Act requires that federal agencies announce new systems of records via publication in the Federal Register, thereby informing the public of certain categories of information that the agencies are maintaining on individuals, the main purposes of the systems, and anticipated routine uses of the records maintained in the systems. In order to ensure that the Department complies with these system of records notice requirements, the Privacy and Civil Liberties Office works with Departmental components in the preparation of System of Records Notices (SORNs) by reviewing (and drafting, as needed) Department-wide and component SORNs, with particular attention to the routine uses included in the SORNs, giving full consideration to associated compatibility issues.

At the heart of the Privacy Act is its general prohibition on the disclosure of information from a system of records absent the written consent of the subject individual, unless the disclosure is pursuant to one of twelve statutory exceptions. Consistent with the Act's other purposes that incorporate the fair information practices, it provides individuals with a means by which they may seek access to and amendment of records about themselves.

Responsible for providing Department-wide counsel on all aspects of the Privacy Act, the Privacy and Civil Liberties Office offers guidance on numerous matters including disclosure, maintenance, access and amendment, and safeguarding of Privacy Act-protected information. The Office also advises components regarding Privacy Act implications in connection with litigation and legislative issues; offers analysis of Privacy Act case law and OMB guidance; develops and conducts Privacy Act training; and provides guidance on Privacy Act regulations.

The E-Government Act

The E-Government Act of 2002 establishes requirements for agencies' use of information technology. Most relevant to the mission of the Privacy and Civil Liberties Office are the requirement (set out in Section 208) that agencies conduct Privacy Impact Assessments (PIAs) of information technology systems that gather certain identifying

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information about individuals, and the reporting requirements for agencies with regard to information security.

A PIA analyzes how information in identifiable form is collected, stored, protected, shared, and managed, and its purpose is to demonstrate that system owners and developers have consciously incorporated privacy protections throughout the entire life cycle of a system. The E-Government Act requires that PIAs be made publicly available, unless doing so would reveal particular classified or sensitive information.

The Privacy and Civil Liberties Office determined that the PIA process within the Department would be much more effective if all components were working from a standard template with standard guidance. Accordingly, utilizing some of the aspects of the Department of Homeland Security's model, the Office drafted official PIA guidance; a Privacy Threshold Analysis to determine whether a PIA is required; and a new PIA Template. Additionally, the Office maintains a listing of completed PIAs (available online at http://www.usdoj.gov/pclo/pia.htm).

The Office has also worked with the Department's Office of the Chief Information Officer to integrate the Privacy Threshold Analysis into the Department's "Trusted Agent" system (a computerized system used for tracking compliance with various aspects of the Federal Information Security Management Act), thereby automatically integrating the Privacy Threshold Analysis into the system development process. The Office is also working with the OCIO to integrate the PIA into the same Trusted Agent system.

The Office answers questions from Departmental employees about completing PIAs and will soon conduct PIA training. The Office has advised state, local, and tribal representatives on the efficacy of the PIA in protecting privacy at the start of an information technology program. The Office's goal is to ensure that the Department looks at the privacy impact of each information technology system at its beginning.

Federal Information Security Management Act (FISMA)

The primary purpose of **FISMA** is to "provide a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets." 44 U.S.C. § 3541. FISMA recognizes the inter-relation between security and privacy, as well as the fact that effective security tools are needed to protect the privacy of information collected by information technology tools. Therefore, the Office works with the Department's OCIO to ensure that privacy protection is considered in information technology security decisions. Also, the Office is responsible for privacy-related portions of the Department's FISMA reporting requirements.

Information Sharing

Among the many important responsibilities that lie with the Privacy and Civil Liberties Office are its privacy and civil liberties responsibilities related to information sharing initiatives. The Chief Privacy and Civil Liberties Officer co-chairs the

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President's Information Sharing Environment Guideline 5 Working Group, along with the Civil Liberties Protection Officer for the Directorate of National Intelligence. Guideline 5 of the December 16, 2005 Memorandum from President George W. Bush requires that the Attorney General and the Director of National Intelligence "develop guidelines designed to be implemented by executive departments and agencies to ensure that the information privacy and other legal rights of Americans are protected in the development and use of the [Information Sharing Environment], including in the acquisition, access, use, and storage of personally identifiable information." The Working Group has developed these guidelines for presidential approval.

The Privacy and Civil Liberties Office also has participated in the launching of the "One-DOJ" environment, which facilitates the sharing of Departmental information with regional partners through the Department's Regional Data Exchange System. As this program was developed, the Office's staff attorneys assisted in the identification and resolution of complex and technical legal issues, drafted the system's SORN, and participated in the drafting and review of its Privacy Impact Assessment and the memoranda of understanding among parties participating in the system.

The Office also works on other information sharing programs such as the National Data Exchange System and "fusion centers," to ensure that privacy laws are complied with and that privacy and civil liberties principles are respected from the programs' earliest stages.

Data Management and Data Security

The Privacy and Civil Liberties Office is working with the Department's OCIO on issues of data management, especially the issue of data security. The Office has issued general guidance to remind employees of their duty to protect personal information and has tasked Department component heads to designate liaisons who will report any significant data breaches to the Chief Privacy and Civil Liberties Officer.

Legislative and Policy Review

The Privacy and Civil Liberties Office works closely with the Department's Office of Legislative Affairs (OLA) to review bills concerning individual privacy matters, civil liberties issues, the collection of personal information, agency disclosure policies, or information sharing with the Department's partners. On any typical day, it is not uncommon for the Privacy and Civil Liberties Office to provide comments on numerous legislative proposals.

The Privacy and Civil Liberties Office also participates in the process of policy drafting by the Department's Office of Legal Policy (OLP). Recently, for example, the Privacy and Civil Liberties Office worked with OLP to finalize the Attorney General's Report on Criminal History Background Checks.

Outreach

The Privacy and Civil Liberties Office actively participates in public outreach activities. In addition to public speaking engagements and active dialoguing with the

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privacy community, the Office participates, for example, in outreach efforts sponsored by the Department's Civil Division with regard to Arab, Muslim and Sikh communities.

International Efforts

One of the Privacy and Civil Liberties Office's goals is to promote international cooperation and understanding of privacy issues relevant to the Department's mission and operations. In support of the Department's mission, the Office:

- Enhances the Department's information-sharing opportunities with our international partners by providing educational outreach and leadership in areas such as privacy impact assessment;
- Interprets international data protection frameworks;
- Counsels the Department and other agency partners on existing and emerging changes in privacy practices and policy approaches globally;
- Engages in dialogue with international privacy commissions and bilateral partnerships, including the European Union, while also leveraging opportunities for dialogue in multilateral forums; and
- Provides counsel and oversight for international agreements related to personal information collection and sharing that impacts the Department's mission; and
- Educates foreign officials on U.S. efforts to protect privacy and civil liberties.

Privacy and Civil Liberties Board

As noted above, the Privacy and Civil Liberties Office has established and regularly convenes a Departmental Privacy and Civil Liberties Board, consisting of senior representatives of the Department's law enforcement and national security components, among others. The Office has divided the Board into three committees, which meet monthly to analyze and report on current important issues. Presently the committees are viewed as internal resources and only issue internal advice, but over time their mission might evolve to meet the goals of the Office and the Department.

- **Outreach Committee**

  This Committee assesses how the Department currently handles outreach to religious or ethnic communities that might be particularly affected by Departmental policy. Currently the Committee is preparing a report on existing efforts taken to improve relations and understanding with affected communities. The goal of the report is to provide better awareness of and coordination among Department initiatives.

- **Law Enforcement and National Security Committee**

  This Committee addresses privacy concerns in the realms of law enforcement and national security. It is currently examining issues such as DNA matching and redress for individuals inappropriately identified on "watch lists."

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- **Data Collection, Aggregation and Maintenance Committee**

  This Committee addresses issues related to information privacy within the Department. Its first task is to respond to recommendations in the April 2006 Government Accountability Office report, titled "Personal Information Agency and Reseller Adherence to Key Privacy Principles." To that end, the Committee is analyzing the Department's use of information reseller data – particularly any obtained from Internet data brokers – and will evaluate potential Department-wide policy with regard to such use.

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Training and Education

One way to ensure that the Privacy and Civil Liberties Office's mission is successful is through a vigorous education and training program. The Office has already launched two initiatives and has plans for broader privacy training in the coming months.

The first initiative was to issue a Departmental Memorandum regarding Safeguarding of Information, which reminded Departmental employees of their responsibilities and duties in safeguarding personally identifiable information. The second initiative was Privacy Impact Assessment training. The Office recently conducted its first annual Privacy Impact Assessment half-day training session, which was attended by over seventy-five Departmental employees and featured presentations on the Privacy Act, FISMA and PIA preparation. In addition to instruction, it featured hands-on exercises such as preparation of a draft PIA based on a model question. From the feedback received, the Office believes that the training was a success.

In the next several months the Office hopes to establish privacy awareness training for all Department employees, to ensure that they are fully informed about how to handle personally identifiable information in a responsible and appropriate manner.

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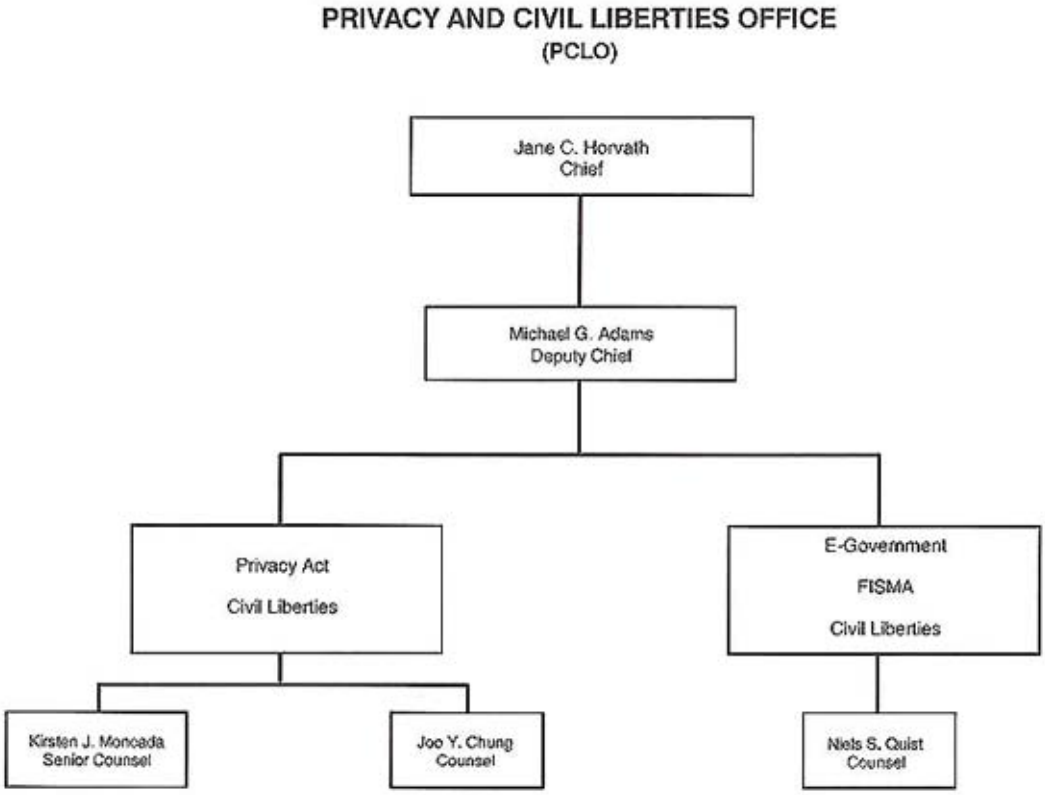
Conclusion

At the launch of the Department's Privacy and Civil Liberties Board, the Deputy Attorney General remarked, "We at Justice are responsible for enforcing the laws. We should be the role model for ensuring that American's privacy and civil liberties are adequately protected in everything that we do."

In its short history, the Privacy and Civil Liberties Office already has become an important part of the Department's structure. In the coming months the Office plans to further its integration into the Department. Being part of the Office of the Deputy Attorney General uniquely positions the Office on the front line of all new Departmental programs. It remains the Office's goal to ensure that privacy and civil liberties are considered and protected in carrying out the Department's mission.

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Appendix – Organizational Chart of the Privacy and Civil Liberties Office



12f-000911



United States Interagency Council on Homelessness

FINAL REPORT TO CONGRESS:

ENSURING THE EDUCATION RIGHTS OF HOMELESS CHILDREN AND YOUTH:

Assessing Federal Agency Guidance to Grantees of Homeless Assistance Programs Regarding the Education Rights of Homeless Children and Youth

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October 25, 2006

United States Interagency Council on Homelessness
Federal Center SW ◆ 409 3rd Street, SW, Suite 310 ◆ Washington, DC 20024
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12f-000912

ENSURING THE EDUCATION RIGHTS OF HOMELESS CHILDREN AND YOUTH:

Assessing Federal Agency Guidance to Grantees of Homeless Assistance Programs Regarding the Education Rights of Homeless Children and Youth

Final Report

October 25, 2006

I. INTRODUCTION

This Final Report is hereby submitted by the United States Interagency Council on Homelessness (USICH) in response to a Congressional request as follows:

> The conferees direct the USICH to conduct an assessment of the guidance disseminated by the Department of Education, the Department of Housing and Urban Development, and other related Federal agencies for grantees of homeless assistance programs on whether such guidance is consistent with and does not restrict the exercise of education rights provided to parents, youth, and children under subtitle B of title VII of the McKinney-Vento Act. The assessment shall address whether the practices, outreach, and training efforts of said agencies serve to protect and advance such rights. The Council shall submit to the House and Senate Committees on Appropriations an interim report by May 1, 2006, and a final report by September 1, 2006. [1]

The report that follows, developed in consultation with Interagency Council member agencies, is in response to that request. Consistent with its statutory responsibility to review Federal activities and programs to assist persons experiencing homelessness, the United States Interagency Council on Homelessness (USICH) has undertaken preliminary steps reported here to assess Federal agency guidance and review issues related to education rights for key Federal agencies. As described here, the Council has conducted research, convened initial discussions with Federal agencies, and collected issue-related documents from several agencies. These actions are reviewed in this document.

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[1] House (Conference) Report 109-307, at 293 (on HR 2058, the "Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006", enacted as P.L.109-115.

II. SUMMARY - EDUCATION RIGHTS OF HOMELESS CHILDREN AND YOUTH

Authorized by the McKinney-Vento Homeless Assistance Act, the Education for Homeless Children and Youth program in the U.S. Department of Education is intended to ensure that all homeless children and youth have access to public education and other related services.

The McKinney-Vento Homeless Education Assistance Improvements Act of 2001 was included in the No Child Left Behind Act of 2001 (P.L. 107-110)(NCLB). The legislation reauthorized the Education of Homeless Children and Youth program.

Subtitle B, Title VII of the McKinney-Vento Act protects the rights of homeless children to go to school, continue in the school they last attended before becoming homeless (referred to as the "school of origin"), receive transportation to the school they last attended, participate in school programs with children who are not homeless, and receive the same special programs and services provided to all other children served in these programs.

The NCLB amendments incorporated previously issued Department of Education guidance on the definition of homeless persons into the statutory definition. The amendments also clarified requirements for school districts related to the provision of transportation to homeless children to their "school of origin," specified that homeless children and youth be enrolled in school immediately, and created mandates for the designation of a liaison for homeless students in each district.

Definition of Homelessness

The McKinney-Vento Act defines the term "homeless children and youths" for the Department of Education to mean:

> "(A) individuals who lack a fixed, regular, and adequate nighttime residence; and (B) includes – (i) children and youths who are sharing the housing of other persons due to a loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; (ii) children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings; (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and (iv) migratory children who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described above."(42 U.S.C. §11434a)

III. SUMMARY OF INTERIM REPORT

Consistent with Congressional direction, the Council produced an Interim Report which reflected background research on the McKinney-Vento education provisions, relevant regulations, and agency program guidance related to education rights. The Council convened a series of individual and interagency meetings with Federal agency representatives to focus on agency actions to ensure the education rights of homeless children. Agencies participating in these discussions have been the U.S. Departments of Agriculture, Education, Health and Human Services, Homeland Security/FEMA, Housing and Urban Development, Labor, and Veterans Affairs.

As part of the assessment process, the Council in December 2005 requested that key member Federal agencies review several initial questions in order to make a preliminary assessment of relevant agency programs where homeless children might be present, and the types of guidance and practices currently in place or planned that may address the issue of education rights and access.

The Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, and Labor provided such documentation to the Council. These documents, which were part of the Interim Report, are now posted at the Council's web site: www.usich.gov

IV. RECENT DEVELOPMENTS

Katrina Related Guidance

The Council requested that agencies submit any guidance or other materials related to post-Katrina actions that supported the education rights of homeless children and served to further those rights in the response to the effects of Katrina.

The Department of Education, which has reported to the Full Council at each meeting since Katrina on its efforts to meet the needs of affected students, provided the following summary of its Katrina-related actions.

Hurricane Education Recovery Act - Education for Homeless Youths

Continuing a recovery process that has aided hundreds of thousands of children, the U.S. Department of Education noted that more than $1.6 billion in funds from the Hurricane Education Recovery Act, signed by President Bush last December, has been made available to reopen schools in the Gulf Coast region and to help educate students across the country displaced or affected by Hurricanes Katrina and Rita.

- $880 million has been provided under the Emergency Impact Aid for Displaced Students (Impact Aid) Program to assist local educational agencies in 49 states and the District of Columbia in paying for the cost of educating students who were enrolled in public and non-public schools in hurricane-affected areas.

- $750 million was provided under the Immediate Aid to Restart School Operations (Restart Aid) Program to help reopen and restart damaged schools in the States most affected by the storms.

- $200 million for institutions of higher education has been sent to affected States.

- $5 million was provided under the Assistance for Homeless Youths (Homeless Aid) Program, to help State Education Agencies (SEAs) address the needs of students displaced by the storms.

The following eight States received funds under the Funds for Homeless Youths program: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Tennessee and Texas

Funds are available to assist Local Education Agencies (LEAs) in serving homeless children and youth displaced by Hurricane Katrina or Hurricane Rita. LEAs are to address the educational and related needs of these students consistent with section 723 of the McKinney-Vento Homeless Assistance Act (McKinney-Vento). The funds are available for obligation through September 30, 2007.

See ED resources and policy letters at: http://hurricanehelpforschools.gov/index.html

Department of Education Report

Subsequent to the preparation of the Council's Interim Report, the Department of Education submitted its *"Report to the President and Congress on the Implementation of the Education for Homeless Children and Youth Program under the McKinney-Vento Homeless Assistance Act,"* a five-year status report on the agency's activities to address the educational needs of homeless children and youth. The report is located at: http://www.ed.gov/programs/homeless/rpt2006.doc

The report notes the following points that the Council addresses in its recommendations:

- The reauthorized legislation requires every district to designate a local liaison to assist homeless children and youth with enrollment, raise awareness of issues related to homelessness and homeless education, and oversee the implementation of the law.

- Local liaisons often have other professional duties that compete with their efforts to serve homeless children and youth. SEAs report that the biggest challenge is very high turnover among local liaisons. Many State Coordinators have difficulty keeping an updated list of contacts and in providing training for the new liaisons who are continually assuming the role.

- Meeting the educational needs of homeless children and youth requires LEA coordination with other agencies. However, local service agencies sometimes have policies that are not aligned with LEA policies.

- ED supports State Coordinators for homeless education and school districts in implementing the McKinney-Vento Act in several ways. It provides technical assistance; develops guidance publications; disseminates awareness materials; collaborates with Federal, State, and local agencies; collects data; and awards funds to States.

- Local liaisons must ensure that public notice of the educational rights of homeless children and youth is posted throughout the LEA and community and that parents and guardians are informed of their children's educational rights. Within one year of the reauthorization, the Education Department's technical assistance contractors mailed over 300 notices to Federal and State agencies on the rights of homeless children and youth guaranteed by McKinney-Vento.

V. RECOMMENDATIONS

The Council has identified several additional steps and has taken several new actions to help ensure that homeless children and youth have access to education by increasing the visibility and availability of informational materials and resources for key Council partners in the field, especially to State and city/county government leaders, members of jurisdictional 10-year planning entities, State Interagency Councils on Homelessness, and Continuums of Care (local homeless planning entities). These recommendations are intended to increase effectiveness of Federal agency actions and promote visibility of education access for children who are homeless.

1. Re-issue existing guidance.

All Federal agencies that submitted guidance as listed above were asked to identify whether there were plans in their agencies to re-release or otherwise promote existing guidance, given that some documents were produced during the preparation of the report and others as long ago as 1992.

- No agency plans were identified for re-releasing documents.

Recommendation: Increase the visibility and availability of key materials that explain and support the right to education, so that key partners can collaborate to ensure this right in communities.

- The Interagency Council will post the Federal agency documents on its web site in a new section of "Tools you can use to ensure access to education for homeless children" (linked to its home page). See www.usich.gov

- The Council recommends that, in future, other Federal agencies post their materials under existing homeless web links and list the material in any "news" section at least annually to achieve greater visibility.

2. Encourage Federal partners to include education resources in mainstream program references.

Recommendation: Incorporate education access information in the Federal FirstStep Resource.

The Council recommends adding education rights material to the Federal interagency electronic tool called FirstStep, an on-line interactive tool for case managers, outreach workers, and others working with people who are homeless. This on-line information source was designed by the Departments of Health and Human Services and Housing and Urban Development, in consultation with the Departments of Agriculture, Labor, and Veterans Affairs, and the Social Security Administration, to assist staff to access Federal mainstream programs and close gaps in program information that might be related to complex eligibility, application, or documentation regiments or staff turnover. The current version can be found at: http://www.cms.hhs.gov/apps/firststep/index.html

Adding basic materials on education rights to FirstStep will help promote the use of this tool as a point of reference for program staff, and place education in the context of other mainstream programs to which eligible persons that are homeless need access.

3. Disseminate information to policymakers at the State and local levels to focus on education rights and resources in a timely way at the start of the school year.

Recommendation: Use the start of the school year to raise visibility of education rights for State and local policymakers.

The Interagency Council has recently disseminated a news story in its weekly e-news to the field on education rights and resources. See http://www.usich.gov/newsletter/archive/09-07-06_e-newsletter.htm

In its September 7, 2006, weekly e-news letter distributed to more than 10,000 State and local policymakers, Continuum of Care coordinators, service providers, and advocates, the Council issued a news story to draw attention to the provisions of the McKinney-Vento Act that ensure access to education for homeless children and youth and identify to readers those resources that can assist parents, children, and others in supporting those rights. Many Federal homeless program grantees and all Continuum of Care coordinators receive the e-news.

The story reviewed the education rights of homeless children and the statutory definition of homelessness under the education programs. The Council will encourage, through its Regional Coordinators, that appropriate State educational agency personnel and local

liaisons, as well as other State and local government officials familiar with homeless education issues and resources, and consumers themselves, are active partners in State and local jurisdictional planning. State Interagency Councils and jurisdictional 10-year planners can play a vital role in ensuring the regular distribution of the consumer and provider oriented materials that explain these rights.

The story included downloadable copies of the English and Spanish language versions of a poster produced by the Department of Education's technical assistance provider that explains who qualifies as homeless under the educational provisions of the McKinney-Vento Homeless Assistance Act and lists the educational rights of children and youth experiencing homelessness. This poster can be placed in schools, in homeless and other programs, and throughout the community.

The story also included a link to the National Center on Homeless Education and its publications, including one specifically for service providers on the details of education rights.

4. Identify education of homeless children as a cross-cutting issue requiring interagency action.

Recommendation: Distribute additional education rights materials to State and City partners to address any existing gaps.

The Interagency Council has recently taken steps to distribute additional education rights materials to State and City partners to address any gap in information that may occur as a result of Continuum of Care groups and service providers receiving primary information from HUD resources and State and local educational agency personnel receiving primary information from Department of Education resources, as identified in the Department of Education report. This will reinforce the identification of education of homeless children as a cross-cutting issue requiring interagency collaboration.

To improve the knowledge base and visibility of resources to ensure education rights, the Council will directly provide, through its Regional Coordinators, copies of key materials to jurisdictional leadership of the 53 State Interagency Councils on Homelessness and over 225 city/county 10-year plans to end homelessness.

As the Council has previously done to ensure the presence of those organizations and resources targeted to serve homeless veterans as partners in State Councils and 10-Year Plans – resulting in documentation of stronger partnerships and planning strategies - the Council's Regional Coordinators will work with State and city government partners to ensure that SEA and LEA participation in State councils and jurisdictional 10-year plans supports education access for homeless children and communicates jurisdictional support for ensuring those rights.

5. Create new resources for information and reference.

The Department of Education's report, and informal evidence from the field, supports the concern that local education and homeless program staff turnover often hinders the effective communication of education-related information. By treating the right to a public education as a mainstream program and providing a stable information source about it to target audiences, Federal agencies have several opportunities to increase the circulation of key information about the access requirement and partnerships to ensure its consistency in delivery and increase visibility. This effort can be combined with identifying new venues to forward education rights information to target audiences of State and local partners, homeless service providers, and others.

Recommendation: Expand the number of available web resources that identify and explain education rights can contribute to increased visibility and effectiveness.

The Interagency Council has recently created a new web page devoted to the education access issue. See http://www.usich.gov/slocal/EducationWebPost.html

On this new web page, the Council has provided a short introduction to the issue drawn from the Department of Education report and added several items from the Department's technical assistance provider, the National Center for Homeless Education, to its web site, with a direct link from the Council's home page. Included in this new posting are:

- The National Center for Homeless Education brochure that explains the educational rights of children and youth experiencing homelessness and provides information about the NCHE national helpline.

- NCHE's parent brochure that explains the educational rights of children and youth experiencing homelessness and informs parents about ways in which they can support their children's education during times of mobility.

- A poster for parents in English and Spanish that explains who qualifies as homeless under the McKinney-Vento Homeless Assistance Act for the purposes of education access and lists the educational rights of children and youth experiencing homelessness.

- A poster for school-age youth in English and Spanish that explains who qualifies as homeless under the McKinney-Vento Homeless Assistance Act for the purposes of education access and lists the educational rights of children and youth experiencing homelessness.

- The Educational Rights of Students in Homeless Situations: What Service Providers Should Know

Recommendation: Ensure increased circulation of key reference material to jurisdictional partners in the field, at both the city/county 10-year plan level and at the State Interagency Council level.

Every Council Regional Coordinator has been directed to provide these materials directly to partners in the field, at both the city/county and state level, including 10-year planning entities for jurisdictions and State Interagency Councils on Homelessness.

6. Include education of homeless children in discussions of family homelessness.

Recommendation: Provide reference material on education rights in settings where family homelessness is the focus.

The Interagency Council will use family homelessness events to focus on education access and to distribute a fact sheet on core materials on education access targeted to providers and consumers. Council technical assistance and research events frequently include jurisdictional partners from State interagency councils on homelessness and jurisdictional 10-year planning entities. Providing targeted information will increase the visibility of the education rights issue and build awareness among government agencies.

For example, in the Council's ongoing initiative to increase participation and knowledge regarding the needs of homeless veterans and veterans serving organizations in State councils and 10-year plans, an effective strategy was including a best practice document on serving veterans at all 10-year plan events. Ongoing initiatives by the Council's Regional Coordinators have turned such participation from being the exception to becoming a best practice. Veteran specific strategies now are emerging in 10-year plans, where none existed previously.

7. Annually review relevant Federal agency actions.

Several of the core elements identified in this report are time sensitive, either as one-time reports, such as the Department of Education implementation report, or represent documents not recently released. A periodic updating of new agency actions and publications is needed to ensure that coordinated focus is provided in the future on an interagency level.

Recommendations:
The Interagency Council will use its senior policy discussion at least annually to assess and survey the Council's member agency actions and updates on access to education for homeless children.

The Council, through its statutorily required Annual Report, will ask member agencies to provide updated reporting on actions to ensure education rights for children who are homeless.

Conclusion

The Interim Report to Congress identified several issues to be considered in shaping effective strategies that are effective in ensuring education access. These included ensuring education rights under diverse Federal programs, and providing information on rights to both providers and consumers. In addition, it is the Council's unique role to reach its partners in State interagency councils and local jurisdictional planning entities.

The preventive effect of education access for children experiencing homelessness is critical. The recommendations outlined here will consolidate and link existing resources under the Council's coordinating role, as well as provide a visible new source of information directly to the field at several levels, including State and local government, where accountability for education access should be a primary concern.

ELECTRIC ENERGY MARKET COMPETITION TASK FORCE

DEPARTMENT OF JUSTICE • FEDERAL ENERGY REGULATORY COMMISSION • FEDERAL TRADE COMMISSION
DEPARTMENT OF ENERGY • DEPARTMENT OF AGRICULTURE

April 5, 2007

The Honorable Richard B. Cheney
President
United States Senate
S-212 U.S. Capitol
Washington, D.C. 20510

Dear Mr. President:

The enclosed report is submitted to Congress pursuant to section 1815 of the Energy Policy Act of 2005 (the Act). Section 1815(a) of the Act established a five-member Electric Energy Market Competition Task Force (Task Force), consisting of one employee from each of the following agencies: (1) Department of Justice; (2) Federal Energy Regulatory Commission; (3) Federal Trade Commission; (4) Department of Energy; and (5) Department of Agriculture.

Section 1815(b) of the Act requires the Task Force to conduct a study and analysis of competition within the wholesale and retail markets for electric energy in the United States and to submit a final report to Congress on the findings of such study and analysis. In compliance with section 1815(c), the Task Force consulted with and solicited comments from the states, representatives of the electric power industry, and the public, in accordance with a notice requesting public comment published in the *Federal Register* on October 19, 2005, 70 Fed. Reg. 60,819 (2005). The Task Force received about 80 comments in response to that notice.

Pursuant to section 1815(b)(2)(B) of the Act, a draft report was issued on June 6, 2006 and published in the *Federal Register* on June 13, 2006, 71 Fed. Reg. 34,083 (2006), providing the public an opportunity for comment. The Task Force received approximately 50 comments in response to the draft report and revised the draft report to

reflect many of the suggestions provided in those comments. The final report provides the Task Force's observations and analysis on competition in wholesale and retail electric power markets in the United States.

Respectfully submitted,

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cc: The Honorable Steny H. Hoyer
Majority Leader

The Honorable John A. Boehner
Minority Leader

ELECTRIC ENERGY MARKET COMPETITION TASK FORCE

DEPARTMENT OF JUSTICE • FEDERAL ENERGY REGULATORY COMMISSION • FEDERAL TRADE COMMISSION
DEPARTMENT OF ENERGY • DEPARTMENT OF AGRICULTURE

April 5, 2007

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

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Respectfully submitted,

J. Bruce McDonald
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Department of Agriculture

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY

Pursuant to Section 1815 of the Energy Policy Act of 2005

The Electric Energy Market Competition Task Force

12f-000928

The Electric Energy Market Competition Task Force

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David Zlotlow – Department of Justice

This report was prepared by the Task Force with the assistance of the Department of

Justice, Federal Energy Regulatory Commission, Federal Trade Commission, Department of Energy, and Department of Agriculture. The Task Force assumes full responsibility for the report and the views expressed herein.

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EXECUTIVE SUMMARY

A. Congressional Request

The Energy Policy Act of 2005 (EPAct 2005)[1] was designed to provide a comprehensive long-range energy plan for the United States. Section 1815 of the Act[2] created an "Electric Energy Market Competition Task Force"[3] (Task Force) to conduct a study of competition in wholesale and retail markets for electricity in the United States. Section 1815(b)(2)(B) required the Task Force to publish a draft final report for public comment at least 60 days prior to submitting the final report to Congress. The Task Force published the draft final report in June 2006 and sought comment on the preliminary observations contained in the draft. Based on those comments, and other input received earlier, the Task Force hereby submits this final report to Congress.

B. Task Force Activities

In preparing this report, the Task Force undertook several activities, as follows:

Section 1815(c) of the EPAct 2005 required the Task Force to "consult with and solicit comments from any advisory entity of the Task Force, the states, representatives of the electric power industry, and the public." Accordingly, the Task Force published a Federal Register notice seeking comment on a variety of issues related to competition in wholesale and retail electric power markets. Over 80 commenters provided a variety of opinions and analyses in response. These comments are available online for public review in the Task Force docket maintained by the Federal Energy Regulatory Commission (FERC) under Docket No. AD05-17-000. The list of parties who submitted comments is attached as Appendix A.[4]

The Task Force met and discussed competition-related issues with a variety of representatives of the states, the electric power industry, and other stakeholders in October-December 2005. These groups are listed in Appendix B.

The Task Force prepared an annotated bibliography of the public cost/benefit studies that have attempted to analyze the status of wholesale and retail competition. Appendix C contains this bibliography.

The Task Force reviewed the status of retail competition in the states and examined in detail the experiences of seven states with active retail competition programs: Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and Texas. These states have taken a variety of approaches to introducing retail competition. Appendix D profiles these retail competition programs, updating information prepared by the Federal Trade Commission (FTC) staff.

[1] Pub. L. No. 109-58, 119 Stat. 594 (2005).

[2] Pub. L. No. 109-58, § 1815, 119 Stat. 594, 1128 (2005).

[3] The Task Force consists of five members: (1) one employee of the Department of Justice, appointed by the Attorney General of the United States; (2) one employee of the Federal Energy Regulatory Commission, appointed by the Chairperson of that Commission; (3) one employee of the Federal Trade Commission, appointed by the Chairperson of that Commission; (4) one employee of the Department of Energy, appointed by the Secretary of Energy; and (5) one employee of the Rural Utilities Service, appointed by the Secretary of Agriculture.

[4] Abbreviations for those parties are also listed in Appendix A.

[5] Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. titles 15, 16, 26, 30, 42, and 43) (1978).

[6] Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[7] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, FERC Stats. & Regs. ¶ 31,036, 31,639 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997); *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) [hereinafter Order No. 888].

[8] 16 U.S.C. §§ 791a et seq. (2000).

[9] APPA comments.

[10] *Id.*

[11] NRECA comments.

[12] 7 U.S.C. 901 *et seq.*

[13] "Nonutilities" – as that term is defined for EIA reporting purposes and as used here – may still be characterized as "utilities" and subject to public service regulation under state law and regulated as "public utilities" by FERC.

[14] QFs are small power producers using eligible alternative electric generating technologies and industrial and commercial cogenerators (combined heat and power producers) that have special status under PURPA.

[15] EEI comments.

[16] LEONARD S. HYMAN, AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE 64 (Public Utility Reports, Inc. 1988) [hereinafter HYMAN]. In the City of Chicago, the city council granted 29 different electric franchises between 1882 and 1905; three of them were citywide.

[17] For more on the history of electric utilities, see also U.S. Department of Energy, Energy Information Administration, *The Changing Structure of the Electric Power Industry: 1970-1991*, at 57 (March 1993), *available at* http://tonto.eia.doe.gov/FTPROOT/electricity/0562.pdf [hereinafter *EIA 1970-1991*]; U.S. Department of Energy, Energy Information Administration, *The Changing Structure of the Electric Power Industry 2000: An Update,* Appendix A (October 2000), *available at* http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update2000.html [hereafter *EIA Update 2000*].

[18] HYMAN at 68.

[19] In economic literature, the concept of a "natural monopoly" developed over time as a rationalization for the regulation of electric utilities. In brief, a "natural monopoly" is an industry characterized by long-run decreasing costs where a single provider can supply product or service at a lower cost than competition. ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, Volume 1, at 11-12 (John Wiley & Sons, Inc. 1970). Kahn also notes the substantial legal and historical "public interest" rationale for regulation of the electric utility industry. Economists have debated whether the electric utility industry or segments of it are natural monopolies for several decades. This debate focuses on the economic theory rationalization for regulation and not the public policy or legal basis for electric power regulation. *See, e.g.*, Vernon Smith, *Regulatory Reform in the Electric Power Industry* (1995) (working paper, on file with the Department of Economics, University of Arizona); RICHARD F. HIRSCH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN UTILITY SYSTEM (MIT Press 1999); SHARON BEDER, POWER PLAY: THE FIGHT TO CONTROL THE WORLD'S ELECTRICITY (W.W. Norton 2003).

[20] HYMAN at 68.

[21] *See EIA Update 2000*.

[22] HYMAN at 74.

[23] 15 U.S.C. §§ 79a *et seq.* (2000).

[24] In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co*., 273 U.S. 83 (1927), the Supreme Court ruled that state regulators were barred by the Commerce Clause from setting the prices of electricity sold across state lines.

[25] *See EIA 1970-1991*.

[26] *EIA Update 2000* at 114-15.

[27] The costs of constructing new nuclear plants quadrupled between 1971 and 1976. Over 63 nuclear units were canceled between 1975 and 1980. *EIA Update 2000* at 114-15.

[28] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,640-41.

[29] *Id.* at 31,641.

[30] *Id.* at 31,639, n.9.

[31] The response to the blackout included the formation of regional reliability councils and the North American Electric Reliability Council (NERC) to promote the reliability and adequacy of bulk power supply. *EIA Update 2000* at 109.

[32] Paul L. Joskow, *The Difficult Transition to Competitive Electricity Markets in the U.S.* 6-7 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 03-13, 2003), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php?id=271 [hereinafter Joskow, *Difficult Transition*].

[33] See *EIA 1970-1991* at 22.

[34] PURPA specifically set forth criteria on who and what could qualify as QFs (mainly technology, size, and ownership criteria). Two types of QFs were recognized: cogenerators, which sequentially produce electric energy and another form of energy (such as heat or steam) using the same fuel source, and small

power producers, which use waste, renewable energy, or geothermal energy as a primary energy source. *See EIA 1970-1991* at 5.

[35] *Id.* at 24.

[36] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,642.

[37] *See* Paul L. Joskow, *Deregulation and Regulatory Reform in the U.S. Electric Power Sector*, at 17 (February 16, 2000) (revised discussion draft prepared for the Brookings-AEI Conference on Deregulation in Network Industries, Dec. 9-10, 1999) [hereinafter Joskow, *Deregulation*].

[38] CONG. RESEARCH SERV., COMM. ON ENERGY AND COMMERCE, 102D CONG., ELECTRICITY: A NEW REGULATORY ORDER? 92 (Comm. Print 1991).

[39] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,644.

[40] Joskow, *Deregulation* at 19.

[41] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,642.

[42] *EIA 1970-1991* at vii.

[43] *Id.* at 27.

[44] *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,643.

[45] *See Regulations Governing Bidding Programs*, Notice of Proposed Rulemaking, 53 Fed. Reg. 9,324 (Mar. 22, 1988), FERC Stats. & Regs. ¶ 32,455 (1988) (modified by 53 Fed. Reg. 16,882 (May 12, 1988)). This proposal would have adopted competitive bidding into the process of acquiring and pricing power from QFs and would have largely abandoned the prior avoided cost purchase rates.

See Regulations Governing Independent Power Producers, Notice of Proposed Rulemaking, 53 Fed. Reg. 9,327 (Mar. 22, 1988), FERC Stats. & Regs. ¶ 32,456 (1988) (modified by 53 Fed. Reg. 16882 (May 12, 1988)). This proposal would have relaxed rate review and regulation of wholesale sales by independent power producers, and other public utilities that did not operate retail distribution systems.

See Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities, Notice of Proposed Rulemaking, 53 Fed. Reg. 9,331 (Mar. 22 1988), FERC Stats. & Regs. ¶ 32,457 (1988) (modified by 53 Fed. Reg. 16882 (May 12, 1988)). This proposal would have revised the elements used in making administrative determinations of avoided costs for rates for utilities' PURPA QF purchases.

[46] *Hearing on National Energy Security Act of 1991 (Title XV) Before the S. Comm. on Energy and Natural Resources,* 102d Cong. 97 (1991) (statement of Cynthia A. Marlette, Associate General Counsel for Hydroelectric and Electric, Federal Energy Regulatory Commission).

[47] *Id.* at 100.

[48] *Id.*

[49] *Id.* at 102.

[50] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,642-43.

[51] Joskow, *Deregulation* at 21. *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,644.

[52] Joskow, *Deregulation* at 23. Under PUHCA 1935, those public utility holding companies that did not qualify for an exemption were subject to extensive regulation of their financial activities and operations. These regulations limited the availability of exemptions and the growth and expansion of electric utility companies. PUHCA 1935 restricted utility operations to a single integrated public-utility system and prevented utility holding companies from owning other businesses that were not reasonably incidental or functionally related to the utility business. Further, registered holding companies had to obtain Securities and Exchange Commission (SEC) approval for the sale and issuance of securities, for transactions among their affiliates and subsidiaries and for services, sales, and construction contracts, and they were required to file extensive financial reports with the SEC.

Although PUHCA 1935 provided for limited exemptions, it was long criticized as discouraging new investment in the electric utility industry by nonutility entities. Mergers and acquisitions of utilities subject to PUHCA 1935 have largely been by other domestic and foreign utilities. Investment by entities outside the industry has been limited, as these entities avoid the extensive regulations imposed by PUHCA 1935.

[53] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,645.

[54] Joskow, *Deregulation* at 24.

[55] *See EIA 1970-1991* at 30; Joskow, *Deregulation* at 23.

[56] Pub. L. No. 102-486, §§ 721-26, 106 Stat. 2776 (1992).

[57] Order No. 888, FERC Stats. & Regs. ¶ 31,036, at ¶ 31,654.

[58] *Id.* Order No. 888 also clarified FERC's interpretation of the federal/state jurisdictional boundaries over transmission and local distribution. While it reaffirmed that FERC has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, it nevertheless recognized the legitimate concerns of state regulatory authorities for the development of competition within their states. FERC therefore declined to extend its unbundling requirement to the transmission component of bundled retail sales and reserved judgment on whether its jurisdiction extends to such transactions. The United States Supreme Court affirmed this element of Order No. 888. *New York v. FERC*, 535 U.S. 1 (2002).

[59] *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 at 31,583 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

[60] Joskow, *Deregulation* at 29.

[61] *EIA 2000 Update* at 66.

[62] *Id.* at 66, 68, 80.

[63] *Id.* at 67.

[64] Joskow, *Deregulation* at 27-28.

[65] *EIA 2000 Update* at ix.

[66] *See* discussion *infra*, Box 1-1.

[67] Joskow, *Deregulation* at 19.

[68] Electricity Consumers Resource Council, *Profiles in Electricity Issues: Cost-of-Service Survey* (Mar. 1986).

[69] *EIA 2000 Update* at 43.

[70] *Id.* at 81-82.

[71] Paul L. Joskow, *Markets for Power in the United States: An Interim Assessment*, ENERGY J. 2 (forthcoming 2006), *available at* http://stoft.com/metaPage/lib/Joskow-2006-power-market-assessment.pdf [hereinafter Joskow, *Interim Assessment*].

[72] Federal Energy Regulatory Commission, *The Western Energy Crisis, the Enron Bankruptcy, and FERC's Response*, *available at* http://www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf.

[73] *Id.*

[74] *Id.*

[75] For example, the Idaho PUC commented that the pass-through power cost adjustment portion of retail rates increased between 30 to 50 percent as a direct result of the impacts of the Western energy crisis. Idaho PUC comments.

[76] *See* discussion *infra*, Box 4-3.

[77] *See, e.g.*, *California Attorney General, Energy White Paper: A Law Enforcement Perspective on the California Energy Crisis, Recommendations for Improving Enforcement and Protecting Consumers in Deregulated Energy Markets* (April 2004), *available at* http://ag.ca.gov/publications/energywhitepaper.pdf [hereinafter Cal. Atty Gen. White Paper]; Federal Energy Regulatory Commission, *Final Report on Price Manipulation in Western Energy Markets: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000 (March 26, 2003); U.S. General Accounting Office, *Restructured Electricity Markets, California Market Design Enabled Exercise of Market Power* (June 2002), *available at* http://www.gao.gov/new.items/d02828.pdf; Lockyer v. FERC, 383 F.3d 1006 (9th Cir., 2004); U.S. Senate, Committee on Governmental Affairs, *Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron Corp* (November 2002), *available at* http://hsgac.senate.gov/_files/111202fercmemo.pdf.

[78] For more on FERC proceedings, see the FERC webpage, "Addressing the 2000-2001 Western Energy Crisis," at http://www.ferc.gov/industries/electric/indus-act/wec.asp.

[79] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, 65 Fed. Reg. 809 (Jan. 6, 2000), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092, 65 Fed. Reg. 12,088 (March 8, 2000), *aff'd, Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) [hereinafter Order No. 2000].

[80] In Order No. 2000, FERC found that "opportunities for undue discrimination continue to exist that may not be remedied adequately by [the] functional unbundling [remedy of Order No. 888]." Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,105.

[81] The term "rate pancaking" refers to circumstances in which a transmission customer must pay separate access charges for each utility service territory crossed by the customer's contract path.

[82] Although RTOs do not now own transmission facilities, they are not precluded by regulation from doing so. FERC's Order No. 2000 allows RTOs that are independent transcos – transmission-owning RTOs that do not own or operate generation and are not affiliated with generation owners or operators. Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,036-37.

[83] Federal Energy Regulatory Commission, Office of Market Oversight and Investigations, *State of the Markets Report: An Assessment of Energy Markets in the United States in 2004*, at 51 (2005) [hereinafter *FERC State of the Markets Report 2004*], *available at* http://www.ferc.gov/legal/staff-reports.asp.

[84] *Id.* at 53.

[85] *Id.* at 52.

[86] *See, e.g.*, APPA comments (2); NRECA comments (2); Alliance of State Leaders Protecting Electricity Consumers comments (2); Wisconsin Load Serving Entities comments (2); Progress and Santee Cooper comments (2).

[87] U.S. Canada Power System Outage Task Force, *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations* (April 2004), at 1.

[88] *Id.* In contrast, the November 1965 Northeast Blackout resulted in the loss of over 20,000 MWs of load and affected 30 million people.

[89] *Id.* at 107.

[90] *See, e.g.*, New York State Public Service Commission, *NYPSC Staff Second Report on the August 13-14, 2003 Blackout* (November 2005), *available at* http://www.dps.state.ny.us. Also, see the NERC blackout website materials, *available at* http://www.nerc.com/~filez/blackout.html, and the reports of the Michigan Public Service Commission, *available at* http:www.michigan.gov/mpsc.

[91] *EIA 2000 Update* at ix. The size of the cost improvements depends on the underlying fuel prices.

[92] *Id.*

[93] *Id.* at 23.

[94] *EIA 1970-1991* at vii.

[95] *Id.*

[96] U.S. Department of Energy, Energy Information Administration, *Electric Power Annual 2004*, at 2 (November 2005), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epa.pdf [hereinafter *EIA Electric Power Annual 2004*].

[97] APPA comments (2).

[98] Edison Electric Institute, *EEI Survey of Transmission Investment: Historical and Planned Capital Expenditures*, at 1 (May 2005).

[99] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,640.

[100] Joskow, *Difficult Transition* at 7.

[101] U.S. Department of Energy, Energy Information Administration, *Electric Power Monthly*, Table 5.3 (July 2006), *available at* http://www.eia.doe.gov/cneaf/electricity/epm/epm_sum.html.

[102] According to an analysis for EEI, "Fuel and purchased power costs have risen substantially and are by far the largest cause of recent electricity price increases. On an industry-wide basis, these account for roughly 95 percent of increases in total operations and maintenance (O&M) costs experienced by electric utilities in the last five years." Peter Fox-Penner, *et al.*, *Behind the Rise in Prices: Electricity Price Increases Are Occurring Across the Country, Among all types of Electricity Providers. Why?*, ELEC. PERSPECTIVES 53 (July/August 2006).

[103] *EIA 1970-1991* at 20.

[104] During the 1990s, with natural gas prices at an all time low and availability of efficient, modular gas turbines, many nonutilities built natural-gas generation facilities to enter wholesale markets. Today, as a result of restructuring-related asset sales and divestitures, nonutilities own and operate a broad mix of nuclear, coal, natural- gas and renewable generation facilities that supply wholesale markets. Natural-gas-fired generating capacity was 57 percent of nonutility generating capacity in 2004. According to EPSA, based on EIA data, 36 percent of electricity produced by competitive generators was coal-fired, 30 percent natural gas, 24 percent nuclear, 6 percent hydroelectric and other renewables, and four percent oil-fired. EPSA comments (2).

[105] *EIA Electric Power Annual 2004* at 2.

[106] Federal Energy Regulatory Commission, *The Western Energy Crisis, The Enron Bankruptcy, & FERC's Response*, at 1, *available at* http://www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf.

[107] *See EIA Electric Power Annual 2004* at 17, table 2.4, *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epat2p4.html.

[108] *See* U.S. Department of Energy, National Energy Technology Lab, *Tracking New Coal-Fired Power Plants*, at 3-4, *available at* http://www.netl.doe.gov/coal/refshelf/ncp.pdf (predicting 85 GWs of new coal capacity created by 2025).

[109] The information provided in this section is current as of July 2006 and does not reflect any subsequent changes.

[110] *See* U.S. Congress, Office of Technology Assessment, *Electric Power Wheeling and Dealing: Technological Considerations for Increasing Competition*, at 47, OTA-E-409 (Washington, DC: U.S. Government Printing Office, May 1989).

[111] *EIA 2000 Update* at 91.

[112] *Id.* at 105-06.

[113] *Id.* at 105.

[114] *Id.* at 91.

[115] *Id.* at 106.

[116] The EIA periodically reports on generation plant transfers. For a list of plants transferred in 2003- 2006, *see* the *EIA Electric Power Monthly* (July 2006), *available at* http://www.eia.doe.gov/cneaf/electricity/epm/tablees4.html.

[117] *FERC State of the Markets Report 2004* at 30-32.

[118] Announced in December 2003, Ameren closed its acquisition of Illinois Power Co. in September 2004. *Id.* at 31.

[119] In January 2004, Black Hills Corp announced the acquisition of Cheyenne Light, Fuel & Power from Xcel Energy. In July 2004, PNM Resources, the parent of Public Service Company of New Mexico, announced the intention to acquire TNP Enterprises, the parent of Texas New Mexico Power Company from a group of private equity investors. *Id.* at 31-32. In December 2004, Exelon announced its intent to merge with PSEG, a plan that would create the nation's largest utility company by generation ownership, market capitalization, revenues, and net income. *Id.* at 32.

[120] *Id.* at 30.

[121] For a full discussion of the theory of competition in wholesale electricity markets, *see* STEVEN STOFT, POWER SYSTEM ECONOMICS: DESIGNING MARKETS FOR ELECTRICITY (IEEE Press 2002).

[122] From an economic perspective, retail electricity prices (or rates) that do not closely track wholesale price trends do not send economically "accurate" price signals when they do not reflect temporal variations in production costs and wholesale market prices within days, across seasons, or even across years (except after long lags).

[123] Electricity Consumers Resource Council, *Profiles in Electricity Issues: Cost-of-Service Survey* (March 1986).

[124] *See, e.g.*, KIP VISCUSI ET AL., ECONOMICS AND REGULATION OF ANTITRUST 6-7 (MIT Press, 4th ed. 2005) [hereinafter VISCUSI, ET AL.].

[125] Most states also regulate the siting of major electric power facilities.

[126] In the academic literature, the risk of utility overinvestment has been explained by the Averch-Johnson Effect. The Averch-Johnson Effect reflects that "a firm that is attempting to maximize profits is given, by the form of regulation itself, incentives to be inefficient. Furthermore, the aspects of monopoly control that regulation is intended to address, such as high prices, are not necessarily mitigated, and could be made worse, by the regulation." KENNETH E. TRAIN, OPTIMAL REGULATION 19 (1991) [hereinafter TRAIN]. The Averch-Johnson Effect also predicts that if a regulator attempts to reduce a firm's profits by reducing its rate of return, the firm will have an incentive to further increase its relative use of capital. *Id.* at 56. Thus, the most obvious regulatory control within cost-base rate regulation creates further distortions. The Averch-Johnson Effect is sometimes thought to explain why a regulated firm is led to "gold plate" its facilities, i.e., incur excessive costs so long as those expenses can be capitalized.

[127] U.S. Department of Energy, *The Future of Electric Power in America: Economic Supply for Economic Growth* (June 1983) (DOE/PE-0045).

[128] Under price cap regulation, a firm can theoretically "produce with the cost-minimizing input mix [and] invest in cost-effective innovation." TRAIN at 318. However, this dynamic only occurs where the price cap is fixed over time and the utility receives the benefit of cost reductions and cost-effective innovations. Further, the benefit of this increased efficiency "accrues entirely to the firm: consumers do not benefit from the production efficiency." *Id.* Where the price cap is adjusted over time, firms are induced to engage in strategic behavior. Additionally, "if, as . . . expected, the review of price caps is conducted like the price reviews under cost-base rate regulation, then the distinction blurs between price-cap regulation and cost-base rate regulation." *Id.* at 319. One way for consumers under a rate cap system to share the benefits of efficiency improvements without eliciting strategic behavior from the regulated firm is to include periodic, automatic reductions in rates based on general trends in productivity.

[129] U.S. Department of Energy, *Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them: A Report to the United States Congress Pursuant to Section 1252 of the Energy Policy Act of 2005* (February 2006) [hereinafter *DOE EPAct Demand Response Report*]. The *DOE EPAct Demand Response Report* discusses the benefits of demand response in electric power markets and makes recommendations to achieve these benefits.

[130] There is substantial literature on setting rates based on marginal costs in the electric sector. *See, e.g.*, M. CREW & P. KLEINDORFER, PUBLIC UTILITY ECONOMICS (St. Martin's Press 1979); B. MITCHELL, W. MANNING, & J. PAUL ACTON, PEAK–LOAD PRICING (Ballinger 1978). Other papers suggest that setting rates based on marginal costs will result in a misallocation of resources. *See* S. Borenstein, *The Long-Run Efficiency of Real-Time Pricing*, 26:3 ENERGY J. (2005). Nevertheless, the literature also indicates that marginal-cost pricing may result in a revenue shortfall or excess, and standard rate-making practice is to require an adjustment (presumably to an inelastic component) to reconcile with embedded cost-of-service. Various rate structures to accomplish marginal-cost pricing include two-part tariffs and allocation of shortfalls to rate classes. *See* VISCUSI, *ET AL.*

[131] The reduction of cross subsidies can be seen as having both positive and negative implications for society as a whole – depending on one's perspective and whether the cross-subsidy supports publicly acceptable goals, such as rural electrification.

[132] *DOE EPAct Demand Response Report* at 7.

[133] Estimates of the total costs in the United States due to the August 14, 2003, blackout range between $4 billion and $10 billion. Electricity Consumers Resource Council, *The Economic Impacts of the August 2003 Blackout* (Feb. 2, 2004).

[134] Chuck Goldman, *et al.*, *Does Real-Time Pricing Deliver Demand Response? A Case Study of Niagara Mohawk's Large Customer RTP Tariff*, Lawrence Berkeley National Laboratory (August 2004), *available at* http://drrc.lbl.gov/pubs/54974.pdf; Nicole Hopper, Charles Goldman and Bernie Neenan, *Demand Response from Day-Ahead Hourly Pricing for Large Customers*, 19:3 ELECTRICITY J. 52 (Apr. 2006) [hereinafter Hopper, *et al.*].

[135] Charles River Associates, *Final Report on the Impact Evaluation of the California Statewide Pricing Pilot* (March 16, 2005), *available at* http://www.energy.ca.gov/demandresponse/documents/group3_final_reports/2005-03-24_SPP_FINAL_REP.PDF. Customers on a similar CPP program at Gulf Power also have high satisfaction with the program, which incorporates automated response to CPP events.

[136] *See* EEI comments. Pepco cautions that many customers, particularly residential and commercial customers, are relatively inflexible in responding to price changes due to constraints imposed by their operations and equipment. *See* Pepco comments.

[137] *See DOE EPAct Demand Response Report*; Mercatus Center comments (2).

[138] APPA comments.

[139] While the demand for surplus energy in wholesale markets can vary as a function of the cost of owned generation and existing contracts, the ultimate demand for energy is entirely a function of end-use load.

[140] Alcoa comments.

[141] TAPS comments.

[142] APPA comments.

[143] Wholesale markets involve sales of electric power among generators, marketers, and load serving entities (i.e., distribution utilities and competitive retail providers) that ultimately resell the electric power to end-use customers (e.g., residential, commercial, and industrial customers).

[144] *U.S. v. Otter Tail Power Company*, 410 U.S. 366 (1973) (the United States sued a vertically integrated utility when it refused to deal with the Town of Elbow Lake, MI, a town that was seeking alternative sources of wholesale power for a planned municipal distribution system).

[145] *See* discussion *infra* Chapter 1.

[146] Retail price impacts of competition are discussed in this report's Chapter 4.

[147] In a 2002 report, the then-named General Accounting Office made a related point, connecting increasing competition to structural changes. U.S. General Accounting Office, GAO-03-271, *Lessons Learned From Electric Industry Restructuring*, at 21 (2002) ("Increasing the amount of competition requires structural changes within the electric industry, such as allowing a greater number of sellers and buyers of electricity to enter the market").

[148] It is important to note that competition in wholesale electric markets may not lead to an efficient allocation of resources involving the services that prevent network collapse. Where there are "public good" aspects to the delivery of a good or service, such as with reliability, regulation may be the best way to ensure that the correct level of the good or service is provided. In some circumstances, however, market remedies may be available that are superior to regulation.

[149] *See* EPAct 1992 House Report, H.R. REP. NO. 102-474(I), at 138.

[150] The New York State Public Service Commission correctly commented that another metric with which to measure competition is its effect on production efficiencies. The Task Force did not seek to quantify this effect, given the constraints of the Report.

[151] EPAct 1992 House Report, H.R. REP. NO. 102-474(I), at 133.

[152] *See* discussion *infra* Chapter 1 for more information on FERC Order No. 888.

[153] The demand charge for long-term point-to-point transmission service is known in advance. For network service, the transmission customer pays a load-ratio share of the transmission provider's FERC-approved transmission revenue requirement. Thus, even if redispatch to relieve transmission congestion occurs and the costs are charged to customers, or expansion is necessary and the expansion costs are added to the revenue requirement, the distribution over the whole system has allowed the charges to individual customers to remain relatively stable. Customers who take either service have a right to continue taking service when their contract expires, although point-to-point customers may have to pay a different rate (up to the maximum rate in the transmission provider's tariff) if another customer offers a higher rate.

[154] APPA comments; TAPS comments. *See also* Midwest Stand-Alone Transmission Companies comments.

[155] Prior to wholesale competition, several of the regions listed had "power pools" of utilities that undertook some central economic dispatch of plants and divided the cost savings among the vertically integrated utility members.

[156] For example, RTOs using LMP pricing address physical deliverability concerns by giving physical access to all users willing to pay the market-determined price. The potential for high LMPs due to limited transmission availability presents a risk that many market participants prefer to hedge. Financial transmission rights (FTRs) have been developed as a means for transmission users to hedge against transmission pricing risk. The amount of FTR MWs available for hedging are determined by the transmission capabilities of the grid, so that a holder of an FTR generally can depend on being able to use the transmission service covered by the FTR. In some RTOs, FTRs are allocated on the basis of historic transmission use. In others, FTRs are allocated either through an auction or through a process that awards FTRs in proportion to the total requests for FTRs for a particular transmission service. Under the latter two approaches, some historic transmission users may have to acquire additional FTRs from other parties in order to hedge their previous levels of transmission use. In particular, in circumstances where certain transmission paths have become highly congested, historic transmission users may have to make significant expenditures to maintain traditional levels of transmission rights.

[157] Companies can also limit their exposure to price swings through financial instruments rather than contracts for physical delivery of electricity. Such contracts are essentially a bet between two parties as to the future price level of a commodity. If the actual price for power at a given time and location is higher than a financial contract price, Party A pays Party B the difference; if the price is lower, Party B pays Party A the difference. In fact, in the United States electricity markets, such agreements are sometimes called "contracts for differences." Purely financial contracts involve no obligation to deliver physical power. In this report, the Task Force discusses contracts for physical delivery rather than financial contracts, unless otherwise noted.

[158] Federal Energy Regulatory Commission, *Staff Report to the Federal Energy Regulatory Commission on the Causes of Wholesale Electric Pricing Abnormalities in the Midwest During June 1998* (1998).

[159] Federal Energy Regulatory Commission, Office of Market Oversight and Investigations, *State of the Markets Report: Assessment of Energy Markets for the Period January 1, 2002 through June 30, 2003*, at 109 (2004), available at http://www.ferc.gov/legal/staff-reports.asp [hereinafter *FERC State of the Markets Report 2002-2003*].

[160] *Id.* at 50.

[161] *FERC State of the Markets Report 2004* at 77.

[162] Southern comments.

[163] *See* Fitch Ratings, *Wholesale Power Market Update* (Mar. 13, 2006), *available at* http://www.fitchratings.com/corporate/sectors/special_reports.cfm?sector_flag=2&marketsector=1&detail=&body_content=spl_rpt.

[164] Currently, the CAISO operates only an imbalance energy market.

[165] *See* discussion *infra* Chapter 1, for a more extensive discussion of the Western Energy Crisis of 2000-2001.

[166] *FERC State of the Markets Report 2004* at 69; *FERC State of the Markets Report 2002-2003* at 41-43.

[167] CAISO comments.

[168] *FERC State of the Markets Report 2002-2003* at 109.

[169] ISO New England Inc., *Forecast Report of Capacity, Energy, Loads, and Transmission*, at 76 (2006), *available at* http://www.iso-ne.com/trans/celt/report/2006/2006_CELT_Report.pdf.

[170] *FERC State of the Markets Report* 2002-2003 at 83 ("These load pockets did not exhibit materially higher locational prices in 2004, probably because the cost of expensive units used to ensure resource adequacy and transmission security in these areas are frequently not eligible to set the clearing price").

[171] *Id.* at 36.

[172] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006); Press Release, ISO New England Inc., ISO New England Announces Broad Stakeholder Agreement on New Capacity Market Design (Mar. 6, 2006), *available at* http://www.iso-ne.com/nwsiss/pr/2006/march_6_settlement_filing.pdf.

[173] *FERC State of the Markets Report 2002-2003* at 109.

[174] *FERC State of the Markets Report 2004* at 97.

[175] *FERC State of the Markets Report* 2002-2003 at 39.

[176] *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at 61,236, *reh'g denied*, 117 FERC ¶ 61,331 (2006).

[177] *FERC State of the Markets Report 2002-2003* at 109.

[178] *FERC State of the Markets Report 2004* at 112.

[179] *Id.* at 188.

[180] AEP proposes to build a new 765-kilovolt (kV) transmission line stretching from West Virginia to New Jersey, with a projected in-service date of 2014. *AEP Interstate Project Summary*, *available at* http://www.aep.com/newsroom/resources/docs/AEP_InterstateProjectSummary.pdf. Allegheny Power (Allegheny) proposes to construct a new 500-kV transmission line, with a targeted completion date of 2011, which will extend from southwestern Pennsylvania to existing substations in West Virginia and Virginia and continue east to Dominion Virginia Power's Loudoun Substation. *Allegheny Power Transmission Expansion Proposal*, *available at* http://www.alleghenypower.com/TrAIL/TrAIL.asp. More recently, Pepco has proposed to build a 500-kv transmission line from Northern Virginia, across the Delmarva Peninsula and into New Jersey.

[181] *ERCOT Response to the DOE Question Regarding the Energy Policy Act 2005*, *available at* http://www.oe.energy.gov/DocumentsandMedia/ercot2.pdf.

[182] Ross Baldick and Hui Niu, *Lessons Learned: The Texas Experience*, *available at* http://www.ece.utexas.edu/~baldick/papers/lessons.pdf.

[183] U.S. General Accounting Office, GAO-02-427, *Restructured Electricity Markets, Three States' Experiences in Adding Generating Capacity*, at 9 (2002) [hereinafter GAO, *Restructured Electricity Markets, Three States' Experiences*].

[184] *Id.* at 19.

[185] Public Utilities Commission of Texas comments (2).

[186] For more information regarding LAAR, *see* http://www.ercot.com/services/programs/load/laar.

[187] *Available at* http://www.columbiagrid.org

[188] For a complete discussion of generation characteristics of the Northwest, *see* NW Power & Con. Council, *The Fifth Northwest Power and Conservation Plan*,

Ch. 2 (2005), *available at* http://www.nwcouncil.org/energy/powerplan/plan/Default.htm.

[189] Under a pay-as-bid market, sellers are paid their actual bid prices, while under a "single price" or uniform price market, all sellers are paid the single market-clearing price.

[190] Par Holmberg, *Comparing Supply Function Equilibria of Pay-as-Bid and Uniform Price Auctions* (2005) (Uppsala University, Sweden Working Paper 2005:17); G. Federico & D. Rahman, *Bidding in an Electricity Pay-As-Bid Auction* (Nuffield College Discussion Paper No 2001-W5, 2001); Joskow, *Difficult Transition* at 6-7.

[191] Alfred E. Kahn, *et al.*, *Uniform Pricing or Pay-as-Bid Pricing: A Dilemma for California and Beyond* (Blue Ribbon Panel Report, study commissioned by the California Power Exchange, 2001).

[192] In theory, a pivotal supplier could bid $1 million or more and set the clearing price, so in practice the ISO would have still set a cap, albeit a high one. In its comments, the Public Utilities Commission of Texas describes a plan it expects to adopt in summer 2006, to raise offer caps incrementally in its energy-only market. The Public Utilities Commission of Texas expects to ultimately pay $3000 per MWh for energy in some hours of the year.

[193] *See generally Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005).

[194] Robert J. Michaels and Jerry Ellig, *Price Spike Redux: A Market Emerged, Remarkably Rational*, 137 PUB. UTIL. FORTNIGHTLY 40 (1999). Wholesale customers with supply contracts for which the prices were tied to the market price paid higher prices for electric power during those hours.

[195] Sometimes, in fact, entry may not be justified, even in the face of high prices. Potential entrants must consider the benefits as well as the costs of entry. Some areas may be so costly to enter, that it is more efficient for society as a whole to pay the higher prices rather than pay the high investment costs to build lower cost generation, institute price-responsive demand programs, or invest in transmission access to lower-cost generation.

[196] Making demand response eligible to meet reserve margins may ease these concerns.

[197] In the areas that need capacity the most – densely populated areas significantly bounded by topographical barriers such as oceans – land prices, environmental restrictions, aesthetic considerations, and other factors may make new generation more (or even prohibitively) expensive. In fact, there are some environmental restrictions that serve as de facto bars to new generation entry.

[198] PJM Interconnection, L.L.C., *PJM Regional Transmission Expansion Plan*, at 20 (2006), *available at* http://www.pjm.com/planning/reg-trans-exp-plan.html.

[199] *See supra* note 180. AEP and Allegheny are both requesting that their proposed transmission projects be designated as a National Interest Electric Transmission Corridor under EPAct 2005.

[200] Regulatory solutions, more so than market-based outcomes, may outlive the circumstances that made them seem reasonable.

[201] New York G&E comments; Idaho PUC comments.

[202] FERC's efforts are not limited to the organized markets, and extend to other markets as well. Also, federal and state antitrust enforcement agencies have jurisdiction to challenge anticompetitive conduct in electricity markets.

[203] NYPSC comments.

[204] ELCON comments; NRECA comments; APPA comments.

[205] *E.g.*, PJM comments; EPSA comments.

[206] Constellation comments; Mirant comments.

[207] ELCON comments.

[208] In competitive markets, customers also have the ability to build their own generation facility if they are unable to obtain the long-term purchase contracts that they seek.

[209] *See, e.g.*, Maine Public Advocate comments; NASUCA comments.

[210] The July 2006 Energy Velocity database shows that of the 165,163 MW of generation that is permitted, proposed, application-pending or has had a feasibility study performed, 110,964 MW, about two-thirds, is nuclear, combined cycle, coal-fired steam or integrated coal gasification technology (generation types typically considered base-load or mid-merit).

[211] *See Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act*, Notice of Inquiry, 59 Fed. Reg. 54,851 (Oct. 26, 1994), FERC Stats. & Regs. ¶ 35,529 (1995) (FERC Docket No. RM94-20-000).

[212] Comments of U.S. Department of Justice, *Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act*, at 6 (Mar. 2, 1995) (FERC Docket No. RM94-20-000). *See also* Reply Comments of the U.S. Department of Justice, *Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act* (Apr. 3, 1995) (FERC Docket No. RM94-20-000).

[213] *See* Comment of the Federal Trade Commission, *Market-Based Rates for Public Utilities*, at 7-8 (Jul. 16, 2004) (FERC Docket No. RM04-7-000), *available at* http://www.ftc.gov/os/comments/ferc/v040021.pdf.

[214] APPA comments; Carnegie Mellon comments.

[215] Nodir Adilov, *Forward Markets, Market Power, and Capacity Investment* (2005) (Cornell Univ. Dep't of Econ. Job Mkt. Papers), *available at* http://www.arts.cornell.edu/econ/na47/JMP.pdf.

[216] APPA comments; TAPS comments.

[217] Pub. L. No. 109-58, § 1233, 119 Stat. 594, 958 (2005) (emphasis added).

[218] Constellation comments; Mirant comments.

[219] In December 2005, FERC proposed to adopt a general rule on the standard of review that must be met to justify proposed modifications to contracts under the FPA, except transmission service agreements executed under an open access transmission tariff as provided for under Order No. 888, and under the Natural Gas Act, except agreements for the transportation of natural gas executed pursuant to the standard form of service agreement in pipeline tariffs. *Standard of Review for Modifications to Filed Agreements*, Notice of Proposed Rulemaking, 71 Fed. Reg. 303 (January 4, 2006), FERC Stats. & Regs. ¶ 61,317 (2005) (Comm'r Kelly, dissenting). Specifically, FERC proposed that, in the absence of specified contractual language permitting the Commission to act on proposed modifications to an agreement on its own motion or on behalf of a signatory or non-signatory under the "just and reasonable" standard, the Commission, a signatory or a non-signatory seeking to change a contract must show that the change is necessary to protect the public interest. FERC explained that its proposal recognized the importance of providing certainty and stability in energy markets, and helped promote the sanctity of contracts. A final rule is pending.

[220] *Nevada Power Company v. Enron*, 103 FERC ¶ 61,353, *order on reh'g*, 105 FERC ¶ 61,185 (2003); *Public Utilities Commission of California v. Sellers of Long Term Contracts*, 103 FERC ¶ 61,354, *order on reh'g*, 105 FERC ¶ 61,182 (2003); *PacifiCorp v. Reliant Energy Services, Inc.*, 103 FERC ¶ 61,355, *order on reh'g*, 105 FERC ¶ 61,184 (2003).

[221] *See Northeast Utilities Service Co., v. FERC*, 55 F.3d 686, 689 (1st Cir. 1995).

[222] *See* Howard L. Siegel, *The Bankruptcy Court vs. FERC- The Jurisdictional Battle*, 144 PUB. UTILS. FORTNIGHTLY 34 (2006).

[223] Another factor creating a potential preference for self-built generation as opposed to long-term purchases is the treatment by some credit rating agencies of power purchase contracts as imputed debt. If a utility's self-built generation is treated as an asset but long-term purchase contracts are treated as imputed debt, it may cause utilities and state regulators to favor constructing and owning over purchasing. *See* EPSA comments.

[224] *See infra* Chapter 4 for a discussion of regulated service offerings in states with retail competition.

[225] Mirant comments; Constellation comments.

[226] Paul L. Joskow, *Competitive Electricity Markets and Investment in New Generating Capacity* (April 28, 2006) (MIT Working Paper).

[227] CONG. BUDGET OFFICE, FINANCIAL CONDITION OF THE U.S. ELECTRIC UTILITY INDUSTRY (1986), *available at* http://www.cbo.gov/showdoc.cfm?index=5964&sequence=0.

[228] Southern comments; Duke comments.

[229] Commodity Futures Trading Commission, *The Economic Purpose of Futures Markets*, *available at* http://www.cftc.gov/opa/brochures/opaeconpurp.htm.

[230] APPA comments.

[231] Task Force Meetings with Credit Agencies, *see* Appendix B.

[232] GAO, *Restructured Electricity Markets, Three States' Experiences* at 13.

[233] Connecticut DPUC comments.

[234] GAO, *Restructured Electricity Markets, Three States' Experiences* at 13.

[235] U.S. Department of Energy, Energy Information Administration, *The Changing Structure of the Electric Power Industry: An Update*, at 38 (December 1996), *available at* http://tonto.eia.doe.gov/FTPROOT/electricity/056296.pdf.

[236] *Id.*

[237] *Hearing on Nuclear Power, Before the Subcomm. on Energy of the S. Comm. on Energy & Nat'l Res.* (Mar. 4, 2004) (statement of Mr. James Asselstine, Managing Director, Lehman Brothers). *See also* Nuclear Energy Institute, *Investment Stimulus for New Nuclear Power Plant Construction: Frequently Asked Questions*, *available at* http://www.nei.org/documents/New_Plant_Investment_Stimulus.pdf.

[238] *Natural Gas Factors Affecting Prices and Potential Impacts on Consumers: Testimony Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs*, United States Senate; GA-06-420T (Feb. 13, 2006), at 7.

[239] EPSA comments.

[240] Occasionally in the past few years net revenues have been sufficient to cover the costs of new peaking units, and in 2005 they were enough to cover the costs of a new coal plant. PJM Interconnection, LLC, Market Monitoring Unit, *2005 State of the Market Report*, at 118 (2006), *available at* http://www.pjm.com/markets/market-monitor/som.html

[241] *PJM Interconnection*, 115 FERC at 61,236.

[242] Public goods have two characteristics – "nonexclusiveness" and "nonrivalry." Nonexclusiveness means that others cannot be excluded from the use of the good (e.g., if one person refuses to pay taxes, that person still can enjoy public parks) and nonrivalry implies that one person's consumption of the good does not diminish another person's consumption (e.g., the fact that one person enjoys the increased safety engendered by military spending doesn't decrease another person's safety.) "Preventing network collapse" is nonexclusive because if the network collapses there is nothing one can do to escape it (unless one constructs freestanding on-site generation) and it is nonrivalrous because one person being protected from collapse does not preclude another person's being protected.

[243] Joskow, *op. cit.*

[244] Federal Energy Regulatory Commission, *Staff Report on the Assessment of Demand Response and Advanced Metering* (August 2006).

[245] The Task Force adopts the convention of designating states as permitting retail competition on the basis of whether a state allows alternative suppliers to enter and obtain multiple, geographically dispersed customers. An even broader potential definition of retail competition would take into account policies that allow individual retail customers to provide some or all of their own generation needs (*i.e.,* to make rather than buy electricity). Onsite generation is common in some industries in some sections of the country. Small onsite generation projects – often referred to as "Distributed Generation" or "Distributed Resources" projects – are gaining popularity as well. Many states that do not have retail choice in the conventional sense do have provisions for various forms of onsite generation and net metering. Another broader form of retail competition involves municipal utilities or cooperatives. NRECA comments (2). These entities can be carved out of existing private utility distribution areas, or can be added back into them if the municipality decides to do so (or if the cooperative disbands). The *Otter Tail Power* case, 410 U.S. 366 (1973), was decided on the basis of this form of retail competition. If these broader definitions of "retail competition" were used, all (or nearly all) states would be designated as retail competition states.

[246] In this report, the Task Force refers to state-mandated and -regulated electrical service in states with consumer choice programs as POLR service. A broad range of terms is used in different states to denote this type of service. Some states have more than one form of mandated service or have changed the form of POLR service over time. In many states, POLR service originated as an element in arrangements to pay the stranded (*i.e*., non-recovered) costs of vertically integrated utilities – costs that may have become unrecoverable when the state adopted a retail customer choice approach.

[247] Debt rating agencies may downgrade the creditworthiness of utilities in states that require utilities to sell at prices below their costs. For example, Moody's Investors Services reportedly has downgraded the creditworthiness of utilities in Maryland – in particular, Baltimore Gas & Electric, due to that firm's inability to pass on increased input costs to consumers, which "leaves BGE in a weakened state that makes it vulnerable to further downgrades and even insolvency if it faces further energy price shocks or other costs that the legislature deems cannot be passed on to customers." Patricia Hill, *Maryland Utilities Designated Near Junk*, WASH. TIMES (July 12, 2006), *available at* http://www.washingtontimes.com/functions/print.php?StoryID=20060711-103048-5690r.

[248] In most retail customer choice states, supply contracts (vesting contracts) have been used to enable distribution utilities to offer POLR service at the capped price level after they have divested generating plants or transferred them to unregulated affiliates. The "rate shock" anticipated in these states is due in part to the lack of laddering in the vesting contracts beyond the end of the transition period, as defined in the legislation. There are two exceptions worth noting. In California, vesting agreements were de-emphasized in favor of procurement at spot market prices. In upstate New York, vesting agreements were longer term and continue to have a moderating effect on average procurement prices for POLR service. Public Utility Law Project of New York comments (2) at 36.

[249] Several commenters emphasized the potential spillovers from problems at the wholesale level to the retail level, including NYPSC comments (2) at 3-4; APPA comments (2) at 4, 21-25; New York Companies comments (2) at 2, 4-5; Direct Energy comments (2) at 7; Alliance for Retail Energy Markets comments (2) at 3-4; Industrial Consumers comments (2) at 9-10, 21-22; Allegheny comments (2) at 15, 19.

[250] Retail competition and options for onsite generation can provide opportunities for a customer to find alternative supply sources, including self-generation, if the customer's present supplier tries to raise prices above the competitive level (*i.e*., attempts to exercise market power).

[251] *See* Appendix D *infra* for each state profile.

[252] Restructured states as of May 2006 include Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia, plus the District of Columbia. The states profiled in Appendix D display a range of conditions that are similar to the other states with retail competition. Virginia is similar to Pennsylvania in that its transition to retail competition evolved over a 10-year period. Maine and Rhode Island are similar to New York and Texas in that prices for "provider of last resort" (POLR) service have been adjusted regularly to reflect changes in wholesale prices. Delaware, the District of Columbia, Illinois, Michigan, New Hampshire, Ohio, and Rhode Island share the situation faced by Maryland, where the transition period of fixed prices for residential and small C&I POLR service will end in the near future. Massachusetts's rate cap period ended recently. Many of the states poised to end the transition period are developing approaches to bring POLR prices for residential and small C&I customers up to market rates in stages rather than all at once. Several of these states also share Maryland's and New Jersey's interest in auctions for procuring POLR service supplies. Oregon's situation differs from the other states in that only nonresidential customers can shop, and that shopping is limited to a short window of time each year.

[253] Retail electric customers in 30 states continue to receive service almost exclusively under a traditional regulated monopoly utility service franchise. These states include 44 percent of all U.S. retail customers, accounting for 49 percent of electricity demand.

[254] For example, Georgia law allows any new customers with loads of 900 kilowatts or more to make a one-time selection from among competing eligible electric suppliers. Southern comments.

[255] FERC and the states will continue to regulate the price for transmission and distribution services, and the local distribution utility will continue to deliver the electricity in most states, regardless of which generation supplier the customer chooses.

[256] A.B. No. 1890, 1995-1996 Sess. (Cal. 1996) (enacted), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_bill_960924_chaptered.pdf.

[257] Wisconsin regulators apparently believed that retail competition might increase the cost of capital for new generation and transmission projects. PSC Wisconsin Comments (2) at 3.

[258] *See, e.g.*, Cal. Atty Gen. White Paper; Federal Energy Regulatory Commission, *Final Report on Price Manipulation in Western Energy Markets: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices* (March 26, 2003) (Docket No. PA02-2-000); U.S. General Accounting Office, *Restructured Electricity Markets, California Market Design Enabled Exercise of Market Power* (June 2002), *available at* http://www.gao.gov/new.items/d02828.pdf.

[259] CPUC comments; Alliance for Retail Energy Markets comments (2).

[260] Many alternative suppliers reportedly have developed customized time-of-use and other forms of energy management contracts for large C&I customers. Wal-Mart comments at 10-11; Commercial End-Users comments at at 3; Direct Energy comments (2) at 3.

[261] The degree to which customers switch to alternative suppliers sometimes is used to measure the extent of retail competition. States with retail customer choice usually report these switching statistics. This can be a useful measure when the greatest concern is that the POLR service provider is obstructing switching, or that certain features of regulation (including lack of information about the retail choice process and below-market pricing of POLR service) are discouraging entry and active consumer shopping for electricity service. Another way to gauge the success of retail competition policy is to survey consumers about their awareness of retail choices and perceptions of the difficulty of switching between suppliers. However, surveys are expensive and results are not available systematically. More generally, consumers can obtain the benefits of competition if existing competition, entry, or the threat of entry prevents incumbent suppliers from exercising market power manifested in the form of higher prices, lower product quality, or reduced innovation. In this sense, retail competition could be effective even without any switching to alternative suppliers. NASUCA comments (2).

[262] There is no reason to believe, however, that retail competition in this market will not function as competition does in any market, by reducing quality-adjusted prices.

[263] *See infra* Massachusetts, New Jersey, and New York profiles, Appendix D. See also Federal Trade Commission, Staff *Report on Competition and Consumer Protection Perspectives on Electric Power Regulation Reform: Focus on Retail Competition*, at 43 (2001), *available at* http://www.ftc.gov/reports/elec/electricityreport.pdf [hereinafter *FTC Retail Competition Report*].

[264] The prices of generation assets have been volatile since these divestitures occurred. Asset prices often are keyed not only to the cost of the fuel necessary to generate the electricity, but also to the location of the asset on the transmission grid.

[265] *See* Illinois and Pennsylvania profiles, Appendix D. *See also FTC Retail Competition Report*, Appendix A (profiles of Illinois and Pennsylvania).

[266] *See infra* Texas profile, Appendix D.

[267] *See infra* New York profile, Appendix D.

[268] Massachusetts Department of Telecommunications and Energy, *List of Competitive Suppliers/Electricity Brokers*, *available at* http://www.mass.gov/dte/restruct/company.htm.

[269] Massachusetts Department of Telecommunications and Energy, *Active Licensed Competitive Suppliers and Electricity Brokers*, *available at* http://www.mass.gov/dte/restruct/competition/index.htm#Licensed%20Competitive%20Suppliers%20and%20Electricity%20Brokers.

[270] New Jersey Board of Public Utilities, *List of Licensed Suppliers of Electric*, *available at* http://www.bpu.state.nj.us/home/supplierlist.shtml. For example, in the Connectiv territory, there are 18 C&I suppliers and only one residential supplier. Eighteen suppliers serve C&I customers and one serves residential customers in the PSE&G service territory.

[271] Texas Public Utility Commission, *Texas Electric Choice Compare Offers from Your Local Electric Providers*, *available at* http://www.powertochoose.org/default.asp.

[272] New York State Public Service Commission, *Competitive Electric and Gas Marketer Source Directory*, *available at* http://www3.dps.state.ny.us/e/esco6.nsf/. The NYPSC reports that this range has moved to between 6 and 16 alternative suppliers, and the agency expects the number and variety of services offered by alternative suppliers to increase as New York State moves forward with retail competition. NYPSC comments (2). Some listed suppliers may not be actively marketing to residential customers. Public Utility Law Project of New York comments (2) at 41-42.

[273] A substantial number of these switches are the result of community aggregations (principally the Cape Light Compact) rather than individual residential switches. Cape Light Compact comments (2) at 1-2.

[274] *See infra* Massachusetts profile, Appendix D.

[275] *See infra* Texas profile, Appendix D. There likely is a "chicken-or-egg" problem about whether more switching over time is attributable to a prior increase in suppliers or vice-versa (or whether both effects interact).

[276] *See infra* New Jersey profile, Appendix D. *See also* Kenneth Rose, *2003 Performance of Electric Power Markets* (Aug. 29, 2003), at II-19 (review conducted for the Virginia State Corporation Commission).

[277] *See infra* Massachusetts profile, Appendix D.

[278] Although the POLR service price is based on the hourly wholesale price of electricity, customers in Maryland and New Jersey who purchase this service are unaware of the price until they consume the power or until they are billed. Galen Barbose, Charles Goldman, and Bernie Neenan, *The Role of Demand Response in Default Service Pricing*, 19:3 ELEC. J. 64 (Apr. 2006) [hereinafter Barbose et al.].

[279] *See, e.g.,* ELCON comments; Portland Cement comments; Alliance of State Leaders comments; Alcoa comments.

[280] Portland Cement comments; Lehigh Cement comments.

[281] *See infra* Appendix C for reference to some price comparisons by other parties.

[282] Rates for residential POLR service in the Consolidated Edison distribution areas in New York State, however, are reported to vary by month rather than being averaged over longer periods of time. Public Utility Law Project of New York comments (2) at 35-36.

[283] For discussion of the exposure to hourly prices among the entire class of the largest C&I customers, rather than just the customers still taking POLR service, *see* Barbose et al.; Hopper, *et al*. The authors report that although most customers switch away from POLR service when it is an hourly price, they often select offers from alternative suppliers that contain elements of hourly pricing. Further, they report that the proportion of customers accepting hourly price aspects in their supply contracts – over 90 percent – is far higher when the price is set on the day-ahead spot market. The authors believe that the higher participation rates in hourly pricing under this circumstance are due to the early warning that customers get in the day-ahead market and the customers' consequently greater ability to respond to these pricing signals.

[284] Direct Energy comments (2) at 7; Mercatus Center comments at 2; CP Consulting comments at 2. Results from trial programs using advanced meters for residential customers indicate that residential demand for air conditioning is more price sensitive than other uses, particularly if the response is automated. Robert Earle and Ahmad Faruqui, *Toward a New Paradigm for Valuing Demand Response*, 19:4 ELEC. J. 21 (May 2006).

[285] Constellation comments; Pepco comments; Southern comments; EEI comments; IURC comments; NYPSC comments; ISO-NE comments.

[286] National Grid comments.

[287] For example, Pepco stopped actively supporting its air-conditioner direct load control program when it divested its generation assets.

[288] In addition to the policies surrounding POLR service discussed above, the comments identified other factors that depress or delay entry into retail markets. For example, the Pennsylvania Consumer Advocate identified several factors that depressed retail entry by suppliers to serve residential customers, including "the acquisition costs associated with marketing programs to reach residential customers, the costs of serving such customers once acquired, and the rising prices for generation supply service in the wholesale market." PA Consumer Advocate comments at 3. The Maine Office of Public Advocate echoed these factors and also identified the "miscalculation by some suppliers as to the risks and rewards for retail electricity competition." Maine Public Advocate comments at 3. The Industrial Consumers observed that retail markets are not fully competitive because of insufficient generation divestitures that left suppliers with market power. ELCON comments at 2. Another factor identified by Industrial Consumers is the inability of alternative suppliers to gain access to necessary transmission services to serve their customers. ELCON comments at 6. Others customers suggested that the lack of uniform rules throughout every service territory hinders entry for suppliers. Wal-Mart comments at 13. Other commenters argued that alternative suppliers need access to customer use data from utilities to be able to market to prospective customers. Constellation comments at 43. Still others argued for no minimum stay requirements at POLR and constrained shopping

windows, which can dampen entry. RESA comments at 30-31; Strategic comments at 10; Wal-Mart comments at 13. The lack of entry in most states makes it difficult for the Task Force to evaluate which additional factors are the most important.

[289] There is one potential exception: a supplier that offers a substantially different product – for example, "green" power from wind turbines – may be able to charge a higher price and still attract customers.

[290] Although state utility regulators often require that POLR service be provided or procured by the incumbent distribution utility, the task of providing or procuring POLR service could be carried out by other entities. New York Companies comments (2). For example, it could be assigned to one or more alternative suppliers, awarded through a competitive bidding process, or assumed directly by the state utility regulator (as in Maine). In any case, the firm assigned to provide or procure POLR service may be exposed to the risk that this responsibility will be unprofitable because costs and demand are volatile or because state utility regulators impose costs on the provider of POLR service (such as switching incentives) during the transition to retail customer choice. This risk can create financial difficulties for the distribution utility or another entity with this responsibility. New York Companies comments (2).

[291] *See, e.g.,* Illinois Commerce Commission comments; PPL comments; PA Office Consumer Advocate comments.

[292] *See, e.g.*, PA Office Consumer Advocate comments; NASUCA comments.

[293] *See, e.g.*, RESA comments; Wal-Mart comments; National Energy comments; SUEZ comments.

[294] Most states have a mechanism by which high-risk drivers can obtain insurance. Often insurers in a state are assigned a portion of the pool of high-risk drivers based on each firm's share of drivers outside the pool. AIPSO manages many of the pools and maintains links with individual state programs at https://www.aipso.com/adc/DesktopDefault.aspx?tabindex=0&tabid=1. Similar plans are available in many states for individuals with prior health conditions who are seeking health insurance coverage. *See* COMMUNICATING FOR AGRICULTURE AND THE SELF-EMPLOYED, COMPREHENSIVE HEALTH INSURANCE OF HIGH-RISK INDIVIDUALS (19th ed. 2005).

[295] Texas will end its "price to beat" system in 2007 (*See infra* Texas profile, Appendix D). Massachusetts ended its rate-capped POLR service in February 2005 (*See infra* Massachusetts profile, Appendix D). In the Atlanta Gas Light distribution territory, the distribution utility petitioned the Georgia Public Service Commission to withdraw from retail sales. In Georgia, under the amended Natural Gas Competition and Deregulation Act of 1997, a customer who does not choose an alternative supplier is randomly assigned an alternative supplier. Discussion and documentation about the Georgia natural gas retail competition program are available at http://www.psc.state.ga.us/gas/ngdereg.asp.

[296] *See infra* New Jersey profile, Appendix D.

[297] *See infra* Illinois profile, Appendix D.

[298] *See infra* Texas profile, Appendix D. In contrast, a state with long lags in fuel cost adjustments would have retail prices well below market rates during periods of increasing fuel prices, and prices well above market rates during periods of declining fuel prices. A single snapshot comparison of prices would be misleading in these circumstances.

[299] *See* discussion *infra* of the California energy crisis, in which one of the state's utilities declared bankruptcy because, among other reasons, capped POLR rates were substantially below wholesale prices.

[300] The distribution utility continues to charge the customer a delivery charge (a "wires" charge) to cover the transmission and distribution expense.

[301] Thomas L. Welch, Chairman, Maine Public Utilities Commission, *UtiliPoint PowerHitters interview* (Jan. 24, 2003), *available at* http://mainegov-images.informe.org/mpuc/staying_informed/about_mpuc/commissioners/ph-welch.pdf.

[302] See Kenneth Rose, *Electric Restructuring Issues for Residential and Small Business Customers*, National Regulatory Research Institute Report NRRI 00-10 (June 2000), *available at* http://www.nrri.ohio-state.edu/dspace/bitstream/2068/610/1/00-10.pdf, for a discussion of adders and their relationship to wholesale prices and headroom for entrants in Pennsylvania and other states.

[303] *Id.*

[304] Over time, the shopping credit in Pennsylvania faded in significance as the competitive rates increased relative to POLR service prices due to fuel cost increases. *See* the pattern of customer switching in the Pennsylvania profile in Appendix D *infra*.

[305] *FTC Retail Competition Report*, State Profiles, Appendix A.

[306] *See infra* New York profile, Appendix D; *FTC Retail Competition Report*, Appendix A (profile of New York).

[307] *See infra* Illinois profile, Appendix D.

[308] *See infra* New Jersey profile, Appendix D.

[309] *See, e.g.*, Maine Public Advocate comments.

[310] *See infra* New York profile, Appendix D.

[311] Because the marginal cost of supplying electricity varies over the course of the day and season and because fuel costs sometimes are volatile, efficient retail prices for electricity are more volatile than the prices that customers are used to paying under traditional regulation. Electricity prices under traditional regulation typically reflect average costs for electricity and risk management over extended periods. In a retail choice environment, alternative suppliers can offer a variety of risk management (hedging) levels that range from full, immediate pass-through of wholesale spot market prices to fixed rates for extended periods. For a discussion of how much hedging is required to eliminate portions of volatility, *see* Severin Borenstein, *Customer Risk from Real-Time Retail Electricity Pricing: Bill Volatility and Hedgability*, (June 6, 2006) (University of California Energy Institute CSEM Working Paper 155), *available at* http://www.ucei.berkeley.edu/PDF/csemwp155.pdf. It is important to note that these bundles of electricity and risk management also can constitute efficient retail prices, although they contain a cost component associated with the risk management services. If POLR service prices become more volatile, a customer who prefers less risk will have incentives to search for an alternative supplier that offers a price/risk tradeoff – slightly higher prices but less volatility.

Alternative suppliers will have incentives to offer preferable price/risk alternatives to gain customers. Retail customers can also consider whether onsite generation or other forms of upstream vertical integration offer a preferable price/risk combination.

In general, so long as customers are served by alternative suppliers or upstream vertical integration is an option, the POLR price is only one component of the average market price.

In a traditional regulatory setting, utilities sometimes offer customers a discount if they agree to have their service interrupted during peak demand periods. Removing restrictions to interruptible service rates would allow more customers to improve the match between their risk preferences and their electric service. Industrial Coalitions comments (2) at 25.

[312] Some commenters observed that cost averaging, cost deferrals, inaccurate cost allocations, double counting of costs, and price caps all can distort consumption and investment that result in loss of consumer welfare. Strategic Energy comments (2) at 6; Constellation comments (2) at 8.

[313] The electricity industry has traditionally provided discounts or other forms of assistance to low-income families. States may need to examine whether the level of this assistance should be increased in response to price increases or greater price volatility. National Association of State Utility Consumer Advocates (2). Similarly, firms whose competitors are in areas with stable or declining prices or diminishing price volatility could face financial distress, just as if they experienced other types of increased or more volatile input costs relative to their rivals. Firms with electricity-intensive production processes are likely to be particularly sensitive to increased prices or price volatility. Alcoa comments (2); Industrial Coalitions comments (2) at 26.

[314] This statement would need to be qualified to the extent there is market power and to the extent there are unpriced externalities such as pollution.

[315] *See, e.g.*, Wal-Mart comments; WPS comments; Illinois Commerce Commission comments; PPL comments; RESA comments.

[316] *See, e.g.*, Wal-Mart comments; RESA comments.

[317] *See, e.g.*, EEI comments.

[318] *See, e.g.*, RESA comments.

[319] *See, e.g.*, Wal-Mart comments at 10-11; Commercial End-Users comments.

[320] In Case 03-E-0641, the New York State Public Service Commission required New York utilities to file tariffs for mandatory real-time pricing (RTP) for large C&I customers. The order observed that "average energy pricing reduces customers' awareness of the relationship between their usage and the actual cost of electricity, and obscures opportunities to save on electric bills that would become apparent if RTP were used to reveal varying price signals." It further notes that "if a sufficient number of customers reduced load in response to RTP, besides benefiting themselves, the reduction in peak period usage would ameliorate extremes in electricity costs for all other customers."

[321] *See infra* New Jersey profile, Appendix D; RESA comments.

[322] *See, e.g.*, New York Companies comments; Alliance for Retail Energy Markets comments; Constellation comments; PPL comments; RESA comments; NYPSC comments; Direct Energy comments; Reliant comments; PA Office Consumer Advocate comments; Wal-Mart comments; Commercial End-Users comments.

[323] Steven Braithwait and Ahmad Faruqui, *The Choice Not to Buy: Energy Savings and Policy Alternatives for Demand Response*, PUB. UTILS. FORTNIGHTLY (Mar. 15, 2001).

[324] James Zolnierek, Katie Rangos, and James Eisner, Industry Analysis Division, Common Carrier Burerau, Federal Communications Commission, *Long Distance Market Shares, Second Quarter 1998*, at 19-20 (Sept. 1998), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/mksh2q98.pdf; Thomas L. Welch, Chairman, Maine Public Utilities Commission, *UtiliPoint PowerHitters interview* (Jan. 24, 2003) *available at* http://mainegov-images.informe.org/mpuc/staying_informed/about_mpuc/commissioners/ph-welch.pdf.

[325] Economists refer to this phenomenon as "rational ignorance." Clemson University, *The Theory of Rational Ignorance* (The Community Leaders' Letter, Economic Brief No. 29), *available at* http://www.strom.clemson.edu/teams/ced/econ/8-3No29.pdf.

[326] Joskow, *Interim Assessment*.

[327] *See, e.g.*, ELCON comments; Progress Energy comments; Constellation comments; Pepco comments; PA Office Consumer Advocate comments.

[328] In Case 05-M-0858, the New York State Public Service Commission adopted the "PowerSwitch" alternative supplier referral program (first developed by Orange & Rockland) as the model for all utilities in the state.

[329] New York State Consumer Protection Board, *Comment to the New York State Public Service Commission*, Case 05-M-0334, Orange & Rockland Utilities, Inc., Retail Access Plan, at 5 (May 2, 2005). The Consumer Protection Board indicated that retail customers who have participated in "PowerSwitch" are returning to POLR service at a rate of less than 0.1 percent per month. The Board applauded PowerSwitch because it is completely voluntary and provides assured initial savings to consumers.

[330] This review focuses on original studies – responses and critiques to these studies are listed under the "Alternate Views" table category.

[331] Information in this appendix is derived in large part from – and updates information contained in the *FTC Retail Competition Report*. Because economic circumstances and state laws and regulations change, regulatory authorities in each state and market participants should be consulted for more detailed and up-to-date information on state retail choice programs.

[332] Average monthly maximum electrical demand on the electric utility's system during the 6 months equals the customer's highest monthly maximum demands in the 12 months ending June 30, 1999.

[333] 220 ILL. COMP. STAT. 5/16-104 (West 2001).

[334] S.B. 2081 (Ill. 2002) (extending the transition period from January 1, 2005, to January 1, 2007).

[335] *Commonwealth Edison Company*, Illinois Commerce Commission, Docket No. 02-0479 (March 28, 2003), *available at* http://eweb.icc.state.il.us/e-docket/reports/view_file.asp?intIdfile=83392&strc=bd.

[336] 220 ILL. COMP. STAT. 5/16-113.

[337] *Id*. at 5/16-110.

[338] *Id.* at 5/16-115.

[339] Illinois Commerce Commission, *Competition in Illinois Retail Electric Markets in 2005*, Table 2 (May 2006), *available at* http://www.icc.illinois.gov/docs/en/060524garpt16120b.pdf.

[340] *See* S.B. 24 (Ill. 1999) (amending H.B. 362). Illinois Commerce Commission comments at 17-18.

[341] 220 ILL. COMP. STAT. 5/16-107.

[342] *Id*. at 5/16-102.

[343] Robert Lieberman (ICC Commissioner), *Ruminations on Demand Response – a View from Chicago* (Oct. 28, 2005), *available at* http://www.raabassociates.org/Articles/Lieberman_10.28.05.ppt#299.

[344] 220 ILL. COMP. STAT. at 5/16-103.

[345] *Id*. at 5/16-108.

[346] *See* 220 ILL. COMP. STAT. 5/16/-103(d).

[347] U.S. Department of Energy, Energy Information Administration, Illinois State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/illinois.pdf.

[348] 220 ILL. COMP. STAT. at 5/16-122.

[349] Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at*

http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[350] Illinois Commerce Commission Resolution, *Response to Governor's Sustainable Energy Plan for the State of Illinois*, Case No. 05-0437 (July 19, 2005), *available at* http://eweb.icc.state.il.us/e-docket/reports/view_file.asp?intIdFile=148072&strC=bd.

[351] MD. CODE ANN., PUB. UTIL. COS., §'7-509 (2000).

[352] *Id.* at § 7-507(b).

[353] *Id.* at § 7-507(c).

[354] Maryland Public Service Commission, *Supplier Authorization Procedures* (Mar. 17, 2000), *available at* http://www.psc.state.md.us/psc/electric/supplierauthorization.htm.

[355] Andrew Green, *Legislators Not Close on Rates*, BALT. SUN (Apr. 4, 2006).

[356] Patrice Hill, *Maryland Utilities Designated Near Junk*, WASH. TIMES (July 12, 2006), *available at* http://www.washingtontimes.com/functions/print.php?StoryID=20060711-103048-5690r.

[357] MD. CODE ANN., PUB. UTIL. COS., § 7-505(d) (2000).

[358] Maryland Public Service Commission, *Maryland Electric Choice FAQ*, *available at* www.psc.state.md.us/psc/electric/FAQ/overall.htm.

[359] MD. CODE ANN., PUB. UTIL. COS., § 7-513 (2000).

[360] *Id.* at § 7-501(p).

[361] *Id.* at § 7-512.1 (2000).

[362] *Id.* at § 7-505.b(10).

[363] *Id.* at § 7-505(b)(13).

[364] *Id.* at § 7-508.

[365] *Id.* at 7-505(b).

[366] Maryland Public Service Commission, *In the Matter of the Commission's Inquiry into the Provision and Regulation of Electric Service*, Order No. 76110 (Apr. 25, 2000).

[367] Maryland Public Service Commission, *In the Matter of the Commission's Inquiry into the Provision and Regulation of Electric Service*, Order No. 76241 (June 15, 2000). See section below on advertising restrictions for supplier requirements to disclose pricing information to customers.

[368] MD. CODE ANN., PUB. UTIL. COS., § 7-505(b) (2000).

[369] MASS. GEN. LAWS ch. 164, § 1F(1) (2001).

[370] 220 MASS. CODE REGS. 11.05(2) (2001).

[371] Massachusetts Department of Telecommunications and Energy, *Massachusetts Competitive Electricity Suppliers* (February 14, 2006). The current listing of active suppliers for each distribution territory is accessible at http://www.mass.gov/dte/restruct/competition/index.htm#licensed%20competitive%20Suppliers%20and%20electricity%20brokers (under "Generation Service Information.")

[372] MASS. GEN. LAWS ch. 164, § 1B(b) (2001).

[373] *Id.* at § 1G(c)(2).

[374] *Id.* at § 1B(b).

[375] *Id.* at § 1B(d).

[376] *Id.* at § 1G(a).

[377] *Id.* at § 1G(e).

[378] David L. O'Connor (Commissioner, Mass. Division of Energy Resources), *Retail Competition: Managing a Difficult Transition* (Apr. 6, 2001), at 6, *available at* http://www.nga.org/Files/ppt/ElecOconnor.ppt.

[379] Cape Light Compact comments.

[380] MASS. GEN. LAWS ch. 164, § 1A(b)(2) (2001).

[381] *Id.* at § 1A(c).

[382] *Id.* at § 1A(b)(1).

[383] U.S. Department of Energy, Energy Information Administration, Massachusetts State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/massachusetts.pdf.

[384] U.S. Department of Energy, Energy Information Administration, State Electricity Profiles 2002, Massachusetts Electric Power Industry Generating Capability by Primary Energy Sources, 1993, 1997, and 2002.

[385] 220 MASS. CODE REGS. 11.04(12).

[386] U.S. Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at* http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[387] 225 Mass. Code Regs. 14.00.

[388] New Jersey Board of Public Utilities, *In the Matter of the Electric Discount and Energy Competition Act of 1999 Customers Account Services Proceeding: Consolidated Billing, Customer Data Card, & Competitive Metering. Energy Consultant: Amendment to Customer Usage Information Process* (June 23, 2004), *available at* http://www.state.nj.us/bpu/wwwroot/energy/EX99090676_20040624.pdf.

[389] N.J. STAT. ANN. § 48:3-51.3 (2001).

[390] New Jersey Board of Public Utilities, *Interim Licensing and Registration Standards* § 4.e, *available at* www.state.nj.us/bpu/wwwroot/energy/licensstands.pdf.

[391] Jeanne M. Fox (Chair, New Jersey Board of Public Utilities), *New Jersey's BGS Auction: A Model for the Nation*, PUB. UTILS. FORTNIGHTLY 16-19 (2005).

[392] Press Release, New Jersey Board of Public Utilities, New Jersey's Basic Generation Service (BGS) Auction Locks in Electric Prices for Retail Customers (Feb. 15, 2002), *available at* http://www.state.nj.us/bpu/wwwroot/communication/04-02.pdf.

[393] N.J. STAT. ANN. § 48:3-57.9.a (2001).

[394] *Id.* at § 48:3-51.3.

[395] *FTC Retail Competition Report* at A80 (citing comments received from the New Jersey Division of the Ratepayer Advocate).

[396] N.J. STAT. ANN. § 48:3-61.13.i.

[397] *FTC Retail Competition Report* at A78 -A80.

[398] New Jersey Board of Public Utilities, *New Jersey Electric Statistics* (Dec. 2005).

[399] *FTC Retail Competition Report* at A78-A80.

[400] N.J. STAT. ANN. at § 48:3-59.11.a.

[401] *FTC Retail Competition Report* at A80 (citing comments received from the New Jersey Division of the Ratepayer Advocate).

[402] New Jersey Board of Public Utilities, *Summary Order Including Protective Order in Docket No. EM99030195, Petition of Rockland Electric Company for Approval of the Sale of Orange and Rockland Utilities, Inc.'s Generating Assets and Certain related Property, a Transition Power Sales Agreement, and a Protective Order* (June 24, 1999), *available at* http://www.state.nj.us/bpu/wwwroot/energy/recodivestord.pdf.

[403] U.S. Department of Energy, Energy Information Administration, New Jersey State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/new_jersey.pdf.

[404] N.J. STAT. ANN. § 48:3-85.36.b.

[405] U.S. Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at* http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[406] New York Public Service Commission, *Statement of Policy on Further Steps toward Competition in Retail Energy Markets* (Aug. 25, 2004) (Case No. 00-M-0504).

[407] New York Public Service Commission, *Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications* (Dec. 22, 2005) (Case No. 05-M-0858, et al.); NYPSC comments at 17.

[408] New York Public Service Commission, *Order Instituting Further Proceedings and Requiring the Filing of Draft Tariffs* (Sept. 23, 2005) (Case No. 03-E-0641).

[409] New York Public Service Commission, *In the Matter of Competitive Metering* (Feb. 26, 2001) (Case No. 00-E-0165); New York Public Service Commission , *In the Matter of Competitive Opportunities Regarding Electric Service* (Feb. 26, 2001) (Case No. 94-E-0952).

[410] New York Public Service Commission, *Opinion and Order Regarding Competitive Opportunities for Electric Service* (May 20, 1996) (Opinion No. 96-12).

[411] *Id.*

[412] New York Public Service Commission, *Staff Report on the State of Competitive Energy Markets: Progress to Date and Future Opportunities* (Mar. 2, 2006) (Electric and Natural Gas Retail Markets sections I to III).

[413] NYPSC comments at 18.

[414] New York Public Service Commission , *Opinion and Order Regarding Competitive Opportunities for Electric Service* (May 20, 1996) (Opinion No. 96-12).

[415] New York Public Service Commission , *PSC Rate and Restructuring Plan Fact Sheets*, *available at* www.dps.state.ny.us/energyarch.htm#facts.

[416] New York Independent System Operator, Inc., *Frequently Asked Questions*, *available at* www.nyiso.com/public/services/customer_relations/faqs/index.jsp.

[417] U.S. Department of Energy, Energy Information Administration, New York State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/new_york.pdf.

[418] New York Public Service Commission , Uniform Retail Access Business Practices, Appendix A, *Customer Information* (Apr. 14, 1999), *at* www.dps.state.ny.us/doc5743_appendix_a.pdf (Case No. 98-M-1343). For information on the acceptance of uniform retail access business practices in New York, *see* www.dps.state.ny.us/ubr.htm.

[419] U.S. Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at* http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[420] Pennsylvania Public Utility Commission, *Pennsylvania Electric Choice, Q&A*, *available at* http://www.puc.state.pa.us/utilitychoice.

[421] Pennsylvania Public Utility Commission, *Pennsylvania Electric Choice, How to Shop Guide*, *available at* http://www.puc.state.pa.us/utilitychoice.

[422] Letter from the Pennsylvania Public Utility Commission to the Energy Association of Pennsylvania approving an extension of a suspension of work of the Electronic Data Exchange Working Group as it relates to the implementation of competitive metering, Docket No. P-00021957 (Feb. 5, 2004).

[423] 66 PA. CONS. STAT. § 2809.A (2001).

[424] *Id.* at § 2804.4.

[425] Comments of the Pennsylvania Public Utility Commission to the *FTC Retail Competition Report* (Apr. 9, 2001).

[426] Ahmed Kaloko (Chief Economist, Pennsylvania Public Utility Commission), *Power 99–California & Pennsylvania Retail Market Development*.

[427] 66 PA. CONS. STAT. § 2807.E (2001).

[428] *Id.*

[429] *Id.*

[430] The order is *available at* http://www.puc.state.pa.us/PcDocs/578097.doc.

[431] 66 PA. CONS. STAT. § 2808.A, B (2001).

[432] Pennsylvania Public Utility Commission, *Electric Choice Frequently Asked Questions (Are there any penalties for changing suppliers?)*, *available at* http://www.puc.state.pa.us/utilitychoice/faq.aspx?ut=ec#4.

[433] 66 PA. CONS. STAT. § 2804.5 (2001).

[434] Pennsylvania Public Utility Commission, Bureau of Conservation, Economics, and Energy Planning, *Electric Power Outlook for Pennsylvania:1999-2004* (July 2000).

[435] Press Release, PJM Interconnection, LLC, Allegheny Power and PJM File with FERC to Create PJM West (Mar. 15, 2001), *available at* www.pjm.com/contributions/news-releases/2001/20010315-ap-pjm-file-with-ferc.pdf.

[436] U.S. Department of Energy, Energy Information Administration, Pennsylvania State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/pennsylvania.pdf.

[437] 52 PA. CONST. STAT. § 54.8 (2001).

[438] *Id.* at § 54.122.2.

[439] Comments of the Pennsylvania Utility Commission to the *FTC Retail Competition Report* (Apr. 9, 2001).

[440] U.S. Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at* http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[441] TEX. UTIL. CODE ANN. § 39.102 (2001).

[442] Public Utility Commission of Texas, *Scope of Competition in Electric Markets in Texas* (January 2005) at 36-38, *available at* http://www.puc.state.tx.us/electric/reports/scope/2005/2005scope_elec.pdf.

[443] TEX. UTIL. CODE ANN. § 39.352-55 (2001).

[444] *Available at* http://www.puc.state.tx.us/electric/reports/RptCard/rptcrd/aug05rptcrd.pdf.

[445] Tex. Util. Code Ann. at § 39.052.

[446] *Id.* at § 39.202.

[447] Public Utility Commission of Texas, *Scope of Competition in Electric Markets in Texas* (January 2005), *available at* http://www.puc.state.tx.us/electric/reports/scope/2005/2005scope_elec.pdf.

[448] *Id.* at 24.

[449] Public Utility Commission of Texas, Sub. Rules § 25.43.

[450] Public Utility Commission of Texas, Project No. 31416, *Evaluation of Default Service for Residential Customers and Review of Rules Relating to the Price to Beat and Provider of Last Resort*; Reliant comments.

[451] Public Utility Commission of Texas, *Texas Electric Choice, Electricity Information-FAQ's*, *available at* http://www.powertochoose.org/yourrights/q_changing.asp.

[452] Although the System Benefit Funds are being collected, the Legislature did not appropriate any fund for a low-income discount or for customer education in the 2005 session. Some REPs are continuing to offer low-income discounts and other benefits to these customers on a voluntary basis. Funding will be reconsidered in the 2007 legislative session; Reliant comments.

[453] Tex. Util. Code Ann. at § 39.051.

[454] *Id.* at § 39.105.

[455] *Id.* at § 39.153.

[456] *Id.* at § 39.154.

[457] Public Utility Commission of Texas, *Electric Competition-Fostering Competition*, *available at* www.choiceenergyservices.com/residential/pdf/Competition.pdf.

[458] ERCOT is not electrically synchronized with the Eastern or Western Interconnects.

[459] Electric Reliability Council of Texas, *The Market Guide: A Guide to How the Electric Reliability Council of Texas (ERCOT) Facilitates the Competitive Power Market* (Feb. 22, 2001).

[460] U.S. Department of Energy, Energy Information Administration, Texas State Profile, Table 4, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/texas.pdf.

[461] Reliant comments; Public Utility Commission of Texas, *Consumer Protections in a Competitive Electric Market*, *available at* http://www.powertochoose.org/publications/consumer_brochure.pdf.

[462] U.S. Department of Energy, Energy Information Administration, *Disclosure Policies*, *available at* http://www.eere.energy.gov/greenpower/markets/disclosure.shtml?print.

[463] The consumer brochure on electricity offer labeling is *available at* http://www.powertochoose.org/publications/efl_brochure.pdf.

[464] Reliant comments.

[465] Public Utility Commission of Texas, *Electric Restructuring to Improve Air Quality*, *available at* www.puc.state.tx.us/nrelease/2000/082400.cfm.

The Task Force published the draft final report in the Federal Register for public comment on June 13, 2006, 71 Fed. Reg. 34,083 (2006). The notice accompanying the draft requested comments on the Task Force observations. About 80 different entities provided comments and suggestions on the draft report. These commenters are listed in Appendix A. Draft report comments are available for public review online in the Task Force docket maintained by FERC under Docket No. AD05-17-000.

In preparing the draft report, the Task Force conducted further research and reviewed the information from comments and interviews.

C. The Goal of Increasing Competition in Electric Power Markets

Federal and several state policymakers generally introduced competition in the electric power industry to overcome perceived shortcomings of traditional cost-based regulation. In competitive markets, prices are expected to guide consumption and investment decisions, leading to more economically efficient investments and lower prices than under traditional cost of service monopoly regulation. More specifically, market-based, as compared to regulated, pricing of electricity would be expected to more accurately reflect the underlying costs of production. These prices should thus align the price of electricity with the value customers place on electricity, leading to a more efficient allocation of electrical resources and lower overall prices than would be the case in the absence of market-based prices. These price signals should

also serve to increase price during periods of scarcity, thereby eliciting reductions in consumption, moderating market power and improving reliability.

D. Observations on Competition in Wholesale Electric Power Markets

Congress has taken a number of steps to facilitate competition in wholesale electric power markets. The Public Utility Regulatory Policies Act of 1978 (PURPA),5 the Energy Policy Act of 1992 (EPAct 1992),6 and EPAct 2005 promoted competition by lowering entry barriers and increasing transmission access. Federal electricity policies have sought to strengthen competition but continue to rely on a combination of competition and regulation.

In assessing wholesale competition, the Task Force addressed the following question: Has competition in wholesale markets for electricity resulted in sufficient generation supply and transmission to provide wholesale customers with the kind of choice that generally is associated with competitive markets?

To answer this question, the Task Force examined whether competition has elicited the consumption and investment decisions generally associated with competitive wholesale markets.

The Task Force found this question challenging to address due to a number of complicating factors. The various U.S. regional wholesale electric power markets developed differently since the introduction of widespread wholesale competition. There were significant regional regulatory and structural differences in the electric power industry when Congress enacted EPAct 1992 and when FERC adopted Order No. 8887 in 1996, mandating nondiscriminatory access to the transmission grid. Even today, the regional markets have different features and characteristics. As discussed in Chapter 3, these differences make it difficult to identify and separate the determinants driving consumption and investment decisions and thus make it difficult for the Task Force to evaluate the degree to which more competitive markets have influenced such decisions.

Despite the difficulty of directly answering the question at hand, the Task Force's examination of wholesale competition did yield useful observations, as outlined below.

1. Wholesale Market Structures

Wholesale markets exhibit regional differences and generally rely on one of two types of market structures to support wholesale transactions.

a. One approach to competition in wholesale markets is to base trades exclusively on bilateral sales negotiated directly between suppliers and scheduled through individual, non-regionalized transmission owners. This approach predominates in the Northwest and Southeast. This traditional trading format allows for somewhat independent operation of transmission control areas and, in the view of some market participants, better accommodates historical contracts. However, prices and terms are more transaction-specific and, for some timeframes, less publicly available than in organized markets, which may result in less efficient generation dispatch. It can be difficult for system operators to coordinate transmission efficiently in these systems, as congestion costs and impacts are not readily apparent. A lack of centralized, shared information about generation dispatch and trades on interconnected systems requires a transmission owner to hold part of its transmission capacity as unused "reserves" to ensure reliable system operation. In some of these markets, wholesale customers have difficulty gaining unqualified access to the transmission needed to access competitively priced generation, thus limiting their ability to shop for least-cost supply options.

b. Another approach to wholesale competition relies on entities that are independent of market participants to control operation of all transmission facilities across a wide region and to operate trading markets – regional transmission organizations (RTOs) or independent system operators (ISOs). Variations of this approach predominate in the Northeast, Mid-Atlantic, Midwest, Texas, and California. The market designs in these regions provide participants with guaranteed physical access to the transmission system (subject to transmission security constraints). These customers are responsible for the cost of that access (if they choose to participate), and thus are exposed to congestion price risks. This more open access to transmission can increase competitive options for wholesale customers and suppliers as compared to most bilateral markets. The price transparency in these regional organized markets can increase the efficiency of the trading process for sellers and buyers and can give clear price signals indicating the best place and time to build new generation. Concerns have been raised, however, about the inability to obtain long-term transmission access at predictable prices in these markets and the impact that this can have on access to competing suppliers and incentives to construct new generation. Some customers have raised concerns about high and sometimes volatile commodity price levels in these markets.

2. Generation Investment in Competitive Wholesale Markets

New generation investment has varied significantly by region since the adoption of open access transmission and the growth of competition. The Task Force examined comments on how competition policy choices have affected investment decisions of both buyers and sellers in wholesale markets. A number of issues emerged. One was the difficulty of raising capital to build facilities whose revenue streams are affected by changing fuel prices, demand fluctuations, and the potential for regulatory intervention. A related theme was the investment dampening effects of a perceived lack of long-term contracting options for generation and transmission. Overall, the Task Force identified several factors that affect investment decisions in wholesale power markets.

a. Availability of Long-Term Contracts. Both generators and wholesale customers cited long-term contracts as critical in obtaining financing for new generation and ensuring adequate supplies for retail loads at predictable prices. Several explanations were offered for a perceived lack of long-term contracting opportunities. First, short-term market conditions, particularly in organized markets with uniform price auctions, may be affecting the availability, pricing, and terms for long-term power supplies under bilateral contracts. Base-load and mid-merit generators may see relatively high profits in short-term markets where clearing prices are often set by higher cost mid-merit and/or peaking plants reliant on oil or natural gas, particularly when fuel prices rise. Second, generators and marketers may be unwilling to enter into long-term supply contracts because of limited opportunities to hedge the potential risks of long-term commitments in highly volatile electricity markets. Third, both generators and customers cited continuing

uncertainties over availability and certainty of long-term delivery options (transmission). Fourth, long-term contracts may be difficult to arrange because of inherent uncertainties associated with federal and state regulation of these contracts. Finally, the uncertainty that distribution utilities face over how much supply they will need to procure for customers that have an option to switch can also discourage utilities from signing long-term contracts.

b. Capital Investment. Potential entrants to generation markets must be able to convince capital markets that generation is a viable profitable undertaking. The availability of long-term contracts, as noted above, is critical to the ability of nonutility generators to secure capital for new investment. Transmission access can be vital to supporting competitive options for market participants. Recently, capital for large investment projects has flowed to traditional utilities more than to merchant generators. This shift in part reflects reduced profitability of many merchant generators in recent years.

c. Transmission Infrastructure. The availability of transmission is often key in determining whether a generating facility is likely to be profitable and, thus, elicit investment. Despite legislative and regulatory efforts to expand transmission access for competitive generation and to reduce the potential for discrimination, the perception of discrimination persists. Commenters reported that such discrimination can increase delivery risk because purchasers fear their transmission transactions could be terminated for anticompetitive reasons. One response to this risk is to turn over operation of the regional transmission grid to ISOs and RTOs. Another is to adopt additional reforms to the Order 888 Open Access Transmission Tariff (OATT). New federal authorities provided by EPAct 2005 also address transmission infrastructure issues.

3. Pricing and Entry in Wholesale Markets for Electricity

Several options may be used to elicit adequate supply in wholesale markets:

a. One possible, but controversial, way to spur entry is to allow wholesale price spikes when supply is short. The profits realized during these price spikes can provide incentives for generators to invest in new capacity. However, if wholesale customers have not hedged (or cannot hedge) against price spikes, then these spikes can lead to adverse customer reactions. Unfortunately, it can be difficult to distinguish high prices due to the exercise of market power from those due to genuine scarcity. Past price spikes have caused regulators and various wholesale market operators to adopt price caps in certain markets. Although price caps may limit price spikes and some forms of market manipulation, they can also limit legitimate scarcity pricing and impede incentives to build generation in the face of scarcity. Not all the caps in place may be necessary or set at appropriate levels.

b. "Capacity payments" also can help elicit new supply and help moderate price volatility. Wholesale customers pay suppliers to assure the availability of generation when needed. Where there are capacity payments in organized wholesale markets, however, it is difficult for regulators to determine the appropriate level of capacity payments to spur entry without over-taxing market participants and customers. Also, capacity payments may elicit new generation when transmission or other responses to price changes might be more affordable and equally effective. Depending on their format, capacity payments also may discourage entry by paying uneconomical generation to continue running when market conditions otherwise would have led to not running, or even decommissioning.

c. Expanding transmission capacity may encourage entry of new generation and/or the more efficient use of existing generation. However, transmission owners may resist building transmission facilities if they also own generation and if the proposed upgrades would increase competition in their sheltered markets. Another challenge is that it is often difficult to assess the beneficiaries of transmission upgrades, who should pay for the upgrades, and how regulators should provide for recovery of the investment through rates. This regulatory challenge may cause uncertainty about the price for transmission and about return on investment both for new generators and for transmission providers.

d. Another option for ensuring adequate generation supply is to exercise traditional regulatory authority over electricity generators/suppliers. In this situation, regulated monopoly utility providers operate under an obligation to plan and secure adequate generation to meet the needs of their customers. Regulators allow the utilities to earn a fair rate of return on their investment, thereby encouraging utility investment. This approach is not without risk to the utility, as regulators have authority to disallow excessive costs. Furthermore, these traditional methods are imperfect and can in some cases lead to overinvestment, underinvestment, excessive spending and unnecessarily high costs. These methods can distort both investment and consumption decisions.

E. Observations on Retail Market Competition

In the early 1990s, several states with high electricity prices began exploring opening retail electric service to competition. While customers would choose their supplier, the local distribution utility would still handle the delivery of electricity. Retail competition was expected to result in lower retail prices, innovative services and pricing options. It also was expected to shift the risks of assuring adequate new generation construction from ratepayers to competitive market providers. By 2006, 16 states and the District of Columbia had restructured retail electric service and allowed competitive suppliers to provide service to some, if not all, retail customers at prices set in the market.

Most restructured states required the local utility to continue to offer service under regulated "provider of last resort" (POLR) rates for all retail customers who did not switch suppliers or who lost or discontinued competitive service. These POLR rates were typically fixed for extended periods of time. In many of these states, vertically integrated utilities divested or transferred their generation assets as part of restructuring plans. As a result, in these states the retail load serving utilities obtain electricity from wholesale markets to meet the needs of their retail customers, including POLR obligations. Some states also required that the utilities join RTOs.

1. Retail Competition Experience in Profiled States

The Task Force examined in detail the implementation of retail competition in Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and Texas. Common goals for retail competition included:

- lower electricity prices than under traditional cost of service regulation through retail suppliers' (and eligible customers') access to competitive wholesale markets;
- better service and more options for customers;
- technological innovation and new products and services for consumers; and

environmental improvements.

In most profiled states, retail competition has not developed as expected for all customer classes. Few residential customers have switched to alternative providers. (Exceptions include Massachusetts, New York, and Texas.) In most of the profiled states, few residential customers have a wide variety of alternative suppliers and pricing options. Commercial and industrial (C&I) customers have more choices and options, but in several states large industrial customers have become increasingly dissatisfied with retail market prices. To the extent that multiple suppliers serve retail customers, prices have not decreased as expected, and the range of new options and services is often limited.

At the same time, there is some evidence that alternative suppliers have offered new retail products, including "green" products that are more environmentally friendly for residential and non-residential customers and customized energy management products for large C&I customers.

Legislative or regulatory limits on POLR prices have hampered entry by competitive suppliers in retail markets. In the profiled states, regulators often capped the POLR electricity price for "transitional" multi-year periods that are now just ending. Several states also required price reductions for POLR service below existing regulated rates (in order to proxy the expected benefits of competition). Over time, these capped and discounted POLR prices fell below prevailing wholesale market price levels. These POLR price caps have the unintended effect of dampening competitive price signals and discouraging entry by competitive suppliers.

The POLR rate caps and the sharp increase in fossil fuel costs affecting all retail suppliers across the country, complicate Task Force efforts to discern any price differences attributable to the introduction of competition. The implementation of retail competition is a relatively new exercise, and retail competition policies involve a number of unresolved issues (including regulatory issues) that can inhibit vigorous competition. It should be easier to evaluate the impact of restructuring in retail electricity markets once some of these issues have been resolved.

2. State Retail Competition Issues

Initial POLR rate discounts, freezes and caps have been lifted in several states, and caps in several more expire in 2006 and 2007. When the rate caps expire, states must decide whether to continue POLR for all customer classes, how POLR providers will secure adequate generation supplies, and how to price POLR service for each class. The Task Force identified some key issues that states may wish to consider as they evaluate their retail competition and POLR policies.

a. Function of POLR Pricing. If regulated POLR service is to be a proxy for efficient price signals, POLR rates must closely approximate a competitive price, which is based on supply and demand at any given time. If the POLR service price does not closely match the competitive price, it is likely to distort consumption and investment decisions.

b. Adjustments to POLR Rates. If POLR prices remain fixed while prices for fuel and wholesale power are rising, customers may experience rate shock when the transition period ends. This can create public pressure to continue the fixed POLR rates at below-market levels. One regulatory response may be to phase in the price increase gradually, by deferring recovery of part of the supplier's costs. This approach reduces rate shock, but it is likely to distort retail electricity markets both in the short term (when costs are deferred) and in the long term (when the deferred costs are recovered). The better practice is to make frequent adjustments to the cap (at least to reflect changes in fuel costs) or to abandon the cap altogether and use a competitive process to procure supply.

c. Nature of POLR Service. States have different policy goals for establishing and maintaining POLR service in competitive retail markets. These policies can affect entry of competitive retail suppliers. POLR service (or an equivalent provision) that is limited to an obligation to serve customers of a supplier that has left the market, while the customer obtains another supplier, is the least intrusive form of POLR service. It also is consistent with protecting consumers against unanticipated loss of electric service. POLR service that goes beyond short-term access to the wholesale spot market involves providing a bundle of services that electricity marketers also could provide. A more expansive version of POLR service may hamper development of alternative suppliers. The economic rationale for maintaining a POLR service obligation usually is limited to trying to correct market imperfections. If a state adopts a more expansive version of POLR service, it should periodically review the rationale for continuing the service.

d. Treatment of Different Customer Classes. States may find that effective retail competition programs require different POLR service designs for different customer classes. Large C&I customers are logical leaders for retail choice because of their familiarity with energy procurement processes and because they are comfortable with decisions to adjust input use based on input prices. State policies have allowed POLR

rates for these large customers to reflect wholesale spot market prices more than POLR rates for residential customers. This approach generally has led large customers to switch suppliers more than small customers have. Also, more suppliers have tried to solicit these large customers.

e. Consumer Education. Customers may find it difficult to find competitive supplier offers in the first place and to understand the terms and conditions of those offers. It also is unclear whether the perceived potential cost savings are sufficient to give customers incentives to undertake the effort to find this information. For these smaller, less sophisticated shoppers, issues of awareness and access to comparative pricing information should be addressed as retail customer choice is implemented.

f. Customer Aggregation. Competitive provider interest in residential and small business customers has been slow to develop in most states. While POLR policies have dampened price signals, the higher per-unit costs of marketing and switching for small customers may also be a disincentive for providers. Retail aggregation programs can reduce shopping burdens and uncertainties for individual customers and lower customer acquisition costs for competitive providers. Several states have approved customer aggregation plans as an alternative approach to developing retail competition. Opt-out customer aggregations may be worth considering because they can minimize transaction costs without limiting customer choice.

g. Procurement of POLR Supply. In all retail competition states, a substantial number of retail customers continue to depend on POLR service. Some states have used, or are proposing to use, auctions to procure POLR supply. Auctions may allow retail customers to get the benefit of competition in wholesale markets as suppliers compete to supply the necessary load. Various auction processes have been suggested.

h. Switching Costs. Switching is important for retail electricity competition to work. Rules and procedures for switching should allow customers to switch easily but should deter unauthorized switching (slamming).

Section E of Chapter 4 presents a description of various approaches to overcoming some of the above-mentioned difficulties and to encouraging competition in retail electricity markets.

CHAPTER 1
INDUSTRY STRUCTURE, LEGAL AND REGULATORY BACKGROUND, TRENDS AND DEVELOPMENTS

For almost all of the 20th Century, the electric power industry was dominated by regulated monopoly utilities. Beginning in the late 1960s, a number of technological, economic, regulatory, and political developments led to fundamental changes in the structure of the industry.

In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative) controlled over 95 percent of the electric generation in the United States. Typically, a single local utility sold and delivered electricity to retail customers under an exclusive franchise regulated under state law. Today, the electric power industry includes both utility and nonutility entities, including many new companies that produce, market and deliver electric energy in wholesale and retail markets. As a result of industry changes, by 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities. This chapter highlights structural changes in the industry since the late 1960s. It provides an overview of the important legislative and regulatory changes, as well as trends that have contributed to increased competition.

A. Industry Structure and Regulation

Participants in the electric power sector in the United States include investor-owned utilities and electric cooperatives; federal, state, and municipal utilities, public utility districts and irrigation districts; cogenerators and onsite generators; and nonutility independent power producers (IPPs), affiliated power producers, power marketers, and independent transmission companies that generate, distribute, transmit, or sell electricity at wholesale or retail.

In 2004, 3,276 regulated retail electric providers supplied electricity to over 136 million customers, with retail sales totaling almost $270 billion. Retail customers purchased more than 3.5 billion megawatt hours (MWhs) of electricity. Active retail electric providers include utilities, federal agencies, and power marketers selling directly to retail customers. These entities differ greatly in size, ownership, regulation, customer load characteristics, and regional conditions. These differences are reflected in policy and regulation. Tables 1-1 to 1-5 provide selected statistics for the electric power sector by type of ownership in 2004 based on information reported to the Department of Energy (DOE), Energy Information Administration (EIA).

1. Investor-Owned Utilities

Investor-owned utility operating companies (IOUs) are private, shareholder-owned companies ranging from small local operations serving a retail customer base of a few thousand to giant multi-state holding companies serving millions of customers. Most IOUs are or are part of a vertically integrated system that owns or controls generation, transmission, and distribution facilities/resources to meet the needs of retail customers in their franchise service areas. Many IOUs have undergone significant restructuring and reorganization under state retail competition plans over the past decade. As a result, many IOUs no longer own generation, but those that sell electric power to retail customers must procure electricity from wholesale markets. See Chapter 4 and Appendix D of this document for details on state experience with retail competition. IOUs continue to be a major presence. In 2004 there were 220 IOUs serving approximately 94 million retail distribution customers, accounting for 68.9 percent of all retail customers and 60.8 percent of retail electricity sales. IOUs directly owned about 39.6 percent of total electric generating capacity and accounted for 44.8 percent of generation for retail and wholesale sales in 2004. IOUs provide service to retail customers under state regulation of territories, finances, operations, services, and rates. States that have not restructured retail service generally regulate retail rates under traditional bundled cost-of-service rate methods. In states that have restructured IOUs, distribution services continue to be provided under monopoly cost-of-service rates, and retail customers obtain generation service either at market rates from alternative competitive providers or at regulated "provider of last resort" (POLR) rates from the distribution utility or another designated POLR service provider. IOUs serve retail customers in every state but Nebraska.

Under the Federal Power Act (FPA),[8] the Federal Energy Regulatory Commission (FERC) regulates wholesale electricity transactions (sales for resale) and unbundled transmission activities of IOUs as "public utilities" engaged in interstate commerce. The exceptions are IOUs that do not have direct interconnections with utilities in other states that allow unimpeded flow of electricity across systems. Thus, IOUs in Alaska, Hawaii, and the Electric Reliability Council of Texas (ERCOT) region of Texas generally are not subject to FERC jurisdiction.

2. Public Power Systems

The more than 2,000 publicly owned power systems include local, municipal, state, and regional public power systems. These providers range from tiny municipal distribution companies to large systems such as the Los Angeles Department of Water and Power. Publicly owned systems operate in every state but Hawaii. About 1,840 of these systems are cities and municipal governments that own and control the day-to-day operation of their electric utilities.[9] Public power systems served over 19.6 million retail customers in 2004, or about 14.4 percent of all customers. Together, they generated 10.3 percent of the nation's power in 2004, accounted for 16.7 percent of total electricity sales and owned about 9.6 percent of total generating capacity. Many public systems are distribution-only utilities that purchase, rather than generate, power. According to the American Public Power Association, about 70 percent of public power retail sales were met from wholesale power purchases, including purchases from municipal joint action agencies by the agencies' member systems. Only about 30 percent of the electricity for public power retail sales comes from power generated by a utility to service its own native load.[10] Publicly owned utilities, thus, depend overwhelmingly on transmission and the wholesale market to bring electricity to their retail customers.

Regulation of public power systems varies among states. In some, the public utility commission exercises jurisdiction in whole or part over operations and rates of publicly-owned systems. In most states, public power systems are regulated by local governments or are self-regulated. Municipal systems usually are governed by a local city council or an independent board elected by voters or appointed by city officials. Other public power systems are operated by public utility districts, irrigation districts, or special state authorities.

On the whole, state retail restructuring initiatives did not affect retail services in public systems. However, some states allow public systems to adopt retail choice alternatives voluntarily.

3. Electric Cooperatives

Electric cooperatives are privately-owned, non-profit electric systems owned and controlled by the members they serve. Members vote directly for the board of directors. In 2004, 884 electric distribution cooperatives provided retail electric service to almost 16.6 million customers. In addition, another 65 generation and transmission cooperatives (G&Ts) own and operate generation and transmission and secure wholesale power and transmission services from others to meet the needs of their distribution cooperative members' retail customers and other rural native load customers. G&T systems and their members engage in joint planning and power supply operations to achieve some of the savings available under a vertically integrated utility structure. Electric cooperatives operate in 47 states. Most were originally organized and financed under the federal rural electrification program and operate in primarily rural areas. Cooperatives provide electric service in all or parts of 83 percent of the counties in the United States.11

In 2004, electric cooperatives sold more than 345 million MWhs, served 12.2 percent of retail customers, and accounted for 9.7 percent of electricity sold at retail. Nationwide electric cooperatives generate about 4.7 percent of total electric generation and own approximately 4.2 percent of generating capacity.

While some cooperative systems generate their own power and sell power in excess of their members' needs, most G&Ts and distribution cooperatives are net buyers. Cooperatives nationwide generated only about half of the power needed by their retail customers. They secured approximately half of their power needs from other wholesale suppliers in 2004. Although cooperatives own and operate transmission facilities, almost all rely to some extent on transmission owned by others to deliver power to their customers.

Regulatory jurisdiction over cooperatives varies among states. Some states exercise considerable authority over rates and operations, while others exempt cooperatives from state regulation. In addition to state regulation, cooperatives with outstanding loans under the Rural Electrification Act of 193612 are subject to financial and operating requirements of the Rural Utilities Service (RUS), Department of Agriculture. RUS must approve borrowers' long-term wholesale power contracts, operating agreements, and transfers of assets. Cooperatives that have repaid their RUS loans and that engage in wholesale sales or provide transmission services to others have been regulated by FERC as public utilities under the FPA. EPAct 2005 gave FERC additional discretionary jurisdiction over transmission services provided by larger electric cooperatives.

4. Federal Power Systems

Federally-owned or chartered power systems include the federal power marketing administrations (PMAs), the Tennessee Valley Authority (TVA), and facilities operated by the U.S. Army Corps of Engineers, the Bureau of Reclamation, the Bureau of Indian Affairs, and the International Water and Boundary Commission. Wholesale power from federal facilities (primarily hydroelectric dams) is marketed through four federal power marketing agencies: Bonneville Power Administration, Western Area Power Administration, Southeastern Power Administration, and Southwestern Power Administration. The PMAs own and control transmission to deliver power to wholesale and direct service customers. They also may purchase power from others to meet contractual needs and may sell surplus power as available to wholesale markets. Existing legislation requires that the PMAs and TVA give preference in selling their generation to public power systems and to rural electric cooperatives.

Together, federal systems have an installed generating capacity of approximately 71.4 gigawatts (GW) or about 6.9 percent of total capacity. Federal systems provided 7.2 percent of the nation's power generation in 2004. Although most federal power sales are at the wholesale level, some are made to end users. Federal systems nationwide directly served 39,845 retail customers in 2004, mostly industrial customers and about 1.2 percent of retail load.

5. Nonutilities

Nonutilities are entities that generate, transmit, or sell electric power but do not operate regulated retail distribution franchises.13 They include wholesale nonutility affiliates of regulated utilities, merchant generators, and qualifying facilities (QFs).14 They also include power marketers that buy and sell power at wholesale or retail but that do not own generation, transmission, or distribution facilities. Independent transmission companies that own and operate transmission facilities but do not own generation or retail distribution facilities or sell electricity to retail customers are also included in this category for EIA reporting purposes.

Non-QF wholesale generators engaged in wholesale power sales in interstate commerce are subject to FERC regulation under the FPA. Power marketers selling at wholesale are also subject to FERC oversight. Power marketers selling only at retail are subject to state jurisdiction and oversight in states where they operate. FERC regulates interstate transmission services of independent transmission companies under the FPA. Such companies also may be organized and regulated as utilities where they are located for planning, siting, permitting, and other purposes.

As retail electric providers, 152 power marketers reporting to EIA served about 6 million retail customers or about 4.4 percent of all retail customers and reported revenues of over $28 billion, on about 11.6 percent of retail electricity sold.

Nonutilities are a growing presence in the industry. In 2004, nonutilities owned or controlled approximately 408,699 megawatts (MWs) or 39.6 percent of all electric generation capacity, compared to about 8 percent in 1993. About half of nonutility generation capacity is owned by nonutility affiliates or subsidiaries of holding companies that also own a regulated electric utility.15 Nonutilities accounted for about 33 percent of generation in 2004. Tables 1-1 through 1-5 summarize this information.

Table 1-1. U.S. Retail Electric Providers, 2004

Ownership	Number of Electricity Providers	Percent of Total	Number of Customers	Percent of Total

			Full-Service	Delivery only*	Total	
Publicly-owned utilities	2,011	61.4	19,628,710	6,125	19,634,835	14.4
Investor-owned utilities	220	6.7	90,970,557	287,9114	93,849,671	68.9
Cooperatives	884	27	16,564,780	12,170	16,576,950	12.2
Federal Power Agencies	9	0.3	39,843	2	39,845	0.03
Power Marketers**	152	4.6	6,017,611	0	6,017,611	4.4
Total	3,276	100	133,221,501	2,897,411	136,118,912	100.0

Notes:
*Delivery-only customers represent the number of customers in a utility's service territory that purchase energy from an alternative supplier.

** Ninety-eight percent of all power marketers' full-service customers are in Texas. Investor-owned utilities in the ERCOT region of Texas no longer report ultimate customers. Their customers are counted as full-service customers of retail electric providers (REPs), which are classified by the Energy Information Administration as power marketers. The REPs bill customers for full-service and then pay the IOU for the delivery portion. REPs include the regulated distribution utility's successor affiliated retail electric provider that assumed service for all retail customers that did not select an alternative provider. Does not include U.S. territories.

Source: American Public Power Association, *2006-07 Annual Directory & Statistical Report*, from Energy Information Administration Form EIA-861, 2004, data.

Table 1-2. U.S Retail Electric Sales, 2004

Sales to Ultimate Consumers in Thousands of MWhs

Ownership	Full-Service	Energy only	Total	Percent
Publicly-owned utilities	525,596	65,466	591,062	16.7
Investor-owned utilities	2,148,351	3,359	2,151,720	60.8
Cooperatives	344,267	890	345,157	9.7
Federal Power Agencies	41,169	352	41521	1.2
Power Marketers	207,696	203,202	410,898	11.6
Total	3,267,089	27,3269	3,540,358	100.0

Source: American Public Power Association, *2006-07 Annual Directory & Statistical Report*, from Energy Information Administration Form EIA-861, 2004 data.

Table 1-3. U.S. Retail Electric Providers, 2004, Revenues from Sales to Ultimate Consumers

Ownership	Sales in $ millions			
	Full-Service	Energy only *	Delivery	Total **
Publicly-owned utilities	$37,734	$5,787	$27	$43,548
Investor-owned utilities	$162,691	$128	$8,746	$171,565
Cooperatives	$25,448	$37	$7	$25,492
Federal Power Agencies	$1,211	$13	$1	$1,224
Power Marketers	$17,163	$11,000	0	$28,162
Total	$244,247	$16,965	$8,761	$269,992

Notes:
* Energy-only revenue represents revenue from a utility's sales of energy outside of its own service territory.

** Total shows the amount of revenue each provider group receives from both bundled (full-service) and unbundled (retail choice) sales to ultimate customers. Eighty-five percent of the energy-only revenue attributed to publicly-owned utilities represents revenue from energy procured for California's investor-owned utilities by the California Department of Water Resources Electric Fund. Ninety-eight percent of power marketers' full-service sales and revenues occur in Texas. IOUs in the ERCOT region of Texas no longer report sales or revenue to ultimate consumers on EIA 861.

Source: American Public Power Association, *2006-07 Annual Directory & Statistical Report*, from Energy Information Administration Form EIA-861, 2004 data

Table 1-4. U.S. Electricity Generation, 2004

Thousands of MWhs and Percent of Total

Ownership	Generation	Percent of Total
	(thousands of MWhs)	
Publicly-owned utilities	397,110	10.3
Investor-owned utilities	1,734,733	44.8
Cooperatives	181,899	4.7
Federal Power Agencies	278,130	7.2
Power Marketers	42,599	1.1
Nonutilities	1,235,298	31.9
Total	3,869,769	100.0

Source: American Public Power Association, *2006-07 Annual Directory & Statistical Report*, from Energy Information Administration Form EIA-861 and EIA-906/920 for generation. Data are for 2004, adjusted for joint ownership.

Table 1-5. U.S. Electric Generation Capacity, 2004

Ownership	Nameplate Capacity	Percent of Total
	(in MWs)	

Publicly-owned utilities	98,686	9.6
Investor-owned utilities	408,699	39.6
Cooperatives	43,225	4.2
Federal Power Agencies	71,394	6.9
Nonutilities	409,689	39.7
Total	1,031,692	100.0

Source: American Public Power Association, *2006-07 Annual Directory & Statistical Report*, from Energy Information Administration Form EIA-860 for capacity, including adjustments for joint ownership. Data are for 2004.

B. Growth of the Electric Power Industry

For a variety of legal, economic, and technological reasons, the electric utility industry in the United States developed as a collection of separate, mostly vertically-integrated monopoly franchises with wholesale and retail prices and services extensively regulated under state and federal law. Many states have elected to maintain this model. The legacy of this vertically-integrated monopoly structure creates substantial challenges for state and federal efforts to restructure the industry and to create new institutional arrangements to facilitate increased reliance on competitive market prices. This section provides a brief overview of the evolutionary changes in the electric power industry.

1. The Rise of Electric Utility Monopolies and Public Utility Regulation

In the late 19th Century, electric utilities developed as small central station power plants with limited local distribution networks. Franchise rights granted by manufacturers and by municipal governments allowed use of public streets and rights of ways. These franchises were often exclusive, but in some cities there was head-to-head competition among competing electric lighting companies.16 In addition, because lighting, electric motors, and traction were the major uses of electricity, customers could turn to alternatives – natural gas lighting or self-generation in the case of street railway, commercial, and industrial customers.17 Many municipalities elected to create and operate their own electric utility systems.

Certain characteristics of providing electric service were recognized early on. Utility systems incurred high fixed costs for investments in generating plants needed to meet peak load and to extend the delivery system. Because they had relatively low operating costs, their profits were determined by the percent of time the power plant was in use. Complementary load diversity – such as balancing daytime traction and electric motor loads with evening lighting loads – could raise generating plant use and revenues to offset fixed costs and boost profits. The high capital costs of electric generating plants made investments risky. Steady gains in generation, transmission, and distribution economies of scale provided incentives to expand the electric networks. Larger plants produced cheaper electricity than many smaller plants. The substantial investment required for electric utility plants also spurred creation of long-term financing structures and the corresponding interest in providing assurances to investors that the entity would be profitable and would remain financially viable long enough to repay the debt.

These characteristics led some to suggest that a single monopoly provider of integrated generation, transmission and distribution service could provide electric service most economically and safely. To avoid abuses of this monopoly power, it was suggested that impartial state agencies should be created to award franchises and establish rates and service standards. An early associate of Thomas Edison, Samuel Insull of Chicago Edison was among them and proposed state regulation of private utilities in a speech before the National Electric Light Association in 1898.18 Insull characterized electricity production as a "natural monopoly."19 Initially, the proposal for state regulation was poorly received, but as private electric companies began to grow and consolidate and concerns were raised over trusts in many industries, the concept began to gain support. In 1907, Wisconsin adopted legislation regulating electric utilities and was quickly joined by two other states. By 1916, 33 states had established state agencies to oversee private electric utilities.20

Generally, under this approach, the state regulatory commission granted exclusive retail electric franchises to private companies within specified territories, protecting the utility from competition. In return, the utility assumed an obligation to provide safe and adequate service to all retail customers within its territory under just and reasonable rates, terms and conditions overseen by the state. Often the utility was authorized to use public rights of way and eminent domain for electric facilities. To meet this obligation to serve, most private utilities built and controlled the generation, transmission, and distribution facilities needed to provide service to customers. Rates were set to cover the companies' reasonable costs plus a fair return on shareholders' investment. The utility could expect a right to reasonable compensation for its services, although a specific rate of return was not guaranteed. Retail rates (price) were based on the average historical system cost of production (including the investors' fair return on investment).

In the early 20th Century, private electric utilities continued to expand under this system of state regulation. Most continued to build their own generation plants and transmission systems, primarily due to the cost and technological limitations of transmitting electricity over distances.21 Initially, there was little wholesale trade among utilities. As the industry grew, continued improvements in technology allowed expansion beyond central cities, and prices for electricity fell at the same time that demand increased substantially.

Over the same period, electric utility holding companies were created and began to acquire local private and municipal utilities. While a holding company's local utility operating companies were regulated by the state, the holding company and its other affiliates and subsidiaries were not, and often did business in several states. The proliferation, consolidation, and complexity of such companies coincided with a number of financial and securities abuses that were documented in an investigation by the Federal Trade Commission (FTC). These holding companies often became the sole providers of various services and products to their affiliated utilities, and their sometimes inflated costs were passed through to the retail customers. By 1932, the eight largest utility holding companies controlled 73 percent of the investor-owned electric industry.22

This pattern of consolidated ownership and holding company abuses led to calls for federal involvement in the electric power industry. As a result of the FTC findings, Congress passed the Public Utility Holding Company Act of 1935 (PUHCA 1935),23 which required the breakup and stringent federal oversight of the large utility holding companies. The FPA expanded the Federal Power Commission's authority to include oversight and regulation of interstate sales of wholesale power (e.g., sales of power between utility systems) and interstate electricity transmission at wholesale by "public utilities" (i.e., investor-owned utilities). FPA jurisdiction over interstate sales closed a gap in electric industry regulation that the Supreme Court had identified in 1927.24

When the FPA was enacted, wholesale and interstate sales of electricity were limited. Most wholesale transactions were long-term power supply contracts by investor-owned utilities to sell and deliver power to neighboring public power and cooperative utilities. Over time, utilities became more interconnected via high-voltage transmission networks. Constructed primarily for reliability, these networks also facilitated more opportunities for interstate trade. However, wholesale trade was slow to develop.

Until the late 1960s, the vertically integrated monopoly utility model appeared to work reasonably well. Utilities were able to meet increasing demand for electricity at decreasing prices as advances in generation technology and transmission provided increased economies of scale with larger units and decreased costs.25

2. The Energy Crisis of the 1970s, PURPA, and the Expansion of Nonutility Generation and Wholesale Power Markets

The shift toward a more competitive marketplace for electricity was precipitated by industry changes that began in the late 1960s and accelerated throughout the 1970s. Resulting financial stresses challenged the continued profitability of the large vertically integrated utility model. They also provoked criticisms of the traditional cost-of-service regulatory model that allowed the pass-through of higher costs and risks of construction to consumers.

By the end of the 1960s, electricity demand and generation were increasing at an annual rate of 7.5 percent, and residential rates were declining at an average annual rate of 1.5 percent.26
At the same time, the new large nuclear and coal plants built in the 1970s did not yield the dramatic improvements in economies of scale that earlier technological advances in generating plant size had produced. The industry's characterization as a long-term decreasing cost industry came into question. Periods of rapid inflation and higher interest rates substantially increased the completion costs of large, base load generating plants.27 New environmental and safety regulations required addition of pollution controls and design features that added to costs and construction time. Moreover, once in operation, many of the new, larger units required more maintenance and longer downtimes than expected. Thus, by the late 1970s, a newer, larger, generation facility no longer could be assumed to be more cost-efficient than a smaller plant.28

This experience stimulated interest in smaller, modular, more energy-efficient generating units. One expression of this interest resulted in commercialization of aeroderivative gas turbine technology. This technology allowed smaller generation units to be constructed at lower costs, more quickly, and at less financial risk than large base-load coal and nuclear plants.29 Thus, construction of low-cost generation became an option for utilities that were formerly captive to high-cost generators and emerged as a viable path for new nonutility generators to enter the market.

As the difficulties plaguing utilities' generation construction programs were playing out, utility fuel prices were escalating rapidly in response to the Arab oil embargo of 1973-1974 and subsequent world oil market disruptions. Significantly higher energy prices added to inflation and increased electric rates.30 Other developments also substantially contributed to the growing interest in electric utility reforms. First, the 1965 Northeast power blackout raised concerns about the reliability of weakly coordinated bulk power system operating arrangements among utilities.31 The nuclear accident at the Three Mile Island plant in Pennsylvania on March 28, 1979, heightened concerns over safety and led to stringent new regulatory requirements for nuclear plants.

Criticism of the traditional cost-of-service utility regulation model by economists and policy analysts also increased during the 1970s with suggestions for alternate approaches to regulation and changes in industry structure. Critics of cost-based regulation argued that the industry structure limited opportunities for more efficient suppliers to expand, placed insufficient pressure on less efficient suppliers to improve performance, and insulated customers from the cost impacts of energy use.32

Congress enacted the Public Utility Regulatory Policies Act (PURPA) as a response to the energy crises of the 1970s. PURPA's major goal was to promote energy conservation and alternative energy technologies and to reduce oil and gas consumption through use of improved technology and regulatory reforms. A perhaps unanticipated side effect was that PURPA prompted a number of parties to see potential profits in developing competitive generating plants, creating an opportunity for nonutilities to emerge as important electric power producers.33

PURPA required electric utilities to interconnect with and purchase power from cogeneration facilities and small power producers that met statutory criteria for a qualifying facility (QF). A utility had to pay the QF at the utility's incremental cost of production. In a departure from cost-based rate approaches, FERC defined this as the utility's avoided cost of power.34 Box 1-1 discusses how implementation of PURPA encouraged nonutility generation suppliers by guaranteeing a market for the electricity produced.35 PURPA changed prevailing views that vertically integrated public utilities were the only reliable sources of power36 and showed that nonutilities could build and operate generation facilities effectively and without disrupting the reliability of the electric grid. PURPA contributed substantially, both directly and indirectly, to the creation of an independent competitive generation sector.37

Before passage of PURPA, nonutility generation was confined primarily to commercial and industrial facilities that generated heat and power for onsite use where it was advantageous to do so. Although nonutility generation facilities were located across the country, development was heavily concentrated geographically, with about two-thirds of such facilities located in California and Texas. Nonutility generation development advanced in states where avoided costs were high enough to attract interest and where natural gas supplies were available. Federal law largely precluded electric utilities from constructing new natural gas plants during the decade following enactment of PURPA, but nonutility generators faced no such restriction and quickly turned to the new smaller gas turbines as the preferred generating technology.

The response to PURPA was dramatic. Annual QF filings at FERC rose from 29 applications covering 704 MW in 1980 to 979 in 1986 totaling over 18,000

MW. From 1980 to 1990, FERC received a total of 4,610 QF applications for a total of 86,612 MW of generating capacity.38

Following PURPA, continued improvement in generating technology lowered costs and further contributed to an influx of new entrants in wholesale markets. They could sell electric power profitably with smaller scale generators, including renewable energy technologies and more efficient, modular gas turbines.39 Other nonutilities that could not meet QF criteria began building new capacity to compete in bulk power markets to meet the needs of utilities.40 These new entities were known as merchant generators or independent power producers (IPPs).41 By 1991, nonutilities (QFs and IPPs) owned about 6 percent of the electric generating capacity and produced about 9 percent of the total electricity generated in the United States.42 Nonutility facilities accounted for one-fifth of all additions to generating capacity in the 1980s.43 Beginning in the 1980s, FERC allowed many new utility and nonutility generators to sell electricity at rates negotiated in wholesale markets, rather than established under cost-of-service formulas.44

Box 1-1

State Implementation of PURPA

PURPA required states to determine each utility's avoided costs of production. This cost was used to set the price for purchasing a QF's power. To encourage renewable and alternative energy generation, several states, including California, New York, Massachusetts, Maine, and New Jersey, required utilities to sign long-term contracts with QFs at prices that eventually ended up being much higher than the utilities' actual marginal savings of not producing the power itself (avoided costs). As a result, many utilities in these states entered into long-term purchase contracts at prices higher than those available in the competitive wholesale markets. The costs of these QF contracts were reflected in retail rates as cost pass-throughs. The experience added to the dissatisfaction with retail rate regulation.

In 1988, FERC solicited public comments on three notices of proposed rulemaking (NOPRs) dealing with electricity pricing in wholesale transactions. These NOPRs addressed the following issues: (1) competitive bidding for new power requirements; (2) treatment of independent power producers; and (3) determination of avoided costs under PURPA.45 These proposals would have moved FERC towards greater use of a "non-traditional" market-based pricing approach in ratemaking as opposed to the agency's "traditional" cost-based approach. The NOPRs, however, proved controversial, and efforts to establish formal rules or policies were abandoned. However, the overall policy goals were still pursued on a case-by-case basis.

Between 1983 and 1991, FERC was asked to approve more than 30 non-traditional market-based rate proposals. These proposals were brought by IPPs, power brokers/marketers, utility-affiliated power producers, and traditional franchised utilities. FERC approved all but four.46 In explaining its approach, FERC staff wrote: "The Commission has accepted non-traditional rates where the seller or its affiliate lacked or had mitigated market power over the buyer, and there was no potential abuse of affiliate relationships which might directly or indirectly influence the market price and no potential abuse of reciprocal dealing between the buyer and seller."47 In determining whether the seller could exercise market power over the buyer, FERC considered whether the seller or its affiliates owned or controlled transmission that might prevent the buyer from accessing other power sources. A seller with transmission control might be able to force the buyer to purchase from the seller, thus limiting competition and significantly influencing price. The FPA does not allow rates to reflect an exercise of such market power.48

FERC recognized the potential for control of transmission to create market power and the challenge such control created in moving to greater reliance on market-based rates. FERC staff told Congress, "Because the Commission's very premise of finding market-based rates just and reasonable under the FPA is the absence or mitigation of market power, or the existence of a workably competitive market, and because the FPA mandates that the Commission prevent undue preference and undue discrimination, we believe the Commission is legally required to prevent abuse of transmission control and affiliate or any other relationships which may influence the price charged a ratepayer."49

Despite these developments, two limitations at that time were perceived to discourage competitive wholesale generation markets. First, IPPs and other generators of cheaper electric power could not easily access the transmission grid to reach potential customers.50 Under the FPA as then written, FERC had limited authority to order access. FERC would subsequently find that "intervening" transmitting utilities would deny or limit transmission service to competing suppliers of generation to protect demand for wholesale power supplied by their own facilities.51 Second, unlike QFs that enjoyed a statutory exemption under PURPA, IPPs were subject to PUHCA 1935, which discouraged nonutilities from entering the generation business.52

3. The Energy Policy Act of 1992 and FERC Orders Nos. 888 and 889

EPAct 1992 amended the FPA and PUHCA 1935 to address what were then seen as the two major limitations to the development of a competitive generation sector.

First, EPAct 1992 created a new category of power producers, called exempt wholesale generators (EWGs).53 An EWG is an entity that directly, or indirectly through one or more affiliates, owns or operates facilities dedicated exclusively to producing electric power for sale in wholesale markets.54 EWGs are exempted from PUHCA 1935 regulations, thus eliminating a major barrier for utility-affiliated and nonaffiliated power producers that wanted to build or acquire new non-rate-based power plants to sell electricity at wholesale.55

Second, EPAct 1992 expanded FERC's authority to order transmitting utilities to provide transmission service for wholesale power sales to any electric utility, federal power marketing agency, or any person generating electric energy.56 It provided for orders to be issued on a case-by-case basis following a hearing if certain protective conditions were met. Although FERC implemented this new mandatory wheeling authority, it ultimately concluded that procedural limitations restricted its reach and a broader remedy was needed to eliminate pervasive undue discrimination in transmission service that hindered competition in wholesale markets.

In April 1996, FERC adopted Order No. 888 in exercise of its statutory obligation under the FPA to remedy undue transmission discrimination. The goal was to ensure that transmission owners do not use their transmission facility monopoly to unduly discriminate against IPPs and other sellers of electric power in wholesale markets. In Order No. 888, FERC found that undue discrimination and anti-competitive practices existed in transmission service provided by public utilities in interstate commerce. FERC determined that non-discriminatory open access transmission service was an appropriate remedy and one of the most critical components of a successful transition to competitive wholesale electricity markets. Accordingly, FERC required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access transmission tariffs (OATTs) containing certain non-price terms

and conditions. They also were required to "functionally unbundle" wholesale power services from transmission services.[57] This meant that a public utility was required to: (1) take wholesale transmission services under the same tariff of general applicability as it offered its customers; (2) define separate rates for wholesale generation, transmission and ancillary services; and (3) rely on the same electronic information network that its transmission customers rely on to obtain information about the utility's transmission system.58

Concurrent with Order No. 888, FERC issued Order No. 88959 that imposed standards of conduct governing communications between a utility's transmission and wholesale power functions to prevent the utility from giving its power marketing arm preferential access to transmission information. Order No. 889 requires each public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce to create or participate in an Open Access Same-Time Information System (OASIS). OASIS must provide information regarding available transmission capacity, prices, and other information that will enable transmission customers to obtain open access to non-discriminatory transmission service.60

In Order No. 888, FERC also encouraged grid regionalization through the formation of independent system operators (ISOs). Participating utilities would voluntarily transfer operating control of their transmission facilities to the ISO to ensure independent operation of the transmission grid.61 The expectation was that ISO regional control would lead to improved coordination, reliability, and efficient operation.62 However, ISO participation was voluntary and was not embraced in all regions.63 Together, Order Nos. 888 and 889 serve as the primary federal regulatory foundation for providing nondiscriminatory transmission service and information about the availability of transmission service.64

4. Retail Electricity Competition and State Electric Restructuring Initiatives

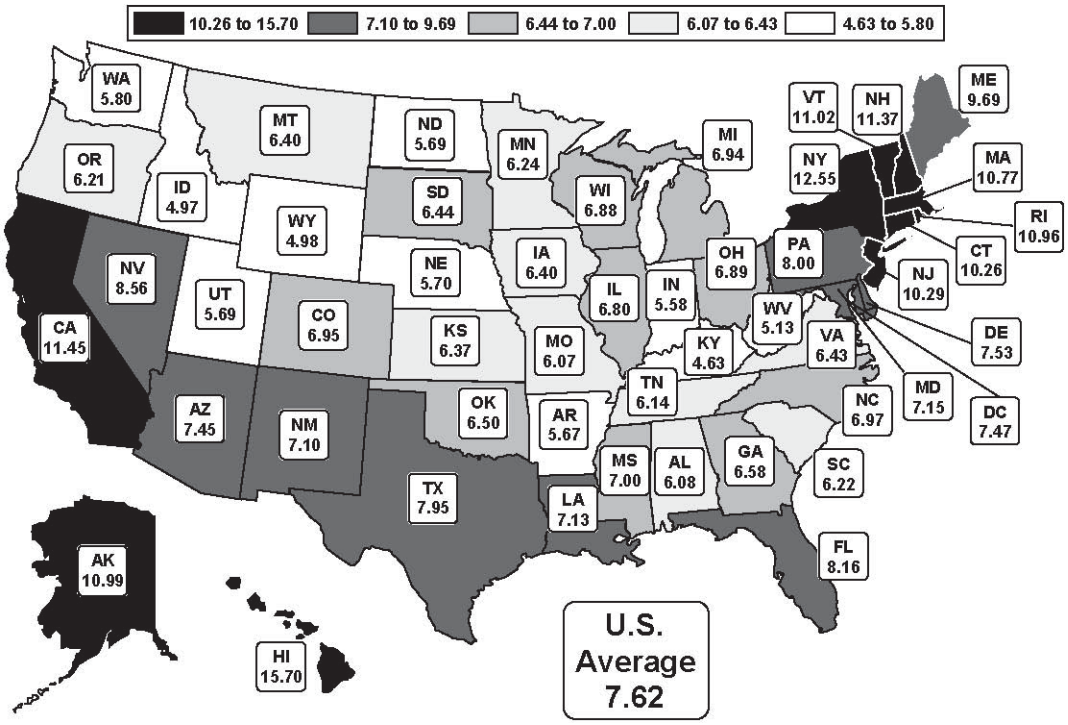
In the early 1990s, several states with high electricity prices began exploring opening retail electric service to competition. While customers would choose their supplier, the delivery of electricity would still be done by the local distribution utility. Retail competition was expected to result in lower retail prices, innovative services and pricing options. It also was expected to shift the risks of new generation construction from ratepayers to competitive market providers. The substantial rate disparity among and between utilities in different states spurred state interest in retail competition. For example, in 1998, customers in New York paid more than two and one-half times the rates paid by customers in Kentucky. Rates in California were well over twice the rates in Washington.65 Some of this disparity can be attributed to different natural resource endowments across regions, such as the availability of hydroelectric resources in the Northwest and of abundant coal reserves in Kentucky and Wyoming– which were reflected in the low cost of electricity in these states. In contrast, in more urban states without these resources, utilities invested heavily in large, new nuclear and coal plants, which often turned out to be more expensive than anticipated, adding to retail rates. Some utilities in high-cost states also had entered into long-term PURPA contracts that subsequently resulted in higher prices than in the wholesale power market.66 These QF contract costs were ultimately reflected in the regulated retail rates.67

Many large industrial customers viewed these rate disparities among states as a competitive disadvantage and looked to retail competition as a way to secure lower cost electricity supplies. Many industrial customers had long objected that they subsidized lower rates for residential customers under state regulated rates. For example, a survey by the Electricity Consumers Resource Council in 1986 contended that industrial electricity consumers paid more than $2.5 billion annually in subsidies to other electricity customers (e.g., commercial and residential customers).[68] It was presumed that allowing industrial customers to choose a new supplier would avoid these subsidies, thereby resulting in lower electricity prices for such customers.

Thus, it was not surprising that many states adopting plans to restructure retail electric service were those with higher prices.69 (Figure 4-1 in Chapter 4 shows average retail electricity prices in 1995.) States with high electricity rates, such as California and those in New England and the mid-Atlantic region, were among the most aggressive in adopting retail competition and restructuring electric service in the hope of lowering retail rates. As of 2004, the disparity in retail prices among the states persisted, as illustrated in Figure 1-1, below.

Figure 1-1. U.S. Electric Power Industry, Average Retail Price of Electricity by State, 2004

Cents per kWh



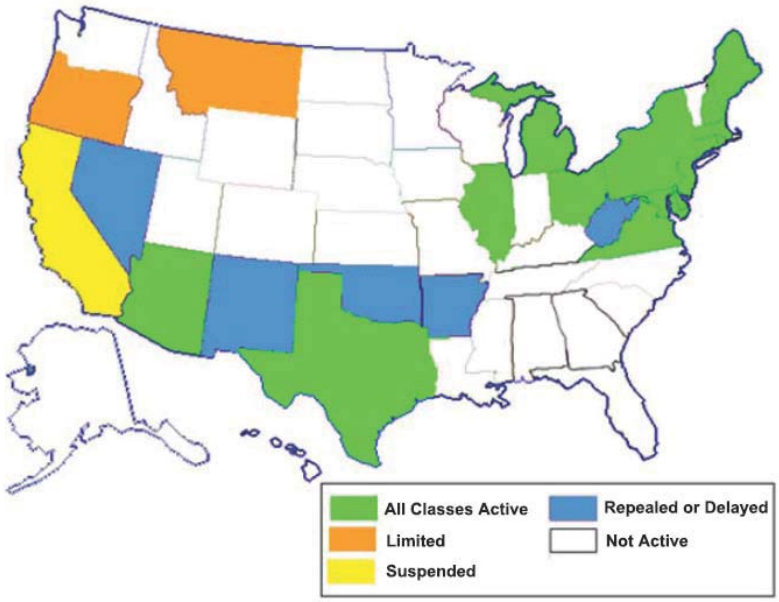
Source: EIA, *Electric Power Annual 2004*, Figure 7.4

Most states considered the merits and implications of competition and industry restructuring, but not all adopted retail competition plans. As of July 2000, 24 states and the District of Columbia had enacted legislation or passed regulatory orders to restructure their electric power industries. Two states had legislation or regulatory orders pending, while 16 states had ongoing legislative or regulatory investigations. Only eight states did not formally initiate restructuring studies.[70] The meltdown of California's electricity markets and the ensuing Western Energy market crisis of 2000-2001 are widely perceived to have halted interest by states in restructuring retail markets. Since 2000, no additional states have announced plans to implement retail competition programs, and several states that had introduced such programs have delayed, scaled back, or repealed their programs entirely (see Figure 1-2 below).[71]

In 2006, retail customers in 30 states continue to receive service almost exclusively under a traditional regulated monopoly utility service franchise. These states include 44 percent of all U.S. retail customers, representing 49 percent of electricity demand. However, 20 states and the District of Columbia have state restructuring plans in force that allow competitive retail providers to provide service to some if not all retail customers at prices set in the market.

State retail restructuring plans often involved divestiture of generating assets by local vertically integrated utilities. As a result, the distribution utilities that sell electricity to retail customers must procure power from wholesale markets under long- or short-term bilateral contracts and from wholesale spot markets. These jurisdictions include many of the most populous states, accounting for over half of all retail customers and loads. With some exceptions, retail competition has been slow to develop in many of these states, particularly for residential customers. Without a competitive provider option, most customers continue service under regulated "provider of last resort" (POLR) rates. In some states, freezes and caps on POLR rates approved by state regulators under retail restructuring cases are expiring, and POLR rates are being revised sharply upward to reflect higher market-based wholesale electricity costs. State experience with electric competition and related issues is discussed in Chapter 4, Retail Competition, and in Appendix D.

Figure 1-2. Status of State Electric Industry Restructuring Activity and Retail Competition, July 2006



Note: Nevada repealed its retail choice legislation in 2001. It subsequently enacted legislation allowing state regulators to approve requests from very lareg C&I customers to procure electricity from alternative suppliers if the contract is found to be in the public interest.

Source: Task Force Comments and EIA, *Status of State Electricity Industry Restructuring Activity 2003*, February 2003, *available at* http://www.eia.doe.gov/cneaf/electricity/chg_str/restructure.pdf.

5. The Western Energy Market Crisis 2000-2001.

California opened its retail markets to competition and started spot markets for wholesale electricity in 1998. In response to the state plan, the three major investor-owned utilities divested most of their non-nuclear generation and turned over operation of transmission facilities to the new California Independent System Operator (CAISO). The IOUs were required to sell into and purchase power through the new California Power Exchange (CalPX) and the CAISO. Retail rates were reduced but remained well above the national average. Rates were then frozen until the utilities recovered their stranded costs. At that point, competitive markets were expected to drive prices lower. San Diego Gas and Electric (SDG&E) fully recovered its stranded costs by summer of 1999, and its retail rates were then allowed to reflect the utility's cost of obtaining power in the wholesale markets. Retail rates for the other two major utilities remained frozen.

In late May 2000, the CAISO called its first Stage 2 power alert as system reserves fell below 5 percent. PX prices that had averaged about $27 per MWh in April spiked to over $50 in May and continued upwards, eventually reaching a high of $450 per MWh in January 2001. These higher prices were quickly passed through in San Diego, where average customer bills tripled by mid-summer. California's other major utilities, Pacific Gas and Electric (PG&E) and Southern California Edison (SCE), were forced to pay the unexpectedly higher PX wholesale prices, but could not pass increases on to retail customers as they were still under a rate freeze.

Price spikes were not California's only problems. On June 14, 2000, the CAISO imposed rolling blackouts in PG&E's San Francisco service area because of shortages attributed to the maintenance shutdown of several generating plants. These were the first of many power emergencies and blackouts affecting the state that did not end until July 2001.

Responding to public concern, the California Public Utilities Commission, the state's attorney general, and FERC all launched investigations. On August 2, 2000, SDG&E filed a complaint at FERC against all sellers in the PX and ISO markets and asked for a price cap of $250.[72] FERC opened a formal investigation of wholesale pricing in California and the West in general. A preliminary FERC staff report in November 2000 found that the market rules and structure were "seriously

flawed" and, coupled with supply and demand imbalance, could result in rates that were not "just and reasonable."73 The staff report concluded that the state's market structure created the potential for abuse of market power when supplies were tight. FERC proposed interim emergency remedies that were instituted in December 2000.74

As the state's market problems continued and spread, price spikes affected electricity pricing hubs and utilities across the West, including states that had not adopted retail competition and that were not included in the CAISO. The region's increased power costs were estimated in the tens of billions and led to retail rate increases in many Western states.75 California declared multiple power emergencies in December 2000, followed by blackouts in January and March 2001. High wholesale market prices that utilities were not allowed to recover through retail rates threatened the solvency of the state's three major IOUs. California sought to end the procurement difficulties faced by IOUs in the state by entering into long-term contracts to secure power on behalf of the utilities and to preserve service to retail customers. Contract prices were set at some of the highest prices prevailing over this period.76 As a condition of assuming responsibility for power procurement, the state suspended retail competition for all but large customers that already had contracts with competitive suppliers. In April, PG&E's retail electric utility subsidiary, one of the largest in the nation, filed for bankruptcy protection, later joined by a number of wholesale seller-creditors, because the financially distressed distribution utilities did not make timely payments to these generators. Power prices did not return to "normal" ranges until fall of 2001.

Over this period, FERC issued a number of orders setting and lowering price caps, establishing market monitoring requirements, and opening an investigation of possible market manipulation in the run-up of natural gas prices in the West. State, federal, and private investigations ultimately uncovered a number of market abuses and regulatory gaps.77 Many FERC and other proceedings arising out of the dysfunctional California markets continue today.78 A number of energy traders eventually faced criminal charges. The 2000-2001 Western Energy Crisis had wide repercussions as other regions adapted their market rules and structures to avoid the problems encountered in the West.

6. Development of Regional Transmission Organizations and Regional Wholesale Markets

After issuing Order Nos. 888 and 889, FERC continued to receive complaints about transmission owners discriminating against independent generating companies. Transmission customers remained concerned that implementation of functional unbundling did not produce complete separation between operating the transmission system and marketing and selling electric power in wholesale markets. There were also concerns that Order No. 888 made some discriminatory behavior in transmission access more subtle and difficult to identify and document.

After FERC issued Order Nos. 888 and 889, the electric industry continued to evolve in response to competitive pressures and state retail restructuring initiatives. Utilities today purchase more wholesale power to meet load than in the past and are relying more on availability of other utility transmission facilities to deliver power. Retail competition increased significantly, and state initiatives brought about the divestiture of generation plants by traditional electric utilities. In addition, there were a number of mergers among traditional electric utilities and among electric utilities and gas pipeline companies. The number of power marketers and independent generation developers increased dramatically, and ISOs were established to manage large parts of the transmission system. Trade in wholesale power markets has increased significantly, and the nation's transmission grid is now used more heavily and in new ways.

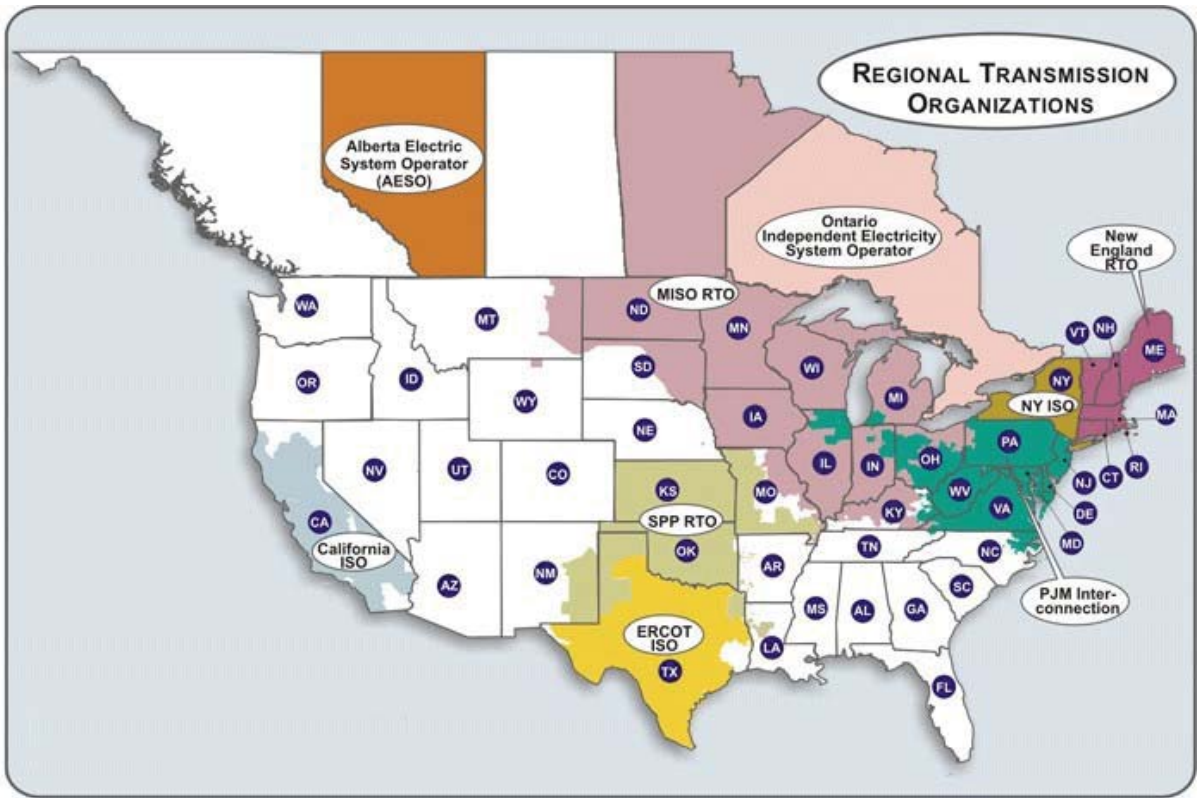
In December 1999, responding to continuing complaints of discrimination and lack of transmission availability, FERC issued Order No. 2000.79 This order recognized that Order No. 888 set up the foundation for competitive electric markets, but did not eliminate the potential to engage in undue discrimination and preference in providing transmission service.80 FERC concluded that regional transmission organizations (RTOs) could eliminate transmission rate pancaking,81 increase region-wide reliability, and eliminate any residual discrimination in transmission services where operation of the transmission system remains in the control of a vertically integrated utility. Accordingly, FERC encouraged voluntary formation of RTOs.

RTOs are entities set up in response to FERC Order Nos. 888 and 2000 encouraging utilities to voluntarily enter into arrangements to operate and plan regional transmission systems on a nondiscriminatory open access basis. RTOs are independent entities that control and operate regional electric transmission grids for the purpose of promoting efficiency and reliability in the operation and planning of the transmission grid and for ensuring non-discrimination in the provision of electric transmission services. RTOs currently do not own transmission.82

FERC has approved RTOs or ISOs in several regions including the Northeast (PJM, New York ISO, ISO-New England), California, the Midwest (MISO) and the Southwest (SPP), as shown in Figure 1-3 below. By the end of 2004, regions accounting for 68 percent of all economic activity in the United States had chosen the RTO option.83 In 2004 and 2005, the PJM RTO grid expanded substantially to include several additional service territories in the Midwest. In 2004, the territories served by Commonwealth Edison (ComEd), American Electric Power (AEP), and Dayton Power and Light joined PJM. The expansion continued in 2005 with the addition of Duquesne Light and Dominion Resources. PJM now covers about 18 percent of total electricity consumption in the United States and includes utility service territories in the Mid-Atlantic, Midwest, and parts of the Southeast.84

In most cases, RTOs have assumed responsibility to calculate the amount of available transfer capability (ATC) for wholesale trades for member systems across the footprint of the RTO. RTOs also are responsible for coordinating regional planning, at least for facilities necessary for reliability above a certain voltage. As of 2004, all RTOs coordinate dispatch of generators in their systems and provide transmission services under a single RTO open access tariff. In addition to operating the regional transmission grid, RTOs operate regional organized energy markets, including a short-term market which prices energy, congestion, and losses. RTOs in the East offer day-ahead and real-time markets, while California and Texas offer real-time markets alone. All current RTOs use or plan to use some form of locational pricing to manage transmission congestion and have independent market monitors that assess and report on market activities.85 RTOs and regional wholesale markets are described in more detail in Chapter 3.

Figure 1-3. RTO Configurations in 2006



Note: The above map shows the general location of approved RTOs. Not all transmitting utilities within the shaded area of an RTO are necessarily members of the RTO and some RTO members are not shown in this map.

Source: FERC RTO Regional Map, 2006, created using Platts POWERmap, *available at* http://www.ferc.gov/industries/electric/indus-act/rto/rto-map.asp

The RTO model and regional organized wholesale markets have been voluntarily adopted by utilities and market participants in the Northeast, Mid-Atlantic, California, and parts of the Midwest and Southwest. Some states required RTO participation as part of restructuring under the state retail competition plan. RTO members include utilities in states that have not adopted retail competition. State regulators often serve on RTO advisory bodies and have been active in FERC proceedings involving RTOs. Although RTOs enjoy broad participation by utilities and competitive power suppliers, some comments filed with the Task Force86 raised concerns over perceived high costs of RTO implementation and operations and oversight of RTO markets.

In other regions, including most of the Southeast, the West outside of California, and other parts of the Midwest, RTOs have been considered, but formation has stalled. State regulators and utilities in these regions have found it difficult to assess the potential benefits and costs of establishing RTOs. They have been reluctant to create new institutional arrangements that could diminish local control over transmission facilities and could impose additional costs on retail customers.

7. August 2003 Blackout

On August 14, 2003, an electrical outage in Ohio precipitated a cascading blackout across seven other states and as far north as Ontario, Canada, leaving more than 50 million people without power.87 The August 2003 blackout was the largest in United States history, leaving some parts of the nation without power for up to four days and costing between $4 billion and $10 billion.88 It affected large portions of the Midwest and Northeast United States and Ontario and an estimated 61,800 MWs of load. It was the eighth major blackout in North America since the 1965 Northeast Blackout. A Joint U.S.-Canada Power System Outage Task Force issued a final Blackout Report in April 2004. The report identified factors that were common to some of the eight major outages from 1965 through the 2003, as shown below:

> (1) conductor contact with trees; (2) overestimation of dynamic reactive output of system generators; (3) inability of system operators or coordinators to visualize events on the entire system; (4) failure to ensure that system operation was within safe limits; (5) lack of coordination on system protection; (6) ineffective communication; (7) lack of "safety nets;" and (8) inadequate training of operating personnel.89

In addition to the Joint Study, affected states and NERC90 carried out their own investigations.

8. The Energy Policy Act of 2005

In August 2005, Congress passed EPAct 2005, which amended the core statutes (FPA, PURPA, PUHCA 1935) governing the electric power industry. Among the notable provisions of EPAct 2005 are the following:

Reliability: Section 1211 authorizes FERC to certify an Electric Reliability Organization to propose and enforce reliability standards for the bulk power system. EPAct 2005 authorized penalties for violation of these mandatory standards.

Transmission Siting: Section 1221 requires the Secretary of Energy to conduct a study of electricity congestion within one year of the enactment of EPAct 2005 and every three years thereafter. It authorizes the Secretary of Energy to designate certain areas experiencing congestion as "National Interest Electric Transmission Corridors" based on these studies. In certain limited circumstances, FERC is authorized to approve construction permits for transmission facilities in designated corridors when states either lack such authority, or withhold approval for more than one year after filing of an application or corridor designation. Proponents of this new federal authority argue that it will facilitate construction of new transmission and help alleviate transmission congestion that can impair competition in electric markets.

Transmission Investment Incentives: Section 1241 requires FERC to establish incentive-based rate treatments for public utilities' transmission infrastructure to promote capital investment in transmission infrastructure, attract new investment with an attractive return on equity, encourage improvement in transmission technology, and allow for recovery of prudently incurred costs related to reliability and improved transmission infrastructure. Proponents contend this will encourage the expansion of transmission capacity and, thus, help foster greater competition in electric markets.

PURPA Reform: Section 1253 permits FERC to terminate, prospectively, the obligation of electric utilities to buy power from QFs, such as industrial cogenerators. FERC may do so when the QFs in the relevant area have adequate opportunities to make competitive sales, as defined by EPAct 2005. The premise is that growth in competitive opportunities in electric markets negates the need for PURPA's "forced sale" requirements.

PUHCA 1935 Repeal: Title XVII, subtitle F repeals PUHCA 1935 and replaces it with new PUHCA 2005. It provides FERC and state access to books and records of holding companies and their members. It also provides that certain holding companies or states may obtain FERC-authorized cost allocations for non-power goods or services provided by an associate company to public utility members in the holding company. PUHCA 2005 also contains a mandatory exemption from the federal books and records access provisions for entities that are holding companies solely with respect to EWGs, QFs or foreign utility companies. The goal is to reduce legal obstacles to investment in the electric utility industry and, thereby, help facilitate the construction of adequate infrastructure.

C. Recent Trends Related to Competition in the Electric Energy Industry

This section discusses several more recent electric industry policy developments and characteristics.

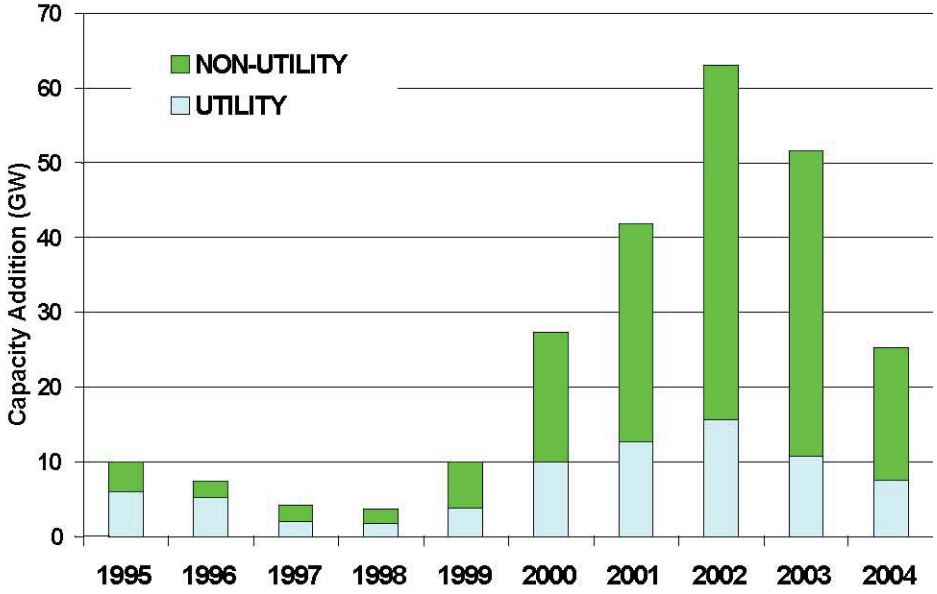
1. Increases in Generation and Growth of Nonutility Generation Suppliers

Electric power industry restructuring has been sustained largely by technological improvements in gas turbines. It is no longer necessary to build a larger generating plant to gain operating efficiencies. Combined-cycle gas turbines reach maximum efficiency at 400 MW, while aero-derivative gas turbines can be efficient at sizes as low as 10 MW. These new gas-fired combined cycle plants can be more energy efficient and less costly than the older oil and gas-fired plants.91 Because of their smaller footprint and low emissions, gas turbine generators can often be located close to load, avoiding the need for additional transmission. Coupled with greater transmission access as a result of Order No. 888, it became feasible for generating plants hundreds of miles apart to compete with each other, giving customers more choices in electricity suppliers.92

The market participation of utilities and other generation suppliers began changing in response to increases in energy costs in the 1970-1990s and the passage of PURPA, which facilitated entry of nonutility QFs as energy-efficient, environmentally-friendly, alternative sources of electric power. The change continued through Order No. 888, which opened up the transmission grid to competing wholesale electricity suppliers.93 Until the early 1980s, electric utilities' share of electric power production increased steadily, reaching 97 percent in 1979.94 By 1991, however, the trend had reversed itself, and the utilities' share declined to 91 percent.95 By 2004, regulated electric utilities' share of total generation continued to decline (63.1 percent in 2004 versus 63.4 percent in 2003) as nonutilities' share increased (28.2 percent versus 27.4 percent in 2003).96

This trend is illustrated by comparing increases in capacity additions for utility and nonutility generation suppliers, as shown in Figure 1-4 below. While most of the existing capacity and most of the additions to capacity through the late 1980s were built by electric utilities, their share of capacity additions declined in the 1990s. Between 1996 and 2004, roughly 74 percent of electricity capacity additions were made by nonutility power producers.

Figure 1-4. Utility and Nonutility Generation Capacity Additions, 1995-2004



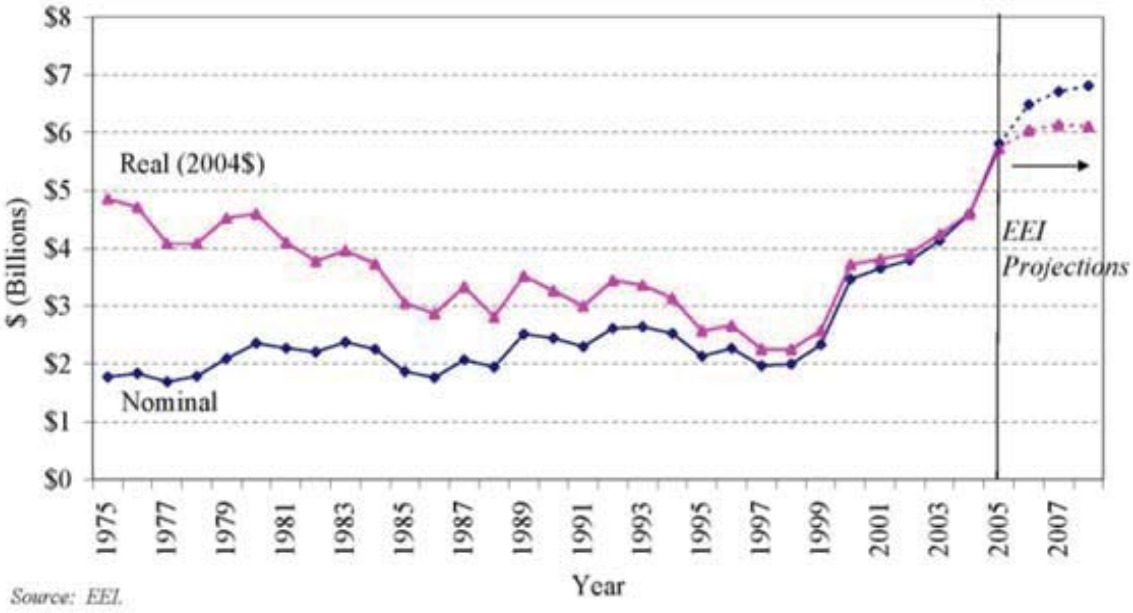
Source: FERC analysis of Platts PowerDat data.

However, the pattern of merchant generation investment outpacing utility investment may be shifting. Traditional regulated utilities, including public power and cooperative utilities, accounted for about 60 percent of capacity additions from 2005 through May 2006. In California, six new power plants began operations, including four owned by public utilities and two owned by IOUs.[97]

2. Transmission Investment

Despite these increased investments in new generation, the Edison Electric Institute (EEI) reports that IOU investment in transmission declined from 1975 through 1999. See Figure 1-5. Over that period, electricity demand more than doubled, resulting in a significant decrease in transmission capacity relative to demand. Box 1-2 suggests reasons for this trend. Since 1999, according to EEI surveys, transmission investment has increased annually. From 1999 to 2003, IOU investment increased 12 percent annually.[98] For 2004 to 2008, IOUs expect to invest about $28 billion in transmission, an almost 60 percent increase over the prior five-year period.

Figure 1-5. Transmission Construction Expenditures by Investor-Owned Utilities, Actual and Projected, 1975-2009



3. Retail Prices of Residential Electricity

As seen in Figure 1-6 below, between 1970 and 1985, national average residential electricity prices more than tripled in nominal terms and increased by 25 percent in real terms (adjusting for inflation).99 U.S. real retail electricity prices began to fall after the mid-1980s until 2000-2001 as fossil fuel prices and interest rates declined and inflation moderated significantly.100 Real retail prices stayed flat through 2004, but have begun to increase in all regions reflecting higher fuel prices and operating costs.

According to the latest information from EIA, residential electric prices in 2005 averaged 9.43 cents per kilowatthour (kWh), an increase of about 5 percent from 2004. Retail electric prices continue to increase, and the national average price for residential customers in April 2006 was 10.31 cents per kWh, up 12 percent from a year earlier.101 These increases reflect substantially higher fuel and purchased power costs.102

Box 1-2

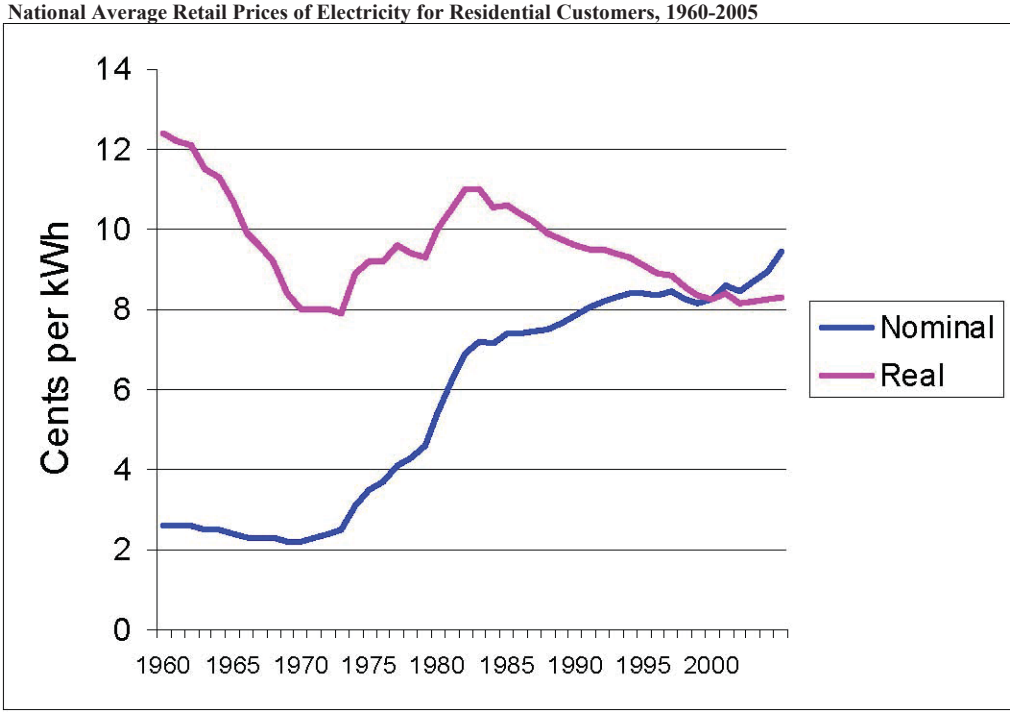
Decline in Transmission Investment

Transmission is the physical link between electricity supply and demand. Without adequate transmission capacity, wholesale competition cannot function effectively.

Some reasons suggested for the decline in transmission investment between 1975 and 1997 (see Figure 1-5) are a decline in investment in large base-load generating plants requiring associated new large transmission additions, an overbuilt system prior to 1975, lack of available capital due to other investment activities by vertically integrated utilities, the protection of vertically integrated utility generation from competition, and regulatory uncertainty over recovery of new transmission investment.

Another explanation for the decline in investment is the difficulty of siting new transmission lines. Siting can bring long delays and negative publicity. Local opposition can be significant. Also, some states may require a showing of benefits to the state for approval of a transmission line. This creates challenges for interstate transmission facilities proposed to primarily benefit interstate commerce.

Figure 1-6. National Average Retail Prices of Electricity for Residential Customers, 1960-2005



Note: Real prices are shown in chained (2000) dollars, calculated by using gross domestic product implicit price deflators.

Source: EIA, *Annual Energy Review 2004*, Table 8.10 Average Retail Prices of Electricity, 1960-2004, and EIA, Monthly Energy Review, July 2006, Table 5-3.

4. Changing Patterns of Fuel Use for Generation – Reaction to Increased Oil Prices and Clean-Air Environmental Regulations

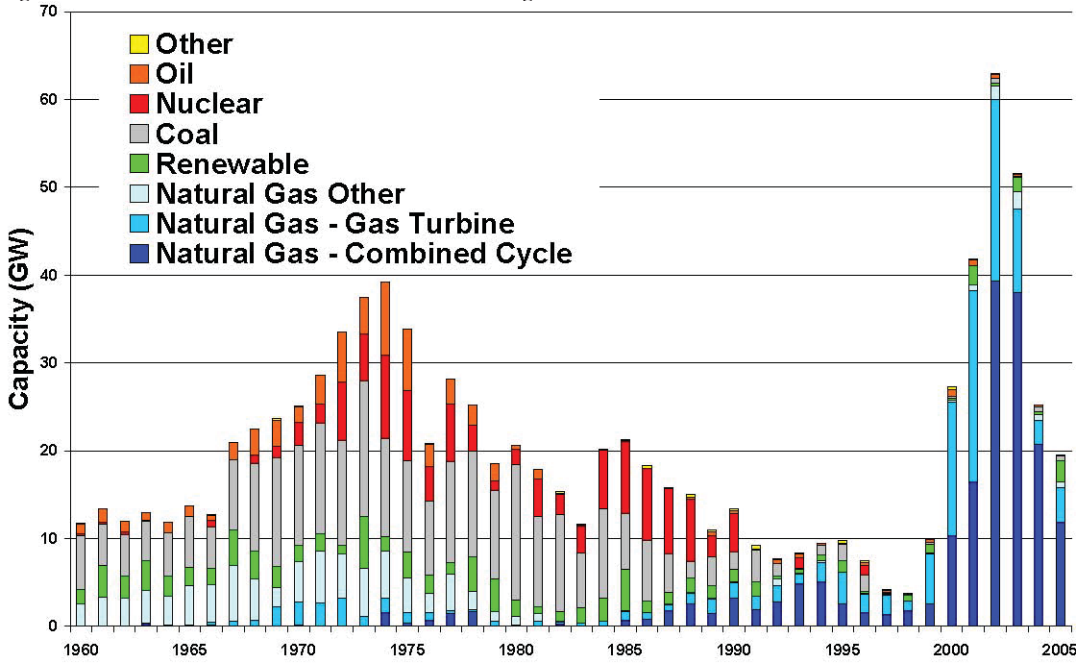
For many years, coal was the fuel most commonly used to generate electricity, providing 46 percent of utilities' generation in 1970 and more than 50 percent since 1980. As world oil prices escalated in the

1970s, oil-fired and gasoline-fired generation's share of electricity supply began decreasing and utilities' use of oil and gas for new generation was restricted by federal law.

Hydroelectric power also has played a large role in the supply of electric power, but its share has declined relative to other major fuels mainly because there are a limited number of suitable sites for hydroelectric projects. Nuclear power emerged as the second largest fuel source in 1991 but was not expected to increase.[103]

For nonutilities, natural gas has been the major fuel for new plant additions.[104] Indeed, in recent years, new capacity additions reflect the prevalence of natural gas.[105] As shown in Figure 1-7, recent plant additions illustrate this change. The Clean Air Act Amendments of 1990 (CAA) and state clean air requirements also contributed to increased use of natural gas. The CAA sought to address the most widespread and persistent pollution problems caused by hydrocarbons and nitrogen oxides, both of which are prevalent with traditional coal and petroleum-based generation. The CAA fundamentally changed the generation business because emission of air pollutants would no longer be cost-free. As a result, many generation owners and new plant developers turned to cleaner-burning natural gas as the fuel source for new generation plants. California has depended heavily on gas-fired generation because of its specific air quality standards.[106]

Figure 1-7. Natural Gas Plants Dominate New Generating Unit Additions



Source: FERC analysis of Platts PowerDat data.

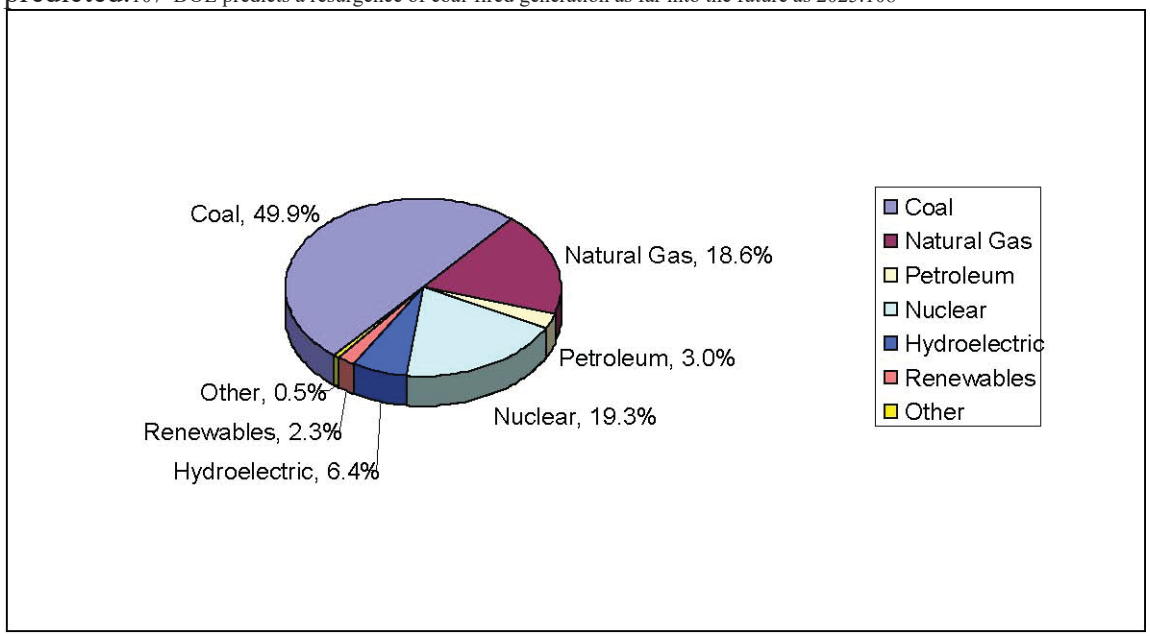
The result of these plant additions through December 2005 is that 49.9 percent of the nation's electric power was generated at coal-fired plants (Figure 1-8). Nuclear plants contributed 19.3 percent; 18.6 percent was generated by natural gas-fired plants, and 2.5 percent was generated at petroleum liquid-fired plants. Conventional hydroelectric power provided 6.6 percent of the total, while other renewables (primarily biomass, but also geothermal, solar, and wind) and other miscellaneous energy sources generated the remaining electric power.

Figure 1-8. Net Generation Shares by Energy Source: Total (All Sectors), January-December 2005

Source: EIA, *Electric Power Monthly*, July 2006, Table 1-1.

The trend toward gas-fueled capacity additions may be changing. There is renewed interest in coal-fired

generation as reflected in utilities' and nonutilities' announcements of new coal plant construction projects. Two major reasons may explain coal's resurgence: (1) the relative price of natural gas compared to coal has increased substantially and (2) the cost of environmental equipment for coal plants, such as scrubbers, has decreased. "Over the past decade, many merchant combined-cycle gas-fired units were built on the assumption that natural gas would be relatively inexpensive and that cleaning technology for coal plants would drive the price of coal plants significantly higher. Sharp increases in natural gas prices in recent years have challenged these assumptions." DOE's EIA estimated that 573 MWs of new coal generation would be added nationally in 2005, which compares with an estimate of 15,216 MWs of gas-fired additions for the same year. For 2009, however, predicted trends shift; the EIA projects that 8,122 MWs of new coal generation will be added that year, whereas only 5,451 MWs of gas-fired generation additions are predicted.[107] DOE predicts a resurgence of coal-fired generation as far into the future as 2025.[108]



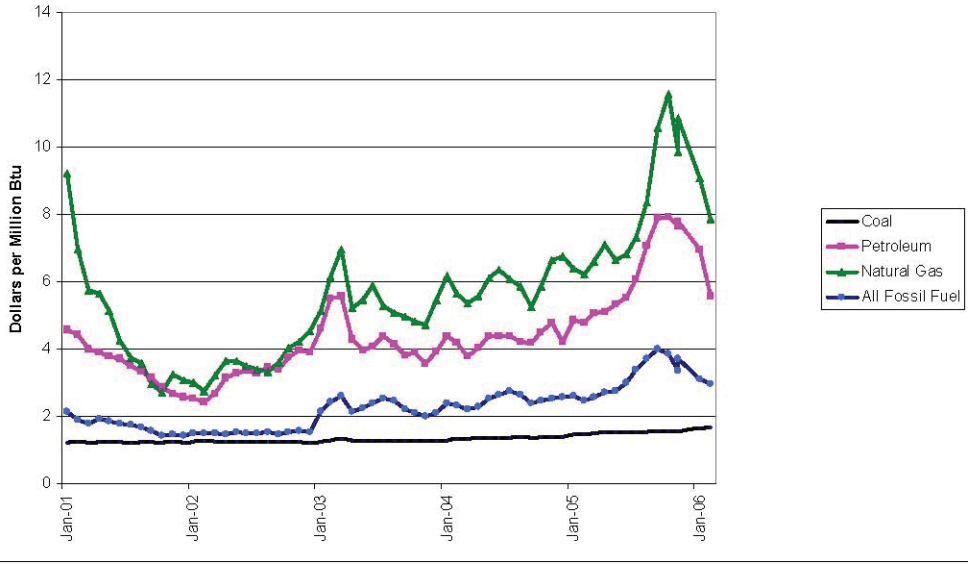
Higher gas prices and environmental concerns have also spurred renewed interest in nuclear generation. EPAct 2005 includes a number of provisions intended to encourage and facilitate a new and improved generation of nuclear power plants.

5. Fuel Price Trends

Natural gas prices have been increasing in recent years, due in part to historically high petroleum prices. Natural gas prices increased 51.5 percent between 2002 and 2003, 10.5 percent between 2003 and 2004, and 37.6 percent between 2004 and 2005. Strong demand for natural gas, as well as natural gas production disruptions in the Gulf of Mexico, contributed to these increases. As shown in Figure 1-9, for December 2005 the overall price of fossil fuels was influenced by the price increases in natural gas. In December 2005, the average price for fossil fuels was $3.71 per million Btu (MMBtu), 10.1 percent higher than for November 2005, and 44.4 percent higher than in December 2004. As natural gas prices increase relative to coal prices, the change may make development of clean-burning coal plants more economically attractive than they were when natural gas fuel prices were lower.

Figure 1-9. Fossil Fuel Costs for Electric Generators, 2001-2006

Dollars per Million Btu



Source: EIA, *Monthly Energy Review*, July 2006, Table 9.10. Cost of Fossil-Fuel Receipts at Electric Generating Plants.

6. Mergers, Acquisitions, and Power Plant Divestitures of Investor-Owned Electric Utilities[109]

Many IOUs have fundamentally reassessed their corporate strategies to function more like competitive, market-driven entities than in their more regulated past.[110] One result is that there was a wave of mergers and acquisitions in the late 1980s through the late 1990s between traditional electric utilities and between electric utilities and gas pipeline companies.

IOUs also have divested a substantial number of generation assets to IPPs or transferred them to an unregulated nonutility subsidiary within the company.[111] Even though FERC-regulated IOUs have functionally unbundled generation from transmission, and some have formed RTOs and ISOs, many utilities have divested their power plants because of state requirements. Some states that opened the electric market to retail competition view the separation of power generation ownership from power transmission and distribution ownership as a prerequisite for retail competition. For example, California, Connecticut, Maine, New Hampshire, and Rhode Island enacted laws requiring utilities to divest their power plants. In other states, the state public utility commission may encourage divestiture to arrive at a quantifiable level of stranded costs for purposes of recovery during the transition to competition.[112]

Since 1997, IOUs have divested power generation assets at unprecedented levels,[113] and these power plant divestitures have also reduced the total number of IOUs that own generation capacity.[114] A few utilities have decided to sell their power plants, as a business strategy, deciding that they cannot compete in a competitive power market. In a few instances, an IOU has divested power generation capacity to mitigate potential market power resulting from a merger.[115] As described in Table 1-6 below, between 1998 and 2001, over 300 plants, representing nearly 20 percent of U.S. installed generating capacity, changed ownership.

Since 2001 the merger trends have shifted slightly, as financial difficulties of the merchant generating sector have prompted the sale or transfer of a substantial share of the merchant fleet. Some purchasers have been traditional utilities, including public power and cooperative utilities.[116]

There were no significant electric power company mergers from 2001 to 2004, but in 2004 utilities and financial institutions exhibited growing interest in mergers and acquisitions, prompting many analysts to herald 2004 as a new round of consolidation in the power sector.[117] One utility-to-utility acquisition closed,[118] and three were announced.[119] Most electric acquisitions in 2004 involved the purchase of specific generation assets. Many companies strove to stabilize financial profiles through asset sales. In aggregate, almost 36 GW of generation, or nearly 6 percent of installed capacity, changed hands in 2004.[120]

Table 1-6. Power Generation Asset Divestitures by Investor-Owned Electric Utilities, as of April 2000

GWs and Percent of Total and U.S. Generating Capacity

Status Category	Capacity (GW)	Percent of Total	Percent of Total U.S.Generation Capacity
Sold	58.0	37	8
Pending Sale (Buyer Announced)	28.2	18	4

For Sale (No Buyer Announced)	31.9	20	4
Transferred to Unregulated Subsidiary	4.1	3	1
Pending Transfer to Unregulated Subsidiary	34.2	22	5
Total	156.5	100	22

Source: EIA, *The Changing Structure of the Electric Power Industry 2000: An Update*, (October 2000), Table 19.

CHAPTER 2
CONTEXT FOR THE TASK FORCE'S STUDY OF COMPETITION IN WHOLESALE AND RETAIL ELECTRIC POWER MARKETS

This chapter provides context and theoretical underpinnings to the Task Force's study of competition in wholesale and retail electric power markets. It describes (1) perceived shortcomings of traditional cost-based regulation that motivated restructuring and regulatory reform, (2) the theoretical role competitive market price signals play in guiding consumption and investment decisions,[121] and (3) a brief discussion of expected benefits of shifting from cost-based rate regulation to market-based pricing of electricity.

A. Overview of Perceived Shortcomings of Cost-Based Rate Regulation

State and federal policymakers regulated providers of the generation, transmission, and distribution of electric power as vertically-integrated monopolies for approximately 70 years. For much of this period it was considered economically inefficient and technologically challenging to have multiple sources of generation, transmission, and distribution facilities serving customers in the same geographic area. Competition was considered impractical and not in the public interest because it would require costly duplication of facilities and likely engender competition that would not be sustainable due to economies of scale. Under this model, competition was expected eventually to result in ratepayers paying for failed facilities without benefiting from alternative sources of supply.

The traditional "regulatory compact" required an electric power utility to serve all retail customers in a defined franchise area in exchange both for the opportunity to earn a reasonable return on its investment and for protection against entry by potential rivals. Consumer prices or "rates" were based on the regulated utilities' average historic cost of production plus an adder for a fair return on investment and often adjustments for changing fuel prices. Regulators used this "cost-based" regulation to try to ensure adequate supplies at reasonable prices for consumers, as required by state laws. Under most state regulatory policies, utilities could not recover new investments in rates until regulators determined that the investment was "prudent" and the facilities were "used and useful" (actually being used to serve customers). Historically, some states allowed large nuclear cost overruns to be included in the rate base, while other states did not. In general, disallowances of investments have been rare.

As described in Chapter 1, beginning in the 1970s, the combined effects of a number of changes – improvements in smaller-scale generation technology, transmission, communications and control technologies, rising energy prices, environmental policy concerns, increased concerns about the effectiveness of traditional utility rate regulation, and favorable experience with the introduction of increased competition in other network industries – began to transform the structure and regulation of the electric power sector.

1. Effects on Electricity Demand and Prices

Under cost-based regulation, end-use, and sometimes wholesale, customers often paid prices for their electricity that were based on average costs calculated over extended periods of months or years so that the prices did not vary with consumption or the marginal cost of generation. These rates were stable and often only varied by season. Although time-based rates and certain regulated products such as interruptible or curtailable services had been used within the electric power industry for decades, they had not been applied to the vast majority of retail customers.

The average cost-based pricing formula precludes economically accurate price signals from guiding consumption decisions.[122] Inefficiency has resulted as consumers purchased either too much electricity (when the average price was below the efficient price) or too little electricity (when the average price exceeded the efficient price). Inefficient resource use can translate to higher production costs and prices. Historical average cost electricity prices, for example, gave consumers no economic reason to conserve electricity when supplies were short or demand was high. Similarly, suppliers did not receive economically accurate price signals to guide their short- and long-term sales of generation. In addition, many industrial customers among others have objected that retail rate structures frequently contained cross-subsidies among customer classes and thus, further distorted prices.[123]

2. Effect on Investment Decisions

Regulators' influence over generation construction decisions likely also contributed to inefficiency. Historically, regulators had encouraged local utilities to build or contract for sufficient generation to serve customers within their territories. Regulators blocked entry by independent generators or allowed the utilities to do so. This resulted in utilities owning nearly all generation assets within their service territories and discouraged competition among generators. While the intent of these policies was partly to keep price down, the unintended effect was to dampen incentives for cost reduction, investment in new capacity and

innovation.124 More competition might have led earlier to technological innovation and lower generation costs.

The fact that regulators had to agree that a capital investment was necessary and prudent before rate recovery was allowed125 further discouraged innovation. Utilities were reluctant to take investment risks that might end up being unrecoverable if regulators deemed their cost unreasonable. Thus, long-term planners and regulators had significant influence over when and where generation would be built. In making decisions, regulators struggled to strike a balance between reasonable rates and providing utilities with incentives to make necessary and sufficient investments.

This regulatory oversight also possibly encouraged an overcapitalization of the industry, as generators were assured a rate of return on any approved capital project. It might also have led to undercapitalization if a regulator was too conservative. Further, if rates were set too high, utilities could earn a higher return on new generation investments than would be warranted by the cost of capital. If regulators were unlikely or unable to identify and disallow excessive construction costs, utilities had little incentive to design new generation plants cost-effectively. At the same time, regulatory disallowances of some costs imposed risk on utility decisions to elicit capital and build new generation, and investors sought compensation for this risk when they supplied capital to utilities.126

Ultimately, ratepayers were left to bear much of the investment risk, as they had to pay for regulator-approved projects resulting in overinvestment as well as any subsequent higher costs from underinvestment (for example, costs of running higher cost generation more often than is economically efficient).

A 1983 DOE analysis of electric power generation plant construction showed that electric utilities (regulated under a cost-based regulatory regime) had limited ability to control construction costs of coal and nuclear plants. During the 1970s and early 1980s, the cost range per MW to build a nuclear plant varied by nearly 400 percent and by 300 percent for coal plants. The study showed that some companies were not competent to manage such large-scale, capital-intensive projects. In addition, they tended to custom design plants, as opposed to using a basic design and then refining it.127

One alternative to traditional cost-based rate-of-return regulation is price cap regulation. Under this approach, the regulator caps the price a firm is allowed to charge.128 This alternative may remedy some of the incentive problems of cost-based regulation, but comes with its own costs. Another alternative is the addition of an open, transparent Integrated Resource Planning process by utilities to consider and support choices about building new generation procuring supplies from wholesale markets, and/or investing in demand-side options to meet projected load growth. In some states, regulators are involved in the utility IRP process and may approve the resulting plan. Even with this oversight mechanism, regulators have few reference points to determine if a builder's choices about design, efficiency, and materials for the IRP selected plant are prudent.

3. Motivation for Change

In part, the struggles of regulators to ensure adequate supplies of power at reasonable rates led policymakers to examine whether competition could provide more timely and efficient incentives for what to consume and build. Advances in technology also allowed the entry of a variety of new, nonutility generators and demand response alternatives and weakened the argument for preserving utilities' monopolies on generation services. These developments set the stage for considering competitive pricing as an option for eliciting entry by new generators or expansion by existing generators. Generally, transmission and distribution have continued to be regulated services.

B. Overview of the Role of Price in Competitive Wholesale and Retail Electric Power Markets

How much a supplier will produce at a given price is determined by many things, including (in the long run) how much it must pay for the labor it hires, the land and resources it uses, the capital it employs, the fuel inputs it must purchase to generate the electric power, the transmission it must use to deliver the electric power to end users, and the risks associated with its investment. Consumers' overall willingness to pay for a product also is determined by a large variety of factors, such as the existence and prices of substitutes, income, and individual preferences.

The following is a review of expectations based on economic theory of how competition might determine prices and discipline investment in the electric utility industry. Chapters 3 and 4 examine how well actual wholesale and retail electricity market structures are meeting these expectations.

1. Price Affects Customer Consumption

Price changes play an important economic function by encouraging customers and suppliers to respond to changing market conditions. Price changes signal to customers in wholesale and retail markets that they should change their decisions about how much and when to consume electric power. Price increases signal customers to reduce consumption. The more consumers reduce their consumption in response to an increase in prices, the less market power sellers are likely to have. Lower prices encourage customers to increase consumption. Consumer price responsiveness is often referred to as "demand response."129

The primary purpose of incorporating market driven prices into wholesale and retail electric power markets is to provide price signals that accurately reflect underlying costs of production and thereby encourage efficient consumption patterns. Economic analysis suggests that the market dynamics of this type of pricing will result in lower overall production costs, which will translate into lower consumer prices.

Accurate price signals are expected to improve the efficiency of electric power production by more closely aligning the price that customers pay *for* and the value they place *on* electricity. In particular, by exposing customers to prices based on marginal production costs, resources can be allocated more efficiently.130 Accurate price signals also reduce cross subsidies between customers and among customer classes.131 Flat electricity prices based on average costs can lead customers to "over-consume – relative to an optimally efficient system in hours when electricity prices are higher than the average rates, and under-consume in hours when the cost of producing electricity is lower than average rates."132 Efficient price signals also have the benefit of increasing price response during periods of scarcity and high prices, which can help moderate generator market power and improve reliability.

When there are many close substitutes for a particular commodity, a relatively small price increase will result in a relatively large reduction in consumption. For example, if natural gas were a very good substitute for electric power at prevailing prices, then even a relatively small increase in electricity prices could persuade many consumers to switch in part or entirely to natural gas. To induce those consumers to return to electricity, electricity prices would not need to fall by very much. However, where there are no close substitutes for electric power, the price of electricity may have to rise substantially to reduce consumption by a significant amount.

Empirical literature shows that, even if the retail price of electricity increases by a large percentage, consumption of electricity does not decline much. In economic terms, it is said that the short-run demand for electricity is "inelastic" with respect to price. See Box 2-2. This inability to substitute other products for electricity in the short run means that changes in supply conditions (price of input fuels, etc.) are likely to cause wider price fluctuations than would be the case if customers could easily reduce consumption when prices rise. Furthermore, electric power has few viable substitutes for key end uses such as refrigeration and lighting, and thus the consequences for supply shortfalls can be significant.133 In the long run, this effect may be somewhat muted as customers may have more

ability to adjust consumption and fuel sources in response to price changes.

Box 2-1

Market Prices

Market prices reflect myriad individual decisions about prices at which to sell or buy. They act as a mechanism that equalizes the quantity demanded and the quantity supplied. Rising prices signal consumers to purchase less and producers to supply more. Falling prices signal consumers to purchase more and producers to supply less. Prices will stop rising or falling when they reach the new equilibrium price: the price at which the quantity that consumers demand matches the quantity that producers supply.

Experience with retail pricing experiments in New York, Georgia, California, and other states have demonstrated that customers are able to adjust their electricity consumption and are at least somewhat responsive to short-run price changes (i.e., have a non-zero short-run price elasticity of demand). Georgia Power's Real Time Pricing (RTP) tariff option found that certain large industrial customers who receive RTP based on an hour-ahead market are somewhat price-responsive (short-run price elasticities ranging from approximately -0.2 at moderate prices, to -0.28 at prices of $1/kWh or more). Among day-ahead RTP customers, short-run price elasticities range from approximately -0.04 at moderate prices to -0.13 at high prices. National Grid also found limited responsiveness to price in its pricing program.134 A critical peak pricing (CPP) experiment in California in 2004 determined that a test group of residential and small business customers responded to price and significantly reduced consumption (13 percent on average, and as much as 27 percent when automated controls such as controllable thermostats were installed) during critical peak periods. In addition, the California pilot found that most customers on the CPP tariffs had a favorable opinion of the rates and would be interested in continuing in the program.135

Customer response to prices requires the following conditions: (1) that time-differentiated price signals are communicated to customers; (2) that customers have the ability to respond to price signals (e.g., by reducing consumption and/or turning on an on-site generator); and (3) that customers have interval meters (i.e., so the utility can determine how much power was used at what time and bill accordingly).136 Most conventional metering and billing systems are inadequate for charging time-varying rates, and most customers are not used to considering price changes in making consumption decisions on a daily or hourly basis. There is, however, a significant effort underway to improve metering technology and infrastructure to better facilitate end-use price responsiveness.137

Box 2-2

Price Elasticity of Demand

The desire and ability of consumers to change the amount of a product they will purchase when its price increases is at the core of the concept of price elasticity of demand for that product. The price elasticity of demand is the ratio of the percent change in the quantity demanded to the percent change in price. That is, if a 10 percent price increase results in a 5 percent decrease in the quantity demanded, the price elasticity of demand equals -0.5 (-5 percent ÷ 10 percent). If the ratio is close to zero, demand is considered "inelastic," and demand is more "elastic" as the ratio increases. Short-run elasticities are typically lower than long-run elasticities.

2. Supplier Responses Interact with Customer Demand Responses to Drive Production

Generation supply responses are equally important in the theoretical determination of an appropriate market price. The extent of supply responses will depend on the cost of increasing or decreasing output. Generally, the longer industry has to adjust to a change in demand, the lower the cost of expanding output will be. With more time, firms have more opportunity to change their operations or invest in new capacity.

If the cost of increasing production is small, a relatively small price increase may be enough to encourage producers to increase production in response to increased demand. If the cost of increasing electricity output is high, however, suppliers will not increase production unless the price increases enough to cover the higher costs. In that case, customers would be compelled to pay significantly higher prices for additional supply. Additionally, when suppliers are already delivering as much electric power as they physically can, increased demand can be met only from new capacity. If prices are to provide incentives for resource additions, suppliers must be confident that prices will remain high enough for long enough to justify building a new generating plant.

These supply decisions are complicated because electric power cannot be stored economically, thus there are generally no inventories of electricity. Therefore, electricity generation must always exactly match electricity consumption.138 The lack of inventories means that wholesale demand is nearly completely determined by end-use demand.139 Moreover, any distant generation must “travel” over a transmission system with its own limiting physical characteristics.140 Transmission capability must allow customers access to distant generation sources. The system is further complicated by the dynamics of the AC transmission grid, which can create network effects and can produce positive externalities (depending on the method used in accounting for transmission costs).141 That is to say, where transmission users are not charged for the congestion impacts of their use patterns, users’ actions can cause costs to others which the causal party is not obligated to pay. This dynamic can distort the effect of price signals on dispatch efficiencies.

Another complication derives from the fact that aggregate retail demand fluctuates throughout the day and over seasons, with typically higher demand during the day than at night. System operators must maintain a sufficient mix of generating capacity and demand response (plus a margin of standby generation and demand response for system support and reliability purposes) to meet peak customer demands at all times – even if a substantial share of that resource mix is only used during a small portion of the day or year. Thus, load-serving entities must supply or procure (through long-term contracts and/or short-term “spot” market purchases) sufficient “energy” *and* demand response to meet varying loads. Generating resources designed to meet these load changes are generally categorized as “base” load, “intermediate” load and “peak” load. Base load generation runs more or less constantly and can be expensive to build but inexpensive to run once it is built (i.e., large coal and nuclear plants). Intermediate load plants are designed to be brought online and shut down quickly to meet fairly predictable daily changes in load above the base level and below peak. A variety of generating plants can be used for intermediate loads, including gas turbines, gas- and oil-fired steam boilers and hydro-electric plants. Peak load generation tends to come from units such as combustion turbines that can respond rapidly to changes in load, are quick and inexpensive to build, but are often expensive to run. The costs of generating electricity for these different applications can differ substantially.

In any case, a higher price driven by resource scarcity should signal a legitimate opportunity for economic profit, attracting new resource construction where it is most highly valued. At the same time customer demand may decrease in response to rising prices. The increase in resources coupled with a demand response

should work together to bring prices down.

3. Customer and Supplier Behavior Responding to Price Changes in Markets

In sum, the combined impact of consumer and supplier responses to changed market conditions should produce a new market equilibrium price. Current prices must change when they create an imbalance between the quantity demanded and the quantity supplied. For example, when demand spikes, short-run prices might have to swing sharply higher to provide incentives for short-run supply increases. However, consumers do not have many good substitutes for electric power, and suppliers usually cannot increase output instantly or transport distant available generation to increase the quantity supplied to a market. Even if higher prices give incentives to change behavior, consumers and producers may have little ability to do so in the short term. Over longer time frames, however, they have more options to react to higher prices. The result is that long-run price increases usually will be much smaller than the short-run price increases needed to induce additional generation.

C. Comparing the Benefits to the Costs of Restructuring Markets for Electricity

While the shortcomings of cost-based regulation played a major role in the shift toward competitive electricity market structures, some market participants question whether the benefits outweigh the costs associated with establishing such markets. Some question whether electricity markets are, by nature, sufficiently competitive to warrant expected price reductions.142 They note the cost of operating ISOs and the cost to consumers of market manipulations and failures. Respondents to these concerns suggest that these markets are too new to warrant passing such judgment. They note that these failures may be a result of ill-advised market designs, and they find benefits despite such failures.

As various regulatory bodies considered whether to deregulate electricity markets, some conducted formal cost-benefit studies to address the relative benefits of the status quo versus proposed policy changes. The Task Force received many comments identifying, endorsing, or criticizing such studies. The Task Force did not, however, have the resources or time to fully examine, critique, or draw definitive conclusions from these widely varying studies. An annotated bibliography of many of these studies is attached as Appendix C. The Task Force also refers the reader to the summary conclusion of a recent DOE review of RTO benefit cost studies. See Box 2-3.

Box 2-3

Review of Cost-Benefit Studies

In December 2005, the Department of Energy released a study reviewing recent RTO Cost/Benefit analyses. This study provides a review of the state of the art in RTO Cost/Benefit studies and suggests methodological improvements for future studies. Following is a summary of this study's conclusions.

In recent years, government and private organizations have issued numerous studies of the benefits and costs of regional transmission organizations (RTOs) and other electric market restructuring efforts. Most studies have focused on benefits that can be readily estimated using traditional production-cost simulation techniques, which compare the cost of centralized dispatch under an RTO to dispatch in the region without an RTO, and on the costs associated with RTO start-up and operation. Taken as a whole, it is difficult to draw definitive conclusions from these studies because they have not examined potentially much larger benefits (and costs) resulting from the impacts of RTOs on reliability management, generation and transmission investment and operation, and on wholesale electricity market operation.

Existing studies should not be criticized for often failing to consider these additional areas of impact, because for the most part neither data nor methods yet exist on which to base definitive analyses. The primary objective of future studies should be to establish a more robust empirical basis for ongoing assessment of the electric industry's evolution. These efforts should focus on impacts that have not been adequately examined to date, including reliability management, generation and transmission investment and operational efficiencies, and wholesale electricity markets. Systematic consideration of these impacts is neither straightforward nor possible without improved data collection and analysis.

J. Eto, B. Lesieutre, & D. Hale, *A Review of Recent RTO Benefit-Cost Studies: Toward More Comprehensive Assessments of FERC Electricity Restructuring Policies* (December 2005) (prepared for the Department of Energy).

CHAPTER 3
COMPETITION IN WHOLESALE ELECTRIC POWER MARKETS

A. Introduction and Overview

As described in the preceding chapters, prior to the introduction of wholesale market competition, vertically integrated utilities sold their excess electric power to other utilities and to wholesale customers such as municipalities and cooperatives that had little or no generating capacity of their own.143 FERC and its predecessor agency, the Federal Power Commission, regulated prices, terms and conditions of interstate wholesale sales by investor-owned utilities. Wholesale purchasers' desire to escape being captive to a vertically integrated monopoly supplier of electricity was a fundamental impetus to opening the generation sector to competition.144 Sellers of wholesale power were also interested in accessing more customers. This desire for competition to play a greater role in determining supply and demand is consistent with standard economic theory, which asserts that effective competition ensures an economically efficient allocation of resources.

As described in Chapter 2, an important effect of a competitive market operation is that it provides customers with prices that reflect market conditions (abundance, scarcity, etc.). These market-based prices are an essential component of effective competition, as they discipline both consumption and production such that the cost of generating electricity is minimized. However, the demand for wholesale power is derived entirely from consumption choices at the retail level. In electricity there has been an impediment to efficiency in that prices of electricity to retail customers often are not directly connected to the wholesale prices in the market in which supplies are sold. This is because states have jurisdiction over retail prices, and state regulators generally set retail rates based on

average costs. Thus, unlike wholesale market-based prices, retail prices did not vary with consumption or the cost of production.145

The effects of this regulated price disconnect are heightened by one of the shortcomings of cost-based rate regulation: its difficulty in providing incentives for investors to make economically efficient decisions concerning when, where, and how to build new generation.146 If competition is to allocate resources in an economically efficient manner, customers must have access to a sufficient number of competing suppliers either via transmission, incumbent generation, demand response, or new local generation.147

Competitive policies in electricity markets were introduced to alleviate these disconnects between retail demand, wholesale demand, and investment incentives and to create more efficient markets.148 In EPAct 1992, Congress determined that competition in wholesale electric markets would benefit from two changes to the traditional regulatory landscape: (1) expansion of FERC's authority to order utilities to transmit, or "wheel," electric power on behalf of others over their own transmission lines and (2) reduction of entry barriers so additional nonutilities could enter the market. The former change permitted wholesale customers to purchase supply from distant generators, while the latter provided customers with competitive alternatives from independent entrants.149

In examining the experience with competition to date, a fundamental question to ask is whether competition in wholesale markets has resulted in sufficient generation supply and transmission to provide wholesale customers with the kind of choice that is generally associated with competitive markets. This is the primary question the Task Force attempts to address in this chapter. Answering this question has been challenging due to difficulties in identifying determinants of investment decisions. Each region was at a different regulatory and structural point when Congress enacted EPAct 1992. For example, some regions began with tight power pools, while others operated transmission and generation in a less centralized manner. Some regions had higher population densities and thus more tightly configured transmission networks than did others. Some regions had access to fuel sources unavailable or less available in other regions (e.g., natural gas supply in the Southeast, hydropower in the Northwest). Currently, some regions operate under a transmission open-access regime that has not changed since the early days of open access, while other regions have well developed independent providers of transmission services and organized day-ahead exchange markets for electric power and ancillary services.

This chapter discusses the question at hand anecdotally – by addressing whether and how entry has occurred in several regions with different forms of competition (i.e., the Midwest, Southeast, California, the Northwest, Texas, and the Northeast). It includes a discussion of how long-term purchase and supply contracts, capital requirements, regulatory intervention, and transmission investment affect supplier and customer decisions. The chapter concludes with observations on various regional experiences with wholesale competition.150 These observations highlight the trade-offs involved with various policy instruments used to introduce competition.

B. Background

One of the overall purposes of EPAct 1992 was "to use the market rather than government regulation wherever possible both to advance energy security goals and to protect consumers."151 Policymakers recognized that vertically integrated utilities had market power in both transmission and generation because they owned all transmission and nearly all generation plants within certain geographic areas. Congress enhanced FERC's ability to reduce monopoly power by enhancing its authority to order utilities, case by case, to transmit power for alternative sources of generation supply.

Today, vertically integrated utilities and other entities that operate transmission systems generally are required to offer transmission service under the terms of the standard Open Access Transmission Tariff (OATT) adopted by FERC in Order No. 888.152 Transmission providers offer two types of long-term transmission service under the OATT: network integration transmission service (network service) and point-to-point transmission service. Box 3-1 describes both types of transmission service. The OATT seeks to put market participants on equal footing when it comes to transmission access – making competition more viable. Price has been predictable and stable for both OATT services over the long term.153

Comments to the Task Force raised several concerns over transmission-dependent customers' access to alternative generator suppliers via OATTs. In particular, some commenters noted the continued possibility of transmission discrimination in their regions and that the ability for transmission suppliers to discriminate can block access to alternative suppliers.154 Commenters concluded that transmission discrimination can increase delivery risk because purchasers fear their transmission transactions might be terminated for anticompetitive reasons by their vertically integrated rival, if they purchase from a generator that is not affiliated with the transmission provider. The facts that electricity cannot be stored economically and electricity demand is very inelastic in the short term heighten delivery risk.

Box 3-1

How Transmission Services Are Provided Under the OATT

OATT contracts can be for point-to-point (PTP) or "network" transmission service. Network integration transmission service allows transmission customers (e.g., load-serving entities) to integrate their generation supply and load demand with that of the transmission provider.

A transmission customer taking network service designates "network resources," which include all generation owned, purchased or leased by the network customer to serve its designated load, and individual network loads to which the transmission provider will provide transmission service. The transmission provider then provides transmission service as necessary from the customer's network resources to its network load. The customer pays a monthly charge for this basic service, based on a "load ratio share" (i.e., the percentage share of the total load on the system that the customer's load represents) of the transmission-owning and operating utility's "revenue requirement" (i.e., FERC-approved cost-of-service plus a reasonable rate of return).

In addition to this basic charge, there may be additional charges. For example, when a transmission customer takes network service, it agrees to "redispatch" its generators as requested by the transmission provider. Redispatch occurs when a utility, due to congestion, changes the output of its generators (either by producing more or less energy) to maintain the energy balance on the system. If the transmission provider redispatches its system due to congestion to

accommodate a network customer's needs, the costs of that redispatch are passed through to all of the transmission provider's network customers, as well as to its own customers, on the same load-ratio share basis as the basic monthly charge.

The transmission provider must plan, construct, operate and maintain its transmission system to ensure that its network customers can continue to receive service over the system. To the extent that upgrades or expansions are needed to maintain service to a network customer, the costs are included in the transmission-owning utility's revenue requirement, thus impacting the load-ratio share paid by network customers.

Point-to-point transmission service, which is available on a firm or non-firm basis and on a long-term (one year or longer) or short-term basis, provides for transmission between designated points of receipt and designated points of delivery. Transmission customers that take this kind of service specify a contract path. A customer taking firm point-to-point transmission service pays a monthly demand charge based on the amount of capacity it reserves. Generally, the demand charge may be the higher of the transmission provider's embedded costs to provide the service, or the incremental costs of any system expansion needed to provide the service. If the transmission system is constrained, the demand charge may reflect the higher of the embedded costs or the transmission provider's "opportunity" costs, with the latter capped at incremental expansion costs.

One response to this risk is to turn over operation of the regional transmission grid to an independent operator, such as the ISOs and RTOs that now operate in New England, New York, the Mid-Atlantic, the Midwest, Texas, and California (organized markets).155 RTOs address deliverability concerns in several ways.156 The market designs in these regions provide participants with guaranteed physical access to the transmission system (subject to transmission security constraints). See Box 3-2 for a discussion of how transmission is provided in organized wholesale markets.

In regions with RTOs, wholesale electricity can be bought and sold through negotiated bilateral contracts, through "standard commercial products" available in all regions, and through various products offered by the organized exchange market.

For bilateral contracts, the contract can be individually negotiated with terms and conditions unique to a single transaction. Standard products are available through brokers and over-the-counter (OTC) exchanges such as the NYMEX and InterContinental Exchange (ICE).157 Standard products have a standard set of specifications so that the main variant is price. Finally, some RTOs also operate organized exchange markets that offer various products including electric power and ancillary services. These markets typically involve both real-time and day-ahead sales. Ancillary services include various categories of generation reserves such as spinning and non-spinning reserves in addition to Automatic Generation Control (AGC) for frequency control.

Box 3-2

How Transmission Is Priced in an ISO or RTO

ISOs and RTOs (hereinafter RTOs) provide transmission service across a region under a single transmission tariff. They also operate organized electricity markets for the trading of wholesale electric power and/or ancillary services. Transmission customers in these regions schedule with the RTO injections and withdrawals of electric power on the system, instead of signing contracts for a specific type of transmission service with the transmission owner under an OATT.

The pricing for transmission service is substantially different in these regions than under a standard OATT. RTOs generally manage congestion on the transmission grid through a pricing mechanism called Locational Marginal Pricing (LMP). Under LMP, the price to withdraw electric power (whether bought in the exchange market or obtained through some other method) at each location in the grid at any given time reflects the cost of making available an additional unit of electric power for purchase at that location and time. In other words, congestion may require the additional unit of energy to come from a more expensive generating unit than the one that cannot be accessed due to the system congestion. In the absence of transmission congestion, all prices within a given area are the same at any given time. However, when congestion is present, the prices at various locations typically will not be the same, and the difference between any two locational prices represents the cost of transmission system congestion between those locations. This congestion cost constitutes the only significant "variable cost" of transmission – the fixed costs of infrastructure investment are recovered through a standard transmission access fee.

Because congestion on the grid changes constantly, a transmission customer may be unable to determine beforehand the price for electric power at any location. To reduce this uncertainty, RTOs make a financial form of transmission rights available to transmission customers, as well as other market participants. Generally known as financial transmission rights (FTRs), they confer on the holder the right to receive certain congestion payments. Generally, an FTR allows the holder to collect the congestion costs paid by any user of the transmission system and collected by the RTO for electricity delivered over the specific path. In short, if a transmission customer holds an FTR for the path it takes service over, it will pay on net either no congestion charges (if the FTR matches the path exactly) or lower congestion charges (if the FTR partially matches), providing a financial "hedge" against the uncertainty.

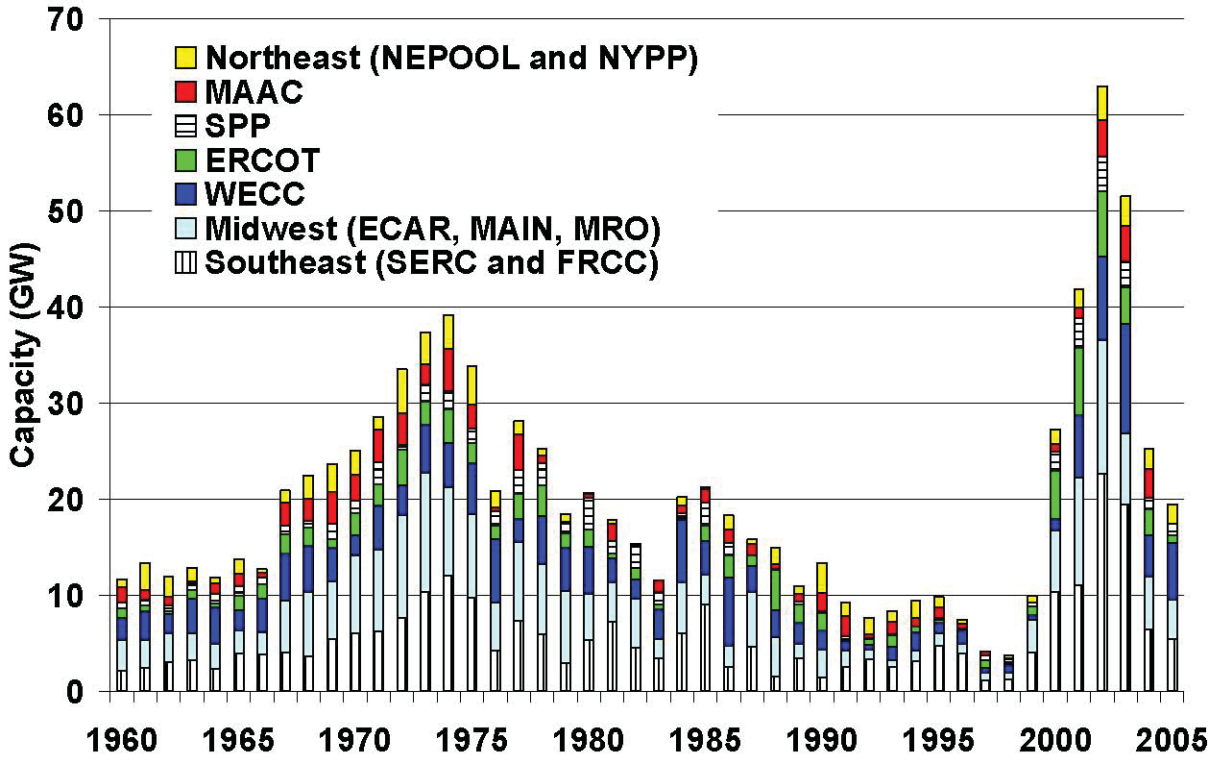
In general, FTRs are now available for one-year terms (or less) and are allocated to entities that pay access charges or fixed transmission rates. Pursuant to EPAct 2005, FERC has adopted rules to ensure the availability of long-term FTRs.

As described above, there is a question as to whether the price signals described in Chapter 2 have functioned to elicit the consumption and investment decisions that were expected to occur with wholesale market competition.

C. Wholesale Electric Power Markets and Generation Investment by Region

New generation investment has varied significantly by region since the adoption of open access transmission and the growth of competition. Figure 3-1 shows the overall pattern of new investment by region. There has been substantial new investment in the Southeast, Midwest, and Texas, while other regions have not experienced as much investment. Each region has different pricing formats for transmission services. Moreover, regions that operate exchange markets for electric power and ancillary services use different forms of locational pricing, price mitigation, and capacity markets.

Figure 3-1. U.S. Electric Generating Capacity Additions, 1960 – 2005



Source: FERC analysis of Platts PowerDat Data

These regional differences provide some insight into the impact of different policy choices on creating markets with sufficient supply choices to support competition and to allocate resources efficiently.

1. Midwest

a. Wholesale Market Organization

In 2004, the Midwest RTO began providing transmission services to wholesale customers in its footprint. On April 1, 2005, the Midwest Independent System Operator (MISO) commenced its organized electric power market operations. Prior to that, there were no centralized electric power exchange markets and wholesale customers obtained transmission under each utility's OATT.

b. New Generation Investment

Wholesale prices spiked in the Midwest in the summer of 1998,158 as an increase in demand due to unusually hot weather combined with unexpected generation outages. A significant amount of new generation was built in response to the price spike, as shown in Table 3-1. For example, from January 2002 through June 2003, the Midwest added 14,471 MW in capacity.159

Most of the new generation was gas-fired, even though the region as a whole relies primarily on coal-fired generation.160 More recently, new generation has been coal fired, in part because of rising natural gas prices.161 This entry and the subsequent drop in wholesale power prices has resulted in (1) merchant generators in the region declaring bankruptcy and (2) vertically integrated utilities returning certain generation assets from unregulated wholesale affiliates to rate-base.

2. Southeast

a. Wholesale Market Organization

Wholesale customers in the region obtain transmission under each utility's OATT (e.g., Entergy or Southern Companies). There are no centralized electric power markets specific to the region.

b. New Generation Investment

Due to the Southeast's proximity to natural gas in the Gulf of Mexico and pipelines to transport it, natural gas is a popular fuel choice for those building plants in the region. The Southeast has seen considerable new generation construction, as shown in Figure 3-1. More than 23,000 MW of capacity were added in the Southern control area between 2000 and 2005,162 and several generation units owned by merchants or load-serving entities have been built in the Carolinas in the past few years.

A significant portion of the region's new generation was nonutility merchant generation, and a number of merchant companies that built plants in the 1990s have sought bankruptcy protection. Often, the plants of bankrupt companies have been purchased by local vertically integrated utilities and cooperatives, such as Mirant's sale of its Wrightsville plant to Arkansas Electric Cooperative Corporation and NRG's sale of its Audrain plant to Ameren.163 Even apart from bankruptcies, some independent power producers have withdrawn from the region.

3. California

a. Wholesale Market Organization

The California ISO began operation in 1998 to provide transmission services. Concurrently, a separate Power Exchange (PX) operated electric power exchanges. After the 2000-2001 energy crisis, the PX was dissolved.164

b. New Generation Investment

Even before the California energy crisis, California depended on imported electric power from neighboring states. Much of the generation capacity that serves load in Southern California was built a substantial distance away from the population it serves, making the region heavily dependent upon transmission. In the past few years, much of the generation in California has operated under long-term contracts negotiated by the state during the energy crisis.165 Since 2000-2001, California's demand has increased, but construction of local generation has not kept pace. Over 6,000 MW of new generation capacity entered California in 2002-2003, but very little was built in congested, urban areas such as San Francisco, Los Angeles, and San Diego.166 Most new generation projects have been in Northern California.167 In the past five years, transmission investments have improved links between Southern and Northern California, and accessible generation investment in the Southwest has increased.

4. New England

a. Wholesale Market Operation

The New England ISO (ISO-NE) provides transmission services as well as a centralized electric power market. Under the electric power pricing mechanism adopted by ISO-NE, certain units used to maintain local resource adequacy must bid into the energy markets at marginal costs under must-run reliability contracts. The fixed costs of these high-priced units are recovered from users in the pertinent reliability zone.

b. New Generation Investment

Much of New England's net new generation has been built in less populated areas of the region, such as Maine, while most of the demand for power is in southern New England. From January 2002 through June 2003, ISO-NE added 4,159 MW in capacity.168 There were fewer capacity additions in 2004 than in the two previous years. In 2004, four generation projects came on line. Generation retirements in 2004 totaled 343 MW, of which 212 MW are deactivated reserves.

Demand growth in the organized New England markets has led to "load pockets," areas of high population density and high peak demand that lack adequate local supply to meet demand and for which transmission congestion prevents use of distant generation. These pockets have not seen entry of generation to meet local demand, and transmission has not always been adequate to bridge this gap. In general, New England needs new generation in the congested areas of Boston and Southwest Connecticut, increased demand response, or increased transmission investment to reduce congestion. Significant transmission upgrades were expected to go into operation in Boston and Southwest Connecticut during 2006.169

Theoretically, locational prices should elicit generation investment where needed, but this has been inadequate in load pockets. The ISO-NE pricing methodology often did not allow the market clearing price to reflect the cost of generation used to serve the congested areas.170 The resulting locational prices were not sufficient to attract significant new entry. Several policies have been adopted to provide the needed incentives. In 2003, ISO-NE implemented a temporary measure known as the Peaking Unit Safe Harbor (PUSH) mechanism, which was intended to enable greater cost recovery for high-cost, low-use units in designated congestion areas; however, PUSH units were not able to recover all their fixed costs.171 In June 2006, FERC approved a settlement establishing a forward capacity market in New England that will project demand three years in advance and hold annual auctions to purchase power resources for the region's needs.172 The forward capacity market includes a locational component to account for areas where transmission congestion limits the ability to import capacity necessary to meet local demand.

5. New York

a. Wholesale Market Operation

NYISO provides transmission services as well as a centralized electric power market. NYISO uses price mitigation to guard against wholesale price spikes, but, in contrast to early ISO-NE practice, it includes high-cost generators in marginal locational pricing.

b. New Generation Investment

New York traditionally has built generation in less populated areas and transmitted the power to more populated areas. For example, the New York Power Authority was created, in part, to get hydroelectric power from the Niagara Falls area into more congested areas of the state. From January 2002 through June 2003, NYISO added 316 MW in capacity.173 Three generating plants with a total summer capacity of 1,258 MW came on line in 2004. Three plants totaling 170 MW retired in 2004.174

Currently, transmission constraints in and around New York City limit competition in the city and lead to greater use of expensive local generation, which results

in high prices. NYISO uses price mitigation measures designed to avoid mitigating prices resulting from genuine scarcity. NYISO has separate mitigation rules for New York City. In an effort to lessen distortion of market signals, NYISO includes the cost of running generators to serve load pockets in its calculation of locational prices. Thus, potential entrants get a more accurate price signal regarding investment in the load pocket.

In a further effort to spur new construction, NYISO also sets a more generous "reference price" for new generators in their first three years of operation (bids above the reference prices may trigger price mitigation).175 Unlike New England, New York is seeing new generation investment in at least one congested area. Approximately 1,000 MW of new capacity entered commercial operation in the New York City area in 2006. The fact that New York is better able than New England to match locational need with investment is likely due to New York's clearer market price signals, both in energy markets and capacity markets. However, the Public Utility Law Project of New York commented that it is the public power agencies and traditional investor-owned utilities – rather than merchants responding to NYISO prices – that have invested in new infrastructure.

The effect of load pockets on prices is shown in Figure 3-2, which estimates the annual value of capacity based on weighted average results of three types of auctions run by the NYISO. Capacity prices are higher in the tighter supply areas of NYC and Long Island.

Figure 3-2. Estimate of Annual NY Capacity Values

Dollars per kilowatt-year ($/kW-yr)

Source: FERC analysis of NYISO data

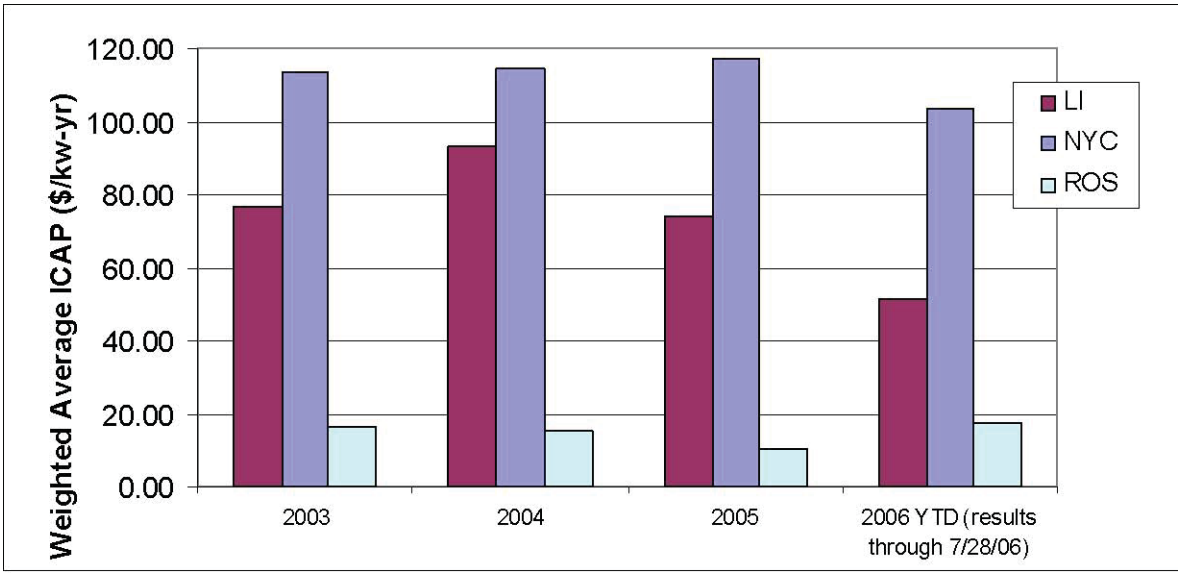
6. PJM

a. Wholesale Market Operation

The PJM Interconnection provides transmission services as well as a centralized electric power market. PJM has both energy and capacity markets. Its energy market has locational prices, and FERC recently approved, in principle, PJM's proposal to shift to locational prices in its capacity markets.176 The locational capacity market has not yet been implemented.

b. New Generation Investment

PJM capacity includes a broad mix of fuel types. Recent PJM expansion into new territories has added significant low-cost coal resources to PJM's overall generation mix, although the National Rural Electric Cooperative Association (NRECA) commented that other parts of PJM lack sufficient generation as a result of inadequate capacity additions. From January 2002 through June 2003, PJM added 7,458 MW in capacity.177 Capacity additions in 2004 were lower than in the two previous years, especially considering that PJM added significant new territory in 2004. In 2004, 4,202 MW of new generation was completed in PJM. During the year, 78 MW of generation was mothballed and 2,742 MW was retired.178



Like other areas, PJM depends on transmission to move power from areas of low-cost generation to areas of high demand. The flow is generally from the western part of PJM, an area with significant low-cost coal-fired generation, to eastern PJM. The easternmost part of PJM is limited by transmission line capacity constraints, which at times limit the deliverability of generation from the west. This means that higher-cost generation must be run in the eastern region to meet local demand. Furthermore, within the eastern region, there are areas of even more limited transmission. As a result, in some areas generation that is not economical to run is given reliability must-run (RMR) contracts to prevent it from retiring and possibly reducing local reliability.179 Recently, three utilities in PJM proposed major transmission expansions to increase capacity for moving power into eastern parts of PJM.180 In its comments, PJM contends that it is experiencing a "robust" level of new transmission investment for reliability upgrades.

7. Texas

a. Wholesale Market Operation

The Electric Reliability Council of Texas (ERCOT) manages power scheduling on an electric grid consisting of about 77,000 MWs of generation capacity and 38,000 miles of transmission lines. It also manages financial settlement for market participants in Texas's deregulated wholesale bulk power and retail electric market. The Public Utility Commission of Texas regulates ERCOT. ERCOT generally is not subject to FERC jurisdiction because its operations are not integrated with other electric systems outside of Texas (i.e., there is no interstate electric transmission). ERCOT is the only market in which regulatory oversight of the wholesale and retail markets is performed by the same governmental entity.

Each year, ERCOT determines the set of transmission constraints within its system that it deems Commercially Significant Constraints (CSCs). Once approved by the ERCOT Board, the CSCs and the resulting Congestion Zones are used by the ERCOT dispatch process for the next year. In 2005, ERCOT had six CSCs and five Congestion Zones. When the CSCs bind, ERCOT economically dispatches generation units' bids against load within each zone. To balance the system in real time, ERCOT issues unit-specific instructions to manage Local (intra-zonal) Congestion, then clears the zonal Balancing Energy Market. The balancing energy bids from all the generators are cleared in order of lowest to highest bid.181

At least one study asserts that when there is local congestion, local market power is mitigated in ERCOT by ad hoc procedures aimed at keeping prices relatively low while maintaining transmission flows within limits. The study concludes that, as a result, prices may be too low to elicit needed investment when there is local scarcity. Since it is difficult for new entrants to enter local markets at these prices, local monopoly positions are essentially entrenched.182

b. New Generation Investment

In the late 1990s, developers added more than 16,000 MW of new capacity to the Texas market.183 Certain aspects of this market may make it attractive to new investment. Texas consumers directly pay (via their electricity bills) for transmission system updates made to accommodate new plants. In other states, FERC often requires developers to pay for system upgrades upfront and recoup the cost over time through credits against their transmission rates.184 In addition, the Texas PUC plans to implement an energy-only resource adequacy market design in the fall of 2006 that requires incrementally raising the energy offer caps over time. More than 13,000 MWs of new capacity is scheduled to be online in 2009-2011.185

c. Hybrid Wholesale/Retail Demand Response

ERCOT has a competitive market-based demand response program that allows competitive retailers, along with willing customers, to respond to market-based price signals. Under the Load Acting As a Resource Program (LAAR), customers bid demand response into ERCOT's ancillary services market for responsive reserves through their scheduling agent.186 If needed by ERCOT, the load is then paid the market-clearing price for responsive reserve. The LAAR program is fully subscribed at 1,150 MWs.

8. The Northwest

a. Wholesale Market Organization

Wholesale customers obtain transmission service through agreements executed pursuant to individual utility OATTs. There are no centralized exchange markets specific to the region, but there is an active bilateral market for short-term sales within the Northwest and to the Southwest and California, which makes use of centralized electronic exchange platforms (such as the InterContinental Exchange). Several trading hubs with significant levels of liquidity provide price

information. Multiple attempts to establish a centralized Northwest transmission operator have proven unsuccessful for a variety of reasons, including difficulties in applying standard restructuring ideas to a system dominated by cascading (i.e., interdependent nodes) hydroelectric generation and difficulties in understanding the potential cost shifts that might result in restructuring contract-based transmission rights. A nascent organization created to enhance coordinated regional reliability and planning, ColumbiaGrid, has recently seated a board and begun development of various "functional agreements."187

b. New Generation Investment

The Northwest's generation portfolio is dominated by hydroelectric generation, which comprises roughly half of all generation resources in the region on an energy basis.188 Coal and natural gas resources make up most of the remaining generation, with smaller contributions from wind, nuclear, and other resources. The hydroelectric share has decreased steadily since the 1960s.

The Northwest's hydroelectric base allows the region to meet almost any capacity demands within the region, but the region is susceptible to energy limitations (given the finite amount of water available to flow through dams). This ability to meet peak demand buffers incentives for building new generation, which might be needed to assure sufficient energy supplies during times of drought. In three out of four years, hydro generation can displace much of the existing thermal generation in the Northwest. However, generation was added in recent years to meet load growth and to attempt to capitalize on high-prices during the Western energy crisis of 2001-2002. Due to high power purchase costs during this crisis, some utilities have added thermal resources as insurance against drought-induced energy shortages and high prices. Altogether, over 3,800 MWs of new generation has been added to the Northwest Power Pool since 1995. Of that, 75 percent was commissioned in 2001 or later.

D. Observations on Current Wholesale Market Options

One of the most diffiult questions federal regulators currently face is whether the different forms of competition in wholesale markets have resulted in an efficient allocation of resources. The various approaches used by the different regions show the range of available options.

1. Open Access Transmission without an Organized Exchange Market

One option is to rely on the OATT to make generation options available to wholesale customers. No centralized transmission operator or exchange market for electric power operates in regions that rely on this option (the Northwest and Southeast). However, active trading platforms can be found in these regions. These platforms provide liquidity and price transparency in some day-ahead or longer-term markets – although the prices do not directly reflect the costs of congestion. For long-term sales in these markets, wholesale customers shop for alternatives through bilateral contracts with suppliers. In both cases, customers separately arrange for transmission via the OATT. With a range of supply options to choose from, long-term bilateral contracts for physical supply can provide price stability for wholesale customers and send them a rough price signal so they can determine whether to build or buy. However, prices and terms can be unique to each transaction and may not be publicly available. Furthermore, the lack of centralized information about trades leaves transmission operators with system security risks that constrain transmission capacity. The lack of price transparency can add to the difficulty of pricing long-term contracts in these markets.

This model depends significantly on the availability of transmission capacity that is sufficient to allow buyers and sellers to connect. Thus, it also depends on the accurate calculation and reporting of available transmission capacity. Short-term availability is not sufficient, even if accurately reported, to form a basis for long-term decisions such as contracting for supply or building new generation. Not only must transmission be available, it also must be seen to be available on a nondiscriminatory basis. As FERC noted in Order 2000, persistent allegations of discrimination can discourage investment even if they are not proven. Without the assurance of long-term transmission rights, wholesale customers may remain dependent on local generation owned by one or only a few sellers, because they cannot access competitive options supplied by more distant generation. Similarly, new suppliers may have no means of competing with incumbent generators located close to traditional load.

2. Organized Wholesale Markets

In organized markets, market participants have access to an exchange market where prices for electric power are set in reference to supply offers by generators and demand by wholesale customers (including Load-Serving Entities or LSEs). While prices can be set by a number of mechanisms, all U.S. exchange markets have a uniform price auction to determine the price of electric power. Uniform price auctions theoretically provide suppliers an incentive to bid their marginal costs, to maximize their chance of getting dispatched.

The principal alternative to uniform price auctions is a pay-as-bid market.189 Research on whether pay-as-bid auctions result in lower prices than do uniform price auctions has been evolving and the results are, at best, mixed. Theoretically, pay-as-bid auctions do not result in lower market-clearing prices and may even raise prices as suppliers base their bids on forecasts of market-clearing prices instead of their marginal costs. Recent research suggests that pay-as-bid can sometimes result in lower costs for customers.190 But the pay-as-bid approach may reduce dispatch efficiency, to the extent generator bids deviate from their marginal costs.191 From a practical perspective, academics and market designers generally agree that uniform price auctions in competitively structured markets produce economically efficient prices.

Currently, in uniform price auction markets some generators (e.g., coal- or nuclear-fueled units) may be earning a return above those typically allowed under cost-based regulation. But other generators (e.g., natural gas-fueled units) are earning returns below those typically allowed under cost-based regulation. In a competitive market, a unit's profitability in a uniform price auction will depend on whether, and by how much, its production costs are below the market clearing price. A uniform price auction thus may produce very high prices compared with the costs of some generators and yet not high enough to give investors an incentive to build new generation that could moderate prices going forward. The uniform price auction creates strong incentives for entry by low-cost generators that will be able to displace high-cost generators in the merit dispatch order. The sufficiency of entry in uniform price auction markets has been a topic of discussion among policymakers and market participants. Four policy options have been suggested.

a. Unmitigated Exchange Market Pricing

One possible, but controversial, way to spur entry is to let wholesale market prices rise with scarcity.192 As discussed in Chapter 2, the market likely will respond in two ways. First, the resulting price spikes will attract capital and investment. To assure that the price signals elicit appropriate investment and consumption decisions, they must reflect the differences in prices of electricity available to serve particular locations. The costs of supplying customers within the region may vary where transmission capacity limits the availability of electric power from some generators within a regional market. Without locational prices, investors may not make wise choices about where to invest in new generation.

Unfortunately, it is difficult to distinguish high prices due to the exercise of market power from those due to genuine scarcity. High prices due to scarcity are consistent with the existence of a competitive market, and therefore perhaps suggest less need for regulatory intervention. High prices stemming from the exercise of market power in the form of withholding capacity may justify regulatory intervention. Being able to distinguish between the two situations is therefore important in markets with market-based pricing.193

Second, higher prices likely will influence customer decisions about how much and when to consume. Price increases signal customers to reduce the amount they consume. Indeed, during the Midwest wholesale price spikes in the summer of 1998, consumption fell when prices rose as customers purchased little supply during those periods.194 To reduce consumption efficiently, retail customers must have the ability to react to accurate price signals. As discussed in Chapter 4, customers often have limited incentive, even in markets with retail competition, to reduce their consumption when the marginal cost of electricity is high. This is because retail rates in the short term do not vary to account for the costs of providing the electricity at the actual time it was consumed.

b. Moderation of Price Volatility with Caps and Capacity Payments

To date, the alternative to unmitigated exchange market pricing has been price and bid caps in wholesale exchange markets. Although price and bid caps may moderate wide swings in market-clearing prices, there is disagreement as to the appropriate level of the caps. Higher caps may strike a balance between a policy of smoothing out the peaks of the highest price spikes and one of demonstrating where capital is required and can recover its full investment. Some argue, however, that high price caps may burden consumers with high prices and yet not allow prices to rise to the level that will actually ensure that investors will recover the cost of new investment.195 Thus prices can rise significantly and yet not attract additional supply that could eventually moderate price.

Capacity payments are one way to ensure that investors recover fixed costs. Such payments can provide a regular payment stream that, when added to power market income, can make a project more economically viable. Like any regulatory construct, however, capacity payments have limitations. It is difficult to determine the appropriate level of capacity payments to spur entry without over-taxing market participants and consumers. In addition, because capacity payments include a reserve margin added on to demand, capacity markets may be more susceptible to market power than energy markets. These markets may not be viable unless there is some mitigation policy, but determining the appropriate mitigation policy is a challenge.196

To the extent that capacity rules change, there is a perception of risk about capacity payments that may limit their effectiveness in promoting investment and ultimately new generation. When rules change, builders and investors may take advantage of short-term capacity payment spikes in a manner that is inefficient from a longer-term perspective.

If capacity payments are provided for generation, they may prompt generation entry when transmission or demand response would be more affordable and equally effective. Capacity payments also may reward traditional utilities and their affiliates disproportionately by providing significant revenues for units that are fully depreciated. Capacity payments also may discourage entry by paying uneconomical units to keep running instead of exiting the market. These concerns can be addressed somewhat by appropriate rules – e.g., NYISO's rules giving capacity payment preference to newly-entered units. In general, however, it is difficult to tell whether capacity payments alone would spur economically efficient entry.

One issue is whether capacity prices should be locational, similar to locational electric power prices. PJM, ISO-NE and NYISO have either proposed or implemented locational capacity markets that may increase incentives for building in transmission-constrained, high-demand areas. The combination of high electric power prices and high capacity prices in these areas may create adequate incentive to build generation in load pockets.197

c. Encouraging Additional Transmission Investment

Building the right transmission facilities may encourage entry of new generation or more efficient use of existing generation located near, but outside, load pockets. But transmission expansion to serve increased or new load raises the difficulty of creating a rate structure that ties the economic and reliability benefits of transmission to particular consumers. Because transmission investments can benefit multiple market participants, it is difficult to assess who should pay for the upgrade, particularly when some market participants do not require the transmission to meet their needs. This regulatory challenge may cause uncertainty about the price for transmission and about return on investment both for new generators and for transmission providers.

Merchant transmission lines, built by nonutilities, once were thought to be a solution to the need for long distance transmission lines. However, few merchant lines have been built. Uncertainties about revenue have made financing difficult. In addition, difficulties in obtaining needed rights-of-way and environmental approvals have chilled potential merchant projects.198 Provisions of EPAct 2005 that allow for federal permitting of transmission projects under certain circumstances appear to have encouraged interest in new transmission projects, including merchant projects.199

Building or expanding transmission capacity, where possible, may remove the congestion that contributes to higher electricity prices in load pockets and other transmission-constrained areas. However, the potential for building new transmission may reduce the incentive to build new generation in the load pockets or develop demand response and thus may sustain the high prices there. Once new transmission capacity is built, it will increase supply options and decrease or dampen prices just as newly built generation or demand response would. Building or expanding transmission may increase supply more cost effectively than building new generation in load pockets and other constrained areas.

Both generation and merchant transmission builders must deal with an existing transmission owner or an RTO/ISO to obtain permission to interconnect their facilities. Moreover, there are substantial difficulties in siting new transmission lines. It is difficult to assess whether these risks are higher for transmission builders than for generation builders or demand response programs.

d. Governmental Control of Generation Planning and Entry

The final alternative is a regulatory, rather than market, mechanism to assure that adequate generation is available to wholesale customers. As a method to spur investment, regulatory oversight of planning has some positive aspects, but it also has costs. Using regulation through governmentally determined resource planning to encourage entry could result in more entry than through market-based solutions, but that entry may not occur where, when, or in a way that most benefits customers. Regulatory oversight of investment also means regulators can bar entry for reasons other than efficiency. The stable rate of return on invested capital under rate regulation can encourage investment. On the other hand, rate regulation can lead to overinvestment, excessive spending and unnecessarily high costs. Regulation also does not provide the same market discipline that effective competition provides. Under regulation, ratepayers may bear the risk of mistakes resulting from where and how investments are made. In competitive markets, the penalties for such mistakes fall on management and shareholders. Future accountability for investment decisions can lead to better decision-making at the outset.200

Some commenters strongly supported Integrated Resource Planning or other governmentally supervised planning processes to provide optimal fuel diversity.201 In particular, they were concerned that the market acting alone creates boom-bust cycles where investors overreact to market signals and too many parties invest in one region. This creates overcapacity, which in turn leads to lower prices. Regulatory oversight of planning could result in greater fuel diversity, and thus less exposure to risks associated with changes in fuel prices or availability. Although IRP often includes consideration of future fuel prices, it is difficult to determine in advance the appropriate mix of fuels given the difficulty of projecting fuel prices. Regulators and planners too can make flawed resource decisions and have done so in the past.

3. Market Oversight of Wholesale Energy Markets

Under current law, market oversight to prevent anticompetitive behavior is an important feature of organized wholesale electricity markets. There is consensus about the need for market oversight and rules to ensure that wholesale electricity markets function efficiently and provide benefits to consumers. FERC's Office of Enforcement and state regulators perform this service by reviewing wholesale electricity markets and the reports of internal and independent market monitors.202 Organized markets also are subject to ongoing scrutiny by state regulators and the independent market monitoring arms of RTOs.203 In sum, market oversight continues to be a vital element of organized wholesale markets, and efforts are ongoing to strengthen the oversight process.

E. Factors that Affect Investment Decisions in Wholesale Electric Power Markets

The Task Force examined comments on how competition policy choices have affected investment decisions of buyers and sellers in wholesale markets. A number of issues emerged. One was the difficulty of raising capital to build facilities whose revenue streams are affected by changing fuel prices, demand fluctuations, and the potential for regulatory intervention. A related theme was the investment dampening effects of a perceived lack of long-term contracting options. Some commenters asserted that significant problems still exist in organized markets, including steep price increases in some locations without the moderating effect of long-term contracting and new construction.204 Alternately, the comment was made that in some markets prices are so low that they discourage entry by new suppliers, despite growing projected demand relative to supply.205 Overall, the Task Force identified six factors that affect investment decisions in wholesale power markets.

Commenters cited long-term contracts as a critical prerequisite in obtaining financing for new generators.206 Both generators and consumers said they were unable to arrange long term contracts.

1. Unavailability of Long-Term Supply Contracts - Wholesale Buyer Perspective

Many wholesale buyers said they had sought to enter into long-term contracts but found few or no offers.207 The Task Force attempted to determine whether the available data supported these allegations by examining 2004-2005 data collected by FERC through its Electric Quarterly Reports for three regions – New York, the Midwest, and the Southeast. Appendix E contains this analysis. Although inconclusive (due to data limitations described in Appendix E) the analysis showed that contracts of less than one year predominated in each of the three regional markets examined. In two of the markets, longer contract terms were observed to be associated with lower contract prices on a per MWh basis.

Three reasons may explain why buyers perceive they cannot enter long-term purchase power contracts.208

First, the APPA commented that its members in RTO regions who attempt to procure power under long-term bilateral arrangements have found it difficult to arrange contracts with base-load and mid-merit generators at prices that reflect the generators' long-term total cost structure. Base-load and mid-merit generators may see relatively high profits when gas-fueled generators are the marginal units, particularly when natural gas prices rise. Natural gas-fueled generators in a uniform price auction may see lower profits as their fuel costs rise, to the extent other generation becomes relatively more economical.209 When natural gas units set the market price, these units may recover only a small margin over their operating costs, while nuclear and coal units recover larger margins. Under the competitive model, entry will occur if long-term prices exceed long-term costs. In fact, recent proposals for new generation show a significant number of proposals to build base-load and mid-merit generation.210 In addition, at least some wholesale customers may have the option of investing in their own generation projects - either directly or through affiliates or joint ventures with other interested parties - if they are dissatisfied with the terms offered by incumbent suppliers. Indeed, in some regions, public power and cooperative utilities have announced plans to participate in new base-load generating plants. Because of the long lead times and considerable uncertainties involved, it will be some years before electricity from any of these plants can enter the market.

There are additional theoretical problems with the effectiveness of competition in providing investment incentives in that the very competitiveness of these markets cannot be assumed. For example, over 10 years ago, FERC requested comments on a wholesale "PoolCo" proposal, the predecessor to today's organized electricity market with open transmission access.211 At the time, the U.S. Department of Justice generally supported the emerging market form but warned:

> The existence of a PoolCo cannot guarantee competitive pricing, since there may be only a small number of significant sellers into or buyers from the pool. The Commission should not approve a PoolCo unless it finds that the level of competition in the relevant geographic markets would be sufficient to reasonably assure that the benefits of eliminating traditional rate regulation exceed the costs.212

These concerns are heightened by the fact that the market-clearing price in organized exchange markets may be established by a changing subset of generators depending upon fluctuations in consumer demand and transmission congestion.213 Indeed, some commenters specifically cited recent studies that argue that electricity markets need a larger number of suppliers to sustain competitive pricing than are needed for other commodities.214

A second explanation for the perceived lack of long-term purchase contracts may be related to limited trading opportunities to hedge the potential costs of long-term commitments. Long-term contracts in other commodities are often priced with reference to a "forward price curve." A forward price curve graphs the price of contracts with different maturities. The forward prices graphed are instruments that can be used to hedge (or limit) the risk that market prices at the time of delivery may differ from the price in a long-term contract. In a market with liquid forward or futures contracts, parties to a long-term contract can buy or sell products of various types and durations to limit their price risk. Currently, liquid electricity forward or futures markets often do not extend beyond two to three years.215 In some markets, one-year contracts are the longest available. In markets where retail load is served by contracts of fixed durations, such as the three-year obligations in New Jersey and Maryland, contracts for the duration of the obligation are growing slowly in number. But the relative lack of liquidity may discourage parties from signing long-term contracts, because they lack the ability to "hedge" these longer-term obligations.

Finally, the availability of long-term purchase contracts depends on the availability and certainty of long-term delivery options (transmission). Box 3-2 above describes how transmission prices are set in organized exchange markets. Wholesale customers have argued that the inability to secure firm transmission rights for multiple years at a known price, particularly in organized markets, introduces unacceptable uncertainty in resource planning, investment, and contracting.216 They say this financial uncertainty has hurt their ability to obtain financing for new generation projects, especially new base-load generation.

Congress addressed the issue of insufficient long-term contracting in the context of RTOs and ISOs in EPAct 2005. In particular, section 1233 of EPAct 2005 provides that:

> [FERC] shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service

obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.217

To implement this provision in RTOs and ISOs, FERC adopted new rules regarding FTRs in July 2006. The rules require such organizations to offer long-term firm transmission rights. FERC did not specify a particular type of long-term firm transmission right, but instead established guidelines for the design and administration of these rights, such as the length of terms and the allocation of those rights to transmission customers.

2. Unavailability of Long-Term Supply Contracts – Generator/Investor Perspective

Commenters cited long-term contracts as a critical prerequisite in obtaining financing for new generators.218 Comments from generation investors suggested that their ability to arrange long-term contracts is inhibited by several uncertainties. Most of these uncertainties arise from the unpredictability of state and federal regulation. Finally, the nascence of market structures for the sale of electricity can make it difficult for market participants to have settled expectations about the risk of long-term contracts. A description of the uncertainties associated with regulatory risk follows.

One type of regulatory uncertainty derives from the fact that most wholesale contracts are subject to regulation by FERC, and a party to a contract can ask FERC to change prices and terms, even if the specific contract has been approved previously.219 For example, in 2001-2002, several wholesale power purchasers asked FERC to modify certain contracts entered into during the California energy crisis. They alleged that problems in the California electricity exchange markets had caused their contracts to be unreasonable. The sellers argued that if FERC overrides existing contracts, market participants would not be able to rely on contracts when transacting for power and managing price risk. In declining to change the contracts,220 FERC cited its obligation to respect contracts except when other action is necessary to protect the public interest.221

A second type of regulatory uncertainty involving bankruptcy may limit future market opportunities for merchant generators and thus reduce their ability to raise capital. In recent years, several merchant generators (NRG, Mirant and Calpine) have sought to use the bankruptcy process to break long-term power contracts.222 This bankruptcy risk may create an additional incentive to favor construction of generation by load-serving entities or to purchase from utility affiliates over wholesale purchases from merchant generators.223 These disputes have spawned conflicting rulings in the courts. In particular, these cases have centered on separate, but intertwined issues. First, there is a question of where jurisdiction over efforts to end power contracts properly lies, as between FERC and the bankruptcy courts, and to what extent courts may enjoin FERC from acting to enforce power contracts. Second, there is an issue of what standard applies to such efforts (what showing must a party make to rid itself of a contract). The law remains unsettled, as do parties' expectations.

A third type of regulatory uncertainty concerns regulated retail service in states with retail competition.224 The uncertainty over how much supply a distribution utility will need to serve its customers, who have the option to switch, can prevent or discourage utilities from signing long-term contracts.225 The extent of this disincentive is unclear if competitive options are available for distribution utilities to purchase needed supply or sell excess supply.

A fourth type of uncertainty relates to a general concern about institutional instability. Some market participants argue that they cannot count on current rules and trading mechanisms because market rules and institutions change so frequently. This can serve to deter new entry.226 At the same time, many market participants continue to advocate changes in regulatory policy, even long-settled policy.

3. Capital Requirements - Risk and Reward in the Face of Price and Cost Volatility

New generation construction in wholesale markets depends on the ability of a company to acquire capital, either from internal sources or external capital markets. There is no federal regulation of generation entry, and most states that have permitted retail competition have eliminated any "need-based" showing to build a generation plant.

In the United States, private capital has funded most electric generation investment. Under traditional cost-base rate regulation, utility investment decisions were based in part on the promise of a regulated revenue stream with little associated risk to the utility. Ratepayers often bore the risk, and money from capital markets was generally available when utilities needed to fund new infrastructure. One significant problem, however, was that regulators had limited ability to ensure that utilities spent their money wisely.227 Investors view regulatory disallowances of imprudent expenditures as regulatory risk. Some believe that Integrated Resource Planning processes with opportunities for public and regulator participation in advance of resource procurement decisions will reduce the risks of later regulatory disallowances.228

In competitive markets, project funding is based on anticipated market-based projections of costs, revenues, and relevant risks factors. The ability to obtain funding is impacted by the degree to which these projections compare with projected risks and returns for other investment opportunities.229 Using this information, potential entrants to generation markets must be able to convince capital markets that new generation is a viable profitable undertaking. In the late 1990s, investors appeared to prefer market investments to cost-based rate-regulated investments, as merchant generators were able to finance numerous generation projects, even without a contractual commitment from a customer to buy the power.230

Recently, capital for large investment projects has flowed to traditional utilities more than to merchant generators.231 In part, this preference reflects the reduced profitability of many merchant generators in recent years and the relative financial strength of many traditional utilities. It also may reflect a disproportionate impact of the collapse of credit and thus trading capability of nonutilities after Enron's financial collapse.232 As shown in the Table in Appendix G, virtually all electric companies rated A- or higher are traditional utilities, not merchant generators.

Investor preference for traditional utilities also may be affected by increasing volatility in electric power markets. As wholesale markets opened to competition, investors recognized that income streams from the newly-built plants would not be as predictable as in the past.233 Under cost-based regulation, vertically integrated utilities' monopoly service territories significantly limited the risk of not recovering the costs of investments. Once generators had to compete for sales, generation plant investors were no longer guaranteed that construction costs would be repaid or that the output from plants could be sold at a profit.234 Financing was easier to obtain for projects such as combined cycle gas and particularly gas turbines that can be built relatively quickly. At the time, they were thought to have a cost advantage over existing generation, including less efficient gas-fueled generators.235 In 1996, the EIA projected that 80 percent of electric generators between 1995 and 2015 would be combined cycle or combustion turbines.236 Base-load units, such as coal plants, with construction and

payout periods that would put capital at risk for a much longer time, were harder to finance.237

The increasing amount of new generation fueled by natural gas, however, has caused electricity prices to vary more frequently as natural gas is a commodity subject to wide swings in price.238 With input costs varying widely, but merchant revenues often limited by contract or by regulatory price mitigation, investors may worry that merchant generators may not recover their costs and provide an attractive rate of return. Commenters suggest that competitive suppliers are beginning to focus on developing facilities fueled by other sources. They cite 2006 announcements by NRG Energy, Inc. (investing $16 billion to develop 10,500 MW of nuclear, wind, and coal facilities), TXU (investing in multiple coal-fired plants), Constellation Energy and Exelon Corp. (developing a nuclear plant), BP and Edison Mission Group (investing $1 billion in a hydrogen-fueled plant), and AES (investing $1 billion in renewable technologies).239

4. Regulatory Intervention May Affect Investment Returns

Economic theory says that, in an unregulated world, needed generation investments will be made and generation investors will recover not only their variable and fixed costs but also make an adequate return on these needed investments to maintain long-term financial viability. The mechanism for this cost recovery of the correct level of generation investment is allowing the highest cost generator being dispatched at a particular time and place to determine the market clearing price. The mechanism works as follows: As resources become scarce relative to demand, market prices are set by more and more expensive resources. Generators with variable costs below the market clearing price receive "scarcity rents" that cover their fixed costs and provide a return on investment. If high prices in a particular energy market reflect scarcity, these economic rents generally are efficient and serve to provide incentives for construction.

However, regulators may limit recovery of high prices during these periods due to the unpalatability of even temporarily high prices and/or suspicion of inappropriate market gaming. Thus regulators may deter suppliers from making needed investments in new capacity by imposing price caps and limiting recovery of legitimate costs and delivery of adequate returns.

This dynamic leads to a chicken-and-egg conundrum: if there were efficient investment, wholesale price or bid caps might not be needed. More investment in capacity would lead to less scarcity, and thus fewer or shorter episodes of high prices that may require mitigation. By contrast, it may be that price regulation during high-priced hours diminishes investors' confidence that market forces (rather than regulation) will set prices. That diminished confidence in their ability to earn sufficient investment returns thus deters entry of new generation supply, thereby limiting competition and giving cause for price caps.

Price mitigation through price or bid caps has become an integral component of most organized markets. The use of price mitigation has led generators to seek adequate returns through implementation of supplemental revenue streams (capacity credits) to encourage entry of new supply. See Box 3-3 for a discussion of capacity credits. In practice, however, the presence or absence of capacity credits has not always resulted in predicted outcomes. California did not have capacity credits and did not experience much new generation, but two regions (Southeast and Midwest) experienced significant new generation entry without capacity credits. Northeast RTOs with capacity credits continue to have some difficulty attracting entry, especially in major metropolitan areas.

As noted, much of the new generation in the Southeast was nonutility merchant generation that relied on the region's proximity to natural gas supplies. In the Midwest, in the late 1990s, largely uncapped prices were allowed to send price signals for investment. In California, price caps of various kinds have been used for a number of years, limiting price signals for new entry. In the Northeast, organized markets have offered capacity payments for long-term investments in addition to electric power prices that are sometimes capped in the short term. There is no conclusive result from any of these approaches – no one model appears to be the perfect answer for how to spur efficient investment with acceptable levels of price volatility.

Box 3-3

The Use of Capacity Credits in Organized Wholesale Markets

In theory, capacity credits could support new investment because suppliers and their investors would be assured a certain level of return even on a marginal plant that ran only in times of high demand. Capacity credits might allow merchant plants to be sufficiently profitable to survive even in competition with the generation of formerly-integrated local utilities that may have already recovered their fixed costs.
Net revenue analyses for centralized markets with price mitigation suggest that price levels are inadequate for new generation projects to recover their full costs. For example, in the last several years, net revenues in the PJM markets have been, for the most part, too low to cover the full costs of new generation in the region.240 Based on 2004 data, net revenues in New England, PJM and California would have allowed a new combined-cycle plant to recover no more than 70 percent of its fixed costs.

Regulation also may interfere with efficient exit of generation plants due to the use of reliability-must-run requirements. In some load pockets in organized markets, plant owners are paid above-market prices to run plants that are no longer economical at the market-clearing price. For example, in its Reliability Pricing Model filing with FERC, PJM states, "PJM also has been forced to invoke its recently approved generation retirement rules to retain in service units needed for reliability that had announced their retirement. As the Commission often has held, this is a temporary and suboptimal solution. Such compensation, like the RMR contracts allowed elsewhere, is outside the market, and permits no competition from, and sends no price signals to, other prospective solutions (such as new generation or demand resources) that might be more cost effective."241 To the extent that market rules allocate the cost of keeping these plants running for customers outside of the load pocket, such payments may distort price signals that, in the long run, could elicit entry. Graduated capacity payments that favor entry of efficient plants may be a partial solution to retiring inefficient old plants.

5. Investment in Transmission: A Necessary Adjunct to Generation Entry

Transmission access can be vital to supporting competitive options for market participants. For example, merchant generators depend on the availability of transmission to sell power, and transmission constraints can limit their range of potential customers. Small utilities, such as many municipal and cooperative utilities, depend on the availability of transmission to buy wholesale power, and transmission constraints can limit their range of potential suppliers. Much of the transmission grid is owned by vertically-integrated, investor-owned utilities. Some have alleged that these utilities have an incentive to limit grid use by others to the extent that such use conflicts with sales by their own generation. In short, the availability of transmission is often key in determining whether a generating facility is likely to be profitable and, thus, elicit investment.

Since Order No. 888, questions have arisen concerning the efficacy of various terms and conditions governing transmission availability. For example, customers have raised concerns regarding the calculation of Available Transfer Capacity (ATC). Another concern has been a lack of coordinated transmission planning between transmission providers and their customers. Finally, customers have raised concerns about some aspects of transmission pricing. Based on these

concerns, in May 2006 FERC proposed modifications to Order 888 open access transmission tariffs to further limit undue discrimination in transmission services. FERC is soliciting public comments on its proposed modifications.

As discussed above, generation that is built where construction costs are low and fuel supplies readily available, but not necessarily near demand, relies heavily on readily available transmission. The Connecticut DPUC noted that, while generation growth may have been sufficient for some regions such as New England as a whole, some localized areas saw demand grow without increases in supply, raising prices in load pockets. If transmission access to the load pocket were available, a large base-load plant outside the load pocket might become an attractive investment.

Less regulatory intervention in wholesale markets for generation may be necessary if transmission upgrades, rather than unrestricted high prices or capacity credits, are used to address the concerns about future generation adequacy. Although capacity credits may spur generators within a load pocket to add additional capacity, capacity credits may not be required for base-load plants outside the load pocket. Those base-load plants would not have the problem of average revenues falling below average costs because they would have access to more load, and would be able to run profitably during more hours of the day. Similarly, price caps may be unnecessary if improved transmission brought power from more base-load units into the congested areas. Prices would be lower because there would be less scarcity, and high-cost units would run for fewer hours.

6. Some Types of Generation Investment May Not Be Adequate without Government Intervention

System reliability, the prevention of network collapse, is a public good.242 The market may not elicit enough generation that has the technical capability (i.e., the ability to generate MWs within a very short period of time in a critical location) to prevent network collapse. An administrative process may be needed to provide the correct level of generation technically capable of responding to reliability needs. Some argue that perceived inadequate generation entry[243] may be due to competitive policies that are inadequate for eliciting appropriate levels of technically capable generation.

7. The Level of Investment in Demand Response Can Affect the Need for Generation and Transmission Investment

Chapter 2 described the typical disconnect between wholesale and retail prices in electric markets. This disconnect can lead to wider price fluctuations than would be the case if customers could easily reduce their demand when prices rise. There are several means to influence the level of demand for power, including energy efficiency and demand response. Examples of energy efficiency include giving customers incentives to replace inefficient refrigerators and air conditioners and imposing appliance standards or more energy-efficient building codes. Tools for eliciting demand response include time-based rates and incentive-based programs. Time-based rates include time-of-use pricing (i.e., a peak price and an off-peak price), critical peak pricing (i.e., similar to time-of-use rates, but with a critical peak component invoked during system emergencies or periods of high wholesale prices), and real-time pricing (e.g., Georgia Power's RTP tariff). Incentive-based demand response programs include interruptible rates, air-conditioner cycling, and independent system operator emergency demand response programs.

By influencing demand, energy efficiency and demand response programs can affect pricing in the short term and in the long term by affecting the amount of generation and transmission needed as well as the composition (i.e., composition of base load, mid-merit and peaking generation) of investment. For instance, programs that aim to reduce electricity consumption that is fairly constant – such as refrigerator efficiency programs – reduce the need for base-load plants. Similarly, programs that improve the efficiency of appliances that contribute to peaking load (i.e., air conditioners) can reduce demand for mid-merit generation. Demand response programs that curtail demand at peak times may resolve constraints that cause load pockets. Even when constraints persist, demand response can also serve to reduce prices in load pockets whether these high prices are the result of scarcity rents or market power. DSM also holds the potential to defer the need for new transmission enhancements. To date, energy efficiency has provided important benefits, but additional capability can be achieved. Demand response capability has been modest, between 3 and 7 percent in most regions.244 The use of energy efficiency and demand response is expected to increase significantly in the next few years, especially after advanced smart metering is installed.

CHAPTER 4
COMPETITION IN RETAIL ELECTRIC POWER MARKETS

A. Introduction and Overview

This chapter examines the development of competition in retail electricity markets and discusses the status of competition in the 16 states and District of Columbia that currently allow customers to choose their electricity supplier.245

Although it has been almost a decade since states started implementing retail competition, residential customers in most of these states still have little choice among suppliers. In most of these states, few residential customers have a wide variety of alternative suppliers and pricing options. Commercial and industrial (C&I) customers have more choices and options, but in several states large industrial customers have become increasingly dissatisfied with retail prices.

The lack of incentives for alternative suppliers and marketers to enter the market at the retail level has been a major impediment to market-based competition. Most states required the distribution utility to offer electricity at a regulated price as a backstop or default if the customer did not choose an alternative supplier or if the chosen supplier went out of business.246 States argued that this was needed to ensure universal access to affordable and reliable electricity.

States often set the price for the regulated service at a discount below then-existing rates and capped the price for multi-year periods. In some states, these initial discounts sought to approximate anticipated benefits of competition for residential customers. Since then, wholesale prices have increased. More than any other policy, this requirement that distribution utilities offer service at low prices unwittingly impeded entry by alternative suppliers to serve retail customers. New entrants cannot compete against a below-market regulated price.

States with prices regulated at below-market levels now face “rate shock.” On the one hand, rate caps for the regulated service most residential customers use expired or will expire within a few years, and states are faced with raising their regulated customer rates. These higher prices are particularly painful to customers that have limited ability to adjust consumption in response to price increases and also lack competitive supply options (other than possibly to install their own onsite generation). On the other hand, if states continue to require distribution utilities to offer regulated service at below-market rates, then retail entry – and thus competition – will not occur. Moreover, below-market rates put the distribution utility’s solvency at risk and do not provide appropriate incentives for conservation.247

This conundrum is further complicated by the fact that most distribution utilities offering regulated service no longer own generation assets. Most of the supply contracts that were part of the agreements under which they divested generating assets were set to expire at the end of a finite transition period.248 Many distribution utilities sold or transferred their generation assets to unregulated affiliates when retail competition began. If they offer regulated service, they must purchase supply in wholesale markets. Their former generation assets may be more expensive now than when they were divested. If the utility repurchases these assets at current prices, it is likely to have “sold low and bought high.”

The competitiveness of wholesale prices directly affects retail prices,249 except where retail prices are set by regulation without regard to current wholesale prices. For example, retail prices usually will reflect imperfections in the wholesale market, such as some wholesale suppliers' ability to exercise market power,250 problems in market design that increase wholesale suppliers' costs, government subsidies to some suppliers for reasons other than addressing market failures, transmission discrimination that prevents low-cost suppliers from reaching customers, or restrictions that delay or prevent entry and diffusion of low-cost generation technologies. Distortions in wholesale prices that lead to distortions in retail prices can cause economic inefficiencies both in retail customers' consumption patterns and in investment decisions. Ultimately these distortions can reduce consumer welfare and raise private and social costs of producing goods made with electricity as an input.

This chapter addresses the status and impact of retail competition in seven states that the Task Force examined in detail: Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and Texas.251 These states represent the various approaches to retail competition.252 The chapter also discusses why it is difficult to determine whether retail prices are higher or lower than they would have been absent the move to retail competition. Also included are several observations based on experiences of states that have implemented retail competition, with an emphasis on how states can minimize market distortions once rate caps expire.

B. Background on Provision of Electric Service and the Emergence of Retail Competition

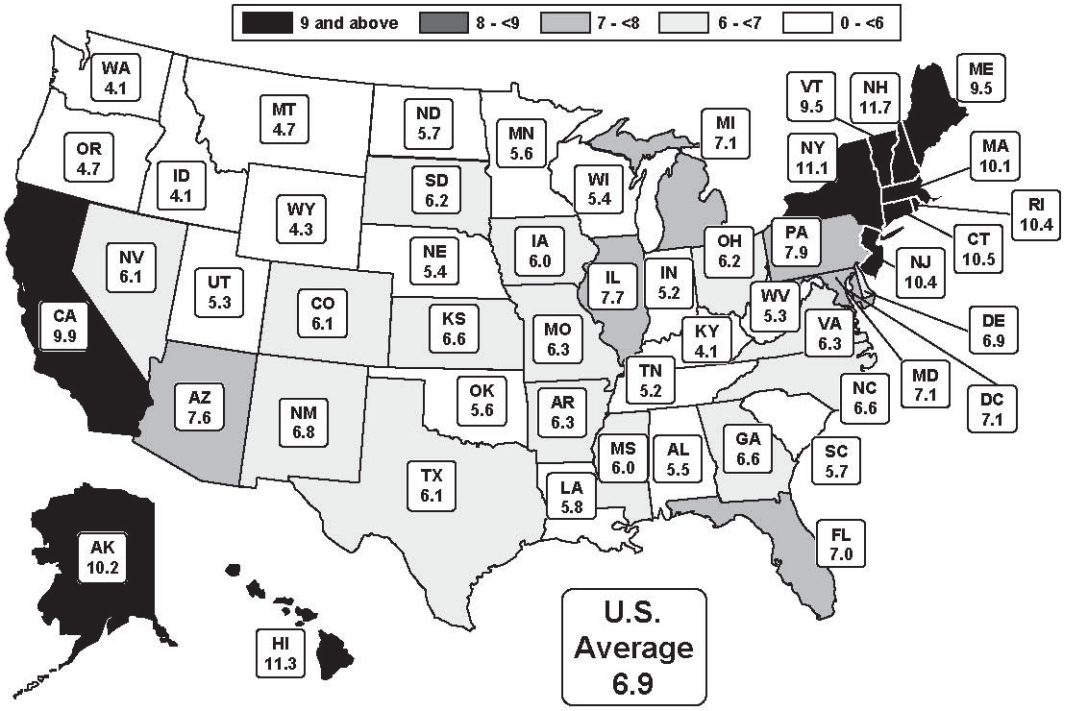
For most of the 20th century, local distribution utilities typically offered electric service at rates that varied among customer classes (e.g., residential, commercial, and industrial). State regulatory bodies set these rates based on the utility's costs. Locally elected boards oversaw the rates for customers of public power and cooperative utilities. For investor-owned systems, the regulated rate included an opportunity to earn an authorized rate of return on investments in utility plants needed to serve customers. Public power and cooperative systems operate under a nonprofit, cost-of-service structure. Their rates typically include a margin to cover unanticipated costs and support new investment.

With minor variations, monopoly distribution utilities deliver electricity to retail customers.[253] Industrial customers sometimes can choose from more options than can small business and residential customers for service and rate structures (e.g., "time-of-use" rates, which are lower when demand is lower during "off-peak" periods).254

Beginning in the early 1990s, several states with high electricity prices began to explore opening retail electric service to competition. As discussed in Chapter 1 and Figure 4-1, rates varied substantially among utilities, even within a single state. Some of the disparity was due to different natural resource endowments across regions, the most important of which are the hydroelectric resources in the Northwest and the abundant coal reserves in such states as Kentucky and Wyoming. Moreover, some states required utilities to enter into PURPA contracts at prices much higher than the utilities' avoided costs. In addition to these rate disparities, some industrial customers contended that their rates subsidized lower rates for residential customers.

Figure 4-1. U.S. Electric Power Industry, Average Retail Price of Electricity by State, 1995

Cents per kWh



Source: EIA, *The Changing Structure of the Electric Power Industry*, Figure 11 (Dec. 1996).

Retail competition allowed customers to choose their electric supplier or marketer, but their electricity

would still be delivered by the local distribution utility.255 The idea was that customers could obtain electric service at lower prices if they could choose among suppliers. For example, they could buy from suppliers outside their local market, from new entrants into generation, or from power marketers, any of which might charge lower prices than the local distribution utility. The ability to choose among alternative suppliers was intended to reduce market power that local suppliers might otherwise have, so that customers might see lower prices from local suppliers. Also, it was thought that new suppliers might offer innovative price and other terms to purchase electricity that could improve the quality of service.

In 1996, California enacted a comprehensive electric restructuring plan to allow customers to choose their electricity supplier. To accommodate retail choice, California extensively restructured its electric power industry. The legislation:

(1) established an Independent System Operator (ISO) to operate the transmission grid throughout much of the state, so that all suppliers could access the transmission grid to serve their retail customers;

(2) established a separate wholesale trading market for electricity supply, so that utilities and alternative suppliers could purchase electricity to serve their retail customers;
(3) mandated an immediate 10 percent rate reduction for residential and small commercial customers that did not choose an alternative supplier;
(4) authorized utilities to collect stranded costs related to generation investments that were unlikely to be as valuable in a competitive retail environment; and
(5) implemented an extensive public benefits program funded by retail ratepayers.256

Other states also enacted comprehensive retail competition legislation: New Hampshire (May 1996), Rhode Island (August 1996), Pennsylvania (December 1996), Montana (April 1997), Oklahoma (May 1997), and Maine (May 1997). By January 2001, 22 states and the District of Columbia had adopted retail competition legislation. Regulatory commissions in four other states (including Arizona, which also enacted legislation) had issued orders requiring or endorsing retail choice for retail electric customers.

Several states – primarily those with low-cost electricity generation, such as Alabama, Colorado, North Carolina, and Wisconsin – concluded that retail competition would not benefit their customers.257 For example, Colorado was concerned that limitations on transmission access and high concentration among generation suppliers would lead suppliers to exercise market power to the detriment of customers. These states opted to keep traditional utility service.

States adopting retail competition plans generally did so to advance several goals, including:

- lower electricity prices than under traditional regulation through access to lower-cost power in competitive wholesale markets where generators compete on price and performance;
- better service and more options for customers through competition from new suppliers;
- innovation in generating technologies, grid management, use of information technology, and new products and services for consumers; and
- improvements in the environment through displacement of dirtier, more expensive generating plants with cleaner, cheaper natural-gas-fired and renewable generation.

Under the restructured model, legislatures and regulators affirmed their support for making electricity available to all customers at reasonable rates, with continued safe and reliable service and consumer protections under regulatory oversight. Boxes 4-1 and 4-2 describe the Pennsylvania and New Jersey legislatures' findings and the expected results of retail competition.

Box 4-1

Findings of the Pennsylvania Legislature

The findings of the Pennsylvania General Assembly demonstrate these varied goals:

(1) Over the past 20 years, the federal government and state government have introduced competition in several industries that previously had been regulated as natural monopolies.

(2) Many state governments are implementing or studying policies that would create a competitive market for the generation of electricity.

(3) Because of advances in electric generation technology and federal initiatives to encourage greater competition in the wholesale electric market, it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth.

(4) Rates for electricity in this commonwealth are on average higher than the national average, and significant differences exist among the rates of Pennsylvania electric utilities.

(5) Competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.

Source: Pennsylvania HB 1509 (1995), *available at* http://www.legis.state.pa.us/WU01/LI/BI/BT/1995/0/HB1509P4282.HTM

Box 4-2

Findings of the New Jersey Legislature

"The [New Jersey] Legislature finds and declares that it is the policy of this State to:

(1) Lower the current high cost of energy, and improve the quality and choices of service, for all of this State's residential, business and institutional consumers, and thereby improve the quality of life and place this State in an improved competitive position in regional, national and international markets;

(2) Place greater reliance on competitive markets, where such markets exist, to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service; . . .

(4) Ensure universal access to affordable and reliable electric power and natural gas service;

(5) Maintain traditional regulatory authority over non-competitive energy delivery or other energy services, subject to alternative forms of traditional regulation authorized by the Legislature;

(6) Ensure that rates for non-competitive public utility services do not subsidize the provision of competitive services by public utilities; . . ."

C. Meltdown and Retrenchment

From late spring 2000 and into the spring of 2001, California experienced high natural gas prices, a strained transmission system, and generation shortages (due to hydro shortages and operating restrictions) that resulted in blackouts. Wholesale electricity prices soared during this time. Existing state law had capped residential "provider of last resort" (POLR) service rates at levels that were soon below the market price for wholesale electric power. After a large investor-owned utility declared bankruptcy because it was unable to increase its retail rates to cover high wholesale power prices, the state stepped in to buy electricity on behalf of two of the state's three IOUs.258 California eventually suspended retail competition for most customers while it reconsidered how to assure adequate electric supplies and continuation of service at affordable rates in a competitive wholesale market environment. Although that suspension continues today, 12

percent of load in the state is supplied by alternative suppliers, some additional consumers remain eligible to switch to alternative suppliers, and new initiatives for municipal aggregation are being pursued.259 Box 4-3 describes California's role in purchasing electricity and the all-time-high prices it paid, and continues to pay.

The California experience sent ripple effects throughout the Western region and prompted several states to defer or abandon efforts to implement retail competition. No new states have adopted retail competition since 2000, and some states – including Arkansas and New Mexico – repealed retail competition plans they previously had adopted.

Other populous states, such as Illinois, New Jersey, New York, Pennsylvania, and Texas, moved ahead with retail competition. Some of these states ended, or are about to end, their POLR service rate caps and will soon purchase wholesale supplies for POLR service at market prices (although several of these states are developing approaches to slow the adjustment to market-based procurement). States such as New York and Texas, which have adjusted POLR prices to approximate market rates on an ongoing basis, do not face a potentially significant increase in POLR service prices.

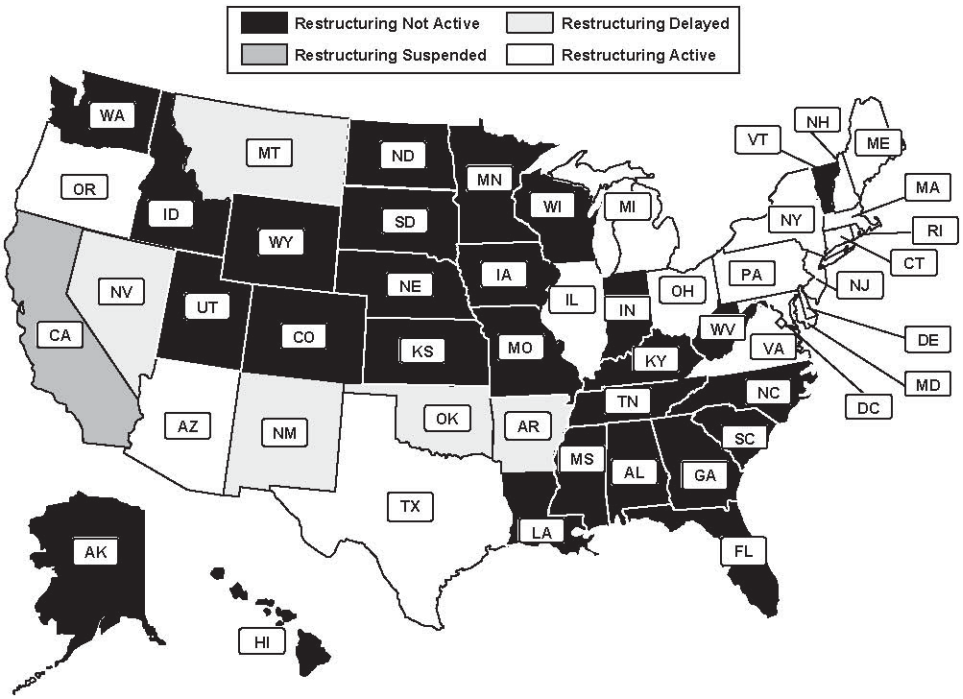
Box 4-3

California's Electricity Purchases at All-Time-High Prices

In 2001, California spent over $10.7 billion to purchase electricity on the spot market to supply customer's daily needs. The state also signed long-term contracts worth approximately $43 billion for10 years. These contracts represented about one-third of the three utilities' requirements for the same period (2001–2011). Viewed with the benefit of perfect hindsight, the state entered these long-term contracts when prices were at an all-time high. Future prices hovered in the range of $350-$550 per MWh during the time California negotiated its long-term contracts, and in April future prices peaked at $750/MWh as the state finalized its last contract. By August 2001, future prices had dropped below $100. Thus, as of May 2006, the state is obligated to pay well over market prices for at least five more years. *See* Southern California Edison.

As shown in Figure 4-2, 16 states and the District of Columbia have restructured at least some electric utilities in their states and allow at least some retail customers to purchase electricity directly from competitive retail suppliers. Restructured states as of April 2006 include Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia, as well as the District of Columbia.

Figure 4-2. United States Map Depicting States with Retail Competition, 2003



Source: EIA, *available at* http://www.eia.doe.gov/cneaf/electricity/chg_str/restructure.pdf

D. Experience with Retail Competition

With the expected benefits of retail competition in mind, the Task Force examined seven states in depth. These "profiled states" – Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and Texas – represent the different approaches to retail competition.

In most profiled states, competition has not developed as expected for all customer classes. In general, few alternative suppliers currently serve residential customers. Where there are multiple suppliers, prices have not decreased as expected, and the range of new options and services often is limited. Development of retail competition has been impeded to a considerable extent by the fact that several states still have capped residential POLR rates. C&I customers generally have more choices in both suppliers and of customized services, than do residential customers.[260] However, most large C&I customers do not have the option to take POLR service at discounted, regulated rates. Alternative suppliers may find C&I customers to be more attractive because the ratio of sales to marketing costs is often perceived to be higher for these customers.

This section reviews the status of retail competition in the profiled states, with an emphasis on entry of new suppliers, migration of customers to alternative suppliers,[261] and the difficulty of drawing conclusions about the effect of retail competition on prices due to the capped POLR service.[262] It then discusses how regulated POLR service has distorted entry decisions by alternative suppliers. Lessons learned from the use of POLR that may assist states as they decide how to structure future POLR service are included.

1. States Have Allowed Distant Suppliers to Access Local Customers and Have Encouraged Distribution Utilities to Divest Generation

Each profiled state adopted measures to encourage entry of new suppliers to compete with the incumbent utility. Each adopted policies to allow suppliers other than the local distribution utility to gain access to retail customers by requiring the utilities to join an ISO or an RTO. As discussed in Chapter 3, larger geographic markets for wholesale electricity enable retail suppliers and marketers to buy generation supplies from a wider range of local and distant sources (e.g., neighboring utilities with excess generation, independent power producers, cogenerators, etc.). Even if no new generation facilities are built, independent operation and management of the transmission grid increases retail customers' choices and makes it more difficult for local generators to exercise market power.

Some states, including Massachusetts, New Jersey, and New York, ordered or encouraged utilities to divest generation assets to independent power producers (IPP) to eliminate possible transmission discrimination or to secure accurate stranded cost valuations.[263] Although these divestitures generally did not require a utility to sell its generation assets to more than one company to eliminate the potential for the exercise of market power, generating facilities frequently have been sold to more than one IPP.[264] In other states, such as Illinois and Pennsylvania, several utilities voluntarily sold or transferred generation assets to unregulated affiliates.[265]

As a result of these divestitures, regulated distribution utilities in profiled states operate fewer generation plants than in the past. Distribution utilities that are required to serve customers must purchase generation in the wholesale market to serve their customers. Table 4-1 shows the amount of a state's generation operated by the state's utilities (i.e., not operated by IPPs or as combined heat and power facilities), both before and after the start of retail competition.

Table 4-1. Percentage of Utility Ownership of Generation Assets by State

State	Prior to Restructuring (1997)	2002
Illinois	97.0	9.1
Maryland	95.4	0.1
Massachusetts	86.6	9.0
New Jersey	81.2	6.8
New York	84.3	32.4
Pennsylvania	92.3	12.3
Texas	88.3	41.2

Note: The utility ownership percentage for New York in 2002 is higher than for other states with divestiture policies because it includes the hydroelectric and nuclear facilities of the Power Authority of the State of New York (even though that body is not a retail distribution utility).

Source: EIA, *State Profiles*, Table 4 in each state profile, *available at* http://www.eia.doe.gov/cneaf/electricity/st_profiles/e_profiles_sum.html.

Other states, such as Texas, limited the market share any one generation supplier can hold in a region, to provide opportunities for other suppliers to enter.266 Still others, such as New York, helped organize introductory temporary discounts from alternative suppliers, thus providing customers an incentive to try out these new suppliers.267

2. Alternative Suppliers Serving Retail Customers and Migration Statistics

Many generation suppliers serve large industrial and large commercial customers in the profiled states. For example, in Massachusetts, over 20 direct suppliers provide service to C&I customers, along with over 50 licensed electricity brokers or marketers.268 However, only four active suppliers serve residential customers in the state.[269] In New Jersey, C&I customers can choose among nearly 20 suppliers, but residential customers only have a choice of one or two competitive suppliers.270

Texas and New York have more options for residential customers. In Texas, residential customers can choose from approximately 15 suppliers.271 In New York, between six and nine suppliers offer services to residential customers in each service territory.272 With the notable exception of the Ohio municipal aggregation program described in Box 4-4, few if any suppliers have provided continuous service to residential customers in the other profiled states or in other retail competition states prior to the end of the respective transition periods.

The percentage of residential customers switching from the POLR service to an alternative competitive supplier is greatest where there are more available generation suppliers. For example, in Massachusetts, 8.5 percent of residential customers had migrated to a competitive supplier as of December 2005.273 Approximately 41 percent of large C&I customers switched to alternative suppliers, representing 57.5 percent of the C&I load.274 In states with several suppliers serving residential customers, higher percentages of residential customers switched to a new supplier (e.g., approximately 26 percent chose a new supplier in Texas).275

Box 4-4

Customer Choice through Municipal Aggregation in Ohio

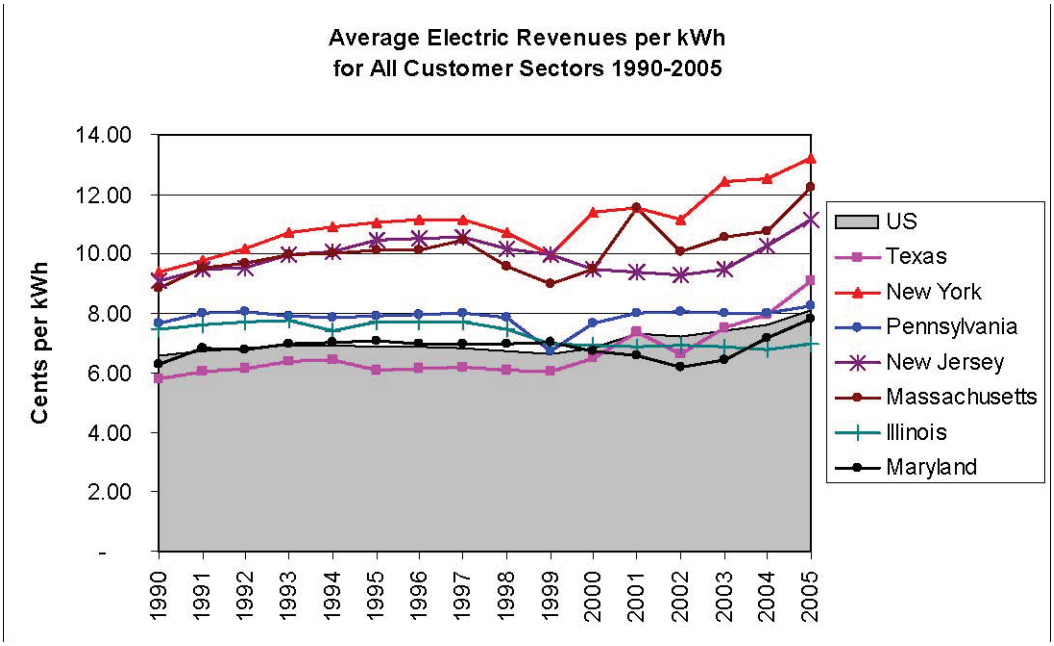
In New York, Texas, and most other states, retail customer switching occurs primarily through individual customer decisions to pick a specific alternative retail supplier. In Ohio, however, most switching activity has occurred through aggregations of customers seeking a supplier under the statewide "Community Choice" aggregation option. The Ohio retail competition law provides for municipal referendums to seek an alternative supplier and allows municipalities to work together to find an alternative supplier. The largest aggregation pool, the Northeast Ohio Public Energy Council, has 100 member communities and served approximately 500,000 residents at its peak. The Ohio program allows individual customers to opt out of the aggregation. In most other states, aggregation programs require customers to specifically opt in to participate. Participation rates generally are much higher in opt-out than in opt-in programs. (NOPEC recently had to contract for supply with an affiliate of the distribution utility after the original supplier withdrew from the market).

3. Retail Price Patterns by Type of Customer

Figure 4-3 shows average revenues per kilowatt hour for all customer types in the profiled states against the national average for 1990-2005. The U.S. national average was generally flat at 8 cents per kWh during this period. Rates in New York, Massachusetts, and New Jersey generally have been higher than the national average, while those in Texas, Pennsylvania, Maryland, and Illinois have been lower. In 2004 and 2005, retail prices in all states began to increase.

Figure 4-3. Average Revenues per kWh for Retail Customers, 1990-2005

Profiled States and National Average



Source: EIA Form 861 data, and Monthly Electricity Report for average electric revenues per kWh all sectors, all retail providers.

a. Residential and Commercial Customers

It is difficult to draw conclusions about how competition has affected retail prices for residential customers in states in which a substantial share of such customers continues to take service under capped POLR rates (e.g., Maryland, Illinois, Pennsylvania, and Texas). Comparisons of regulated prices shed little light on price patterns resulting from retail competition.

POLR prices have increased recently in states in which residential rate caps have expired. In New Jersey, residential rate caps on POLR service expired in the summer of 2003. Since then, the state has conducted an internet auction to procure POLR supply of various contract lengths (one- and three-year contracts). The state holds annual auctions to replace suppliers with expiring contracts and to acquire additional supply. Rates for the generation portion of POLR service were flat in 2003 and 2004 after adjusting for deferred charges, but increased in 2005 and 2006, with rates increasing approximately 13 percent between 2005 and 2006.276

In Massachusetts, capped POLR rates expired in February 2005. Since then, customers who did not choose an alternative supplier still have been able to obtain POLR service. Massachusetts based the generation portion of its POLR service on the price of supply procured in wholesale markets through fixed-priced, short-term (three- or six-month) supply contracts. Rates for the generation portion of POLR service in the Boston Edison (north) territory increased from 7.5 to 12.7 cents per kWh from 2005 to 2006.277

b. Large Industrial Customers

Examining large industrial customers that continue to use a fixed price POLR service also sheds little light on price patterns. A number of states have revised their POLR policies for large customers. Their POLR price for generation is a pass-through of the hourly wholesale price for electricity plus a fixed administrative fee. For example, Maryland, New Jersey, and New York have adopted this type of POLR pricing for large industrial customers.278 Many customers have switched to alternative suppliers in these states.

Large industrial customers described how their rates have increased since the beginning of retail competition.279 Some commenters suggested that the Task Force should compare prices of a utility operating in a state that did not implement retail competition against prices of the same utility in a state that implemented retail competition.280

The difficulty with this comparison is that many factors unrelated to retail competition may simultaneously influence prices. For example, one state may have reduced cross-subsidies among customer classes while other states increased them. As a result, a price comparison between two states for a class of customers would conflate competition and cross-subsidization effects. Transmission congestion also may affect access to different generators (with low or high prices), so that comparing two states as if they were in the same physical location would be misleading. The timing of rate adjustments may differ between states, so that a single snapshot of rates would show a lower price in one state at one point in time, but a lower price in the other state at a different point in time – even if the net present values of typical bills in the two states were identical over a long observation period. Finally, some states may defer recovery of costs, whereas other states choose not to. Thus, without accounting for these and other factors, a simple price comparison between two states may not reveal whether retail competition has benefited customers. At this point the Task Force does not have sufficient data to provide a definitive explanation of price differences between states.281

4. Results of Efforts to Bring Accurate Price Signals into Retail Electric Power Markets

There is mixed evidence concerning the degree to which retail competition has resulted in efficient price signals to customers. Residential POLR service rate caps have not increased customer exposure to time-based rates.282 In contrast, real-time pricing is the POLR service available to the largest customers in New Jersey, Maryland, and New York.283 The shift to real-time pricing has been eased by technical advances in metering that have increased the sophistication (and decreased the prices) of meters that record the volume of consumption in each small block of time.284

Commenters argue that POLR rate structure can significantly affect customer response to price, especially among larger customers. A broad spectrum of utilities, state regulators, and ISOs argue that variable rates permit customers to react to price changes by enabling them to see clearly how much they can save.[285] The experience of the largest customers in National Grid USA's New York area suggests that customers using real-time pricing demonstrate price sensitivity.286

In states with traditional cost-based regulation, utilities have used various incentives to induce customers to reduce consumption when demand is high or transmission is congested (e.g., hot summer days). In other instances, such as in New York State, ISOs have successfully implemented demand response programs available to retail customers. In some instances, retail competition has discouraged these traditional types of programs, particularly when distributing utilities are no longer responsible for POLR service.[287] When distribution utilities are required to maintain a portfolio of resources to meet POLR loads, they may no longer value these types of programs as a resource to ensure reliable and efficient grid operation. Shifting the responsibility of grid operation and reliability to regional organizations such as ISOs/RTOs further decreases distribution utilities' interest in these products.

5. Retail Competition in Rural America

Many rural areas are served by small non-profit electric cooperative and public power utilities. They were among the last to be electrified and the most costly to serve. Customers are scattered over large geographic areas, with residential and small loads predominating. Although electric distribution cooperative service areas have been opened to competition under some state plans, no state has required municipal and/or public power utilities to implement retail competition.

Eight states with retail competition – Arizona, Delaware, Maine, Maryland, Michigan, New Hampshire, Pennsylvania, and Virginia – required cooperatives to implement retail competition in their service territories. With the exception of Pennsylvania, state public utility commissions regulated electric cooperatives' retail rates and approved their competition plans. Pennsylvania left the design and implementation of retail competition to the individual distribution cooperatives. The Pennsylvania Public Utility Commission is responsible for licensing competitive retail providers in cooperative service territories. Cooperative retail competition plans have been fully implemented in Delaware, Maine, New Hampshire, Pennsylvania, and Virginia. Some aspects of cooperative retail competition plans are still in administrative or judicial proceedings in Arizona and Michigan. Michigan has allowed electric cooperatives to offer retail competition to a portion of their very large C&I customers, but has deferred extending competition to other customers.

Other states – including Illinois, Montana, New Jersey, Ohio, and Texas – allow electric cooperatives to opt into retail competition on a vote of their boards or membership. None of these states regulates cooperatives' rates or services. They leave the design and implementation of retail competition to the individual cooperative. The state licenses competitive providers, but providers must enter into agreements with the cooperative to begin enrolling retail customers. A handful of individual cooperatives in Montana and Texas elected to provide retail competition options for their members.

It is difficult to track the progress of retail competition in rural areas because most states do not make switching data available or maintain up-to-date information on active suppliers in cooperative service territories. Nevertheless, the Task Force determined that there were few alternative competitive providers, if any, for residential customers of rural systems open to retail competition. No competitive providers were enrolling customers in cooperative systems in Arizona, Maine, Maryland, New Hampshire, Pennsylvania, or Virginia in May 2006. In Delaware and Montana, competitive providers had been licensed to serve cooperative customers, but it is unclear whether any is currently enrolling customers. Licensed provider and switching information for Texas cooperatives is not yet available.

E. POLR Service Price Significantly Affects Entry of New Suppliers

Each profiled state required local distribution utilities to offer a POLR service for customers who do not select an alternative generation provider or whose supplier has exited the market. The price that the distribution utility charges for regulated POLR service is usually "fixed" for an extended period – that is, it does not vary with increases or decreases in wholesale prices. Generation accounts for the most significant portion of the POLR service price. This component constitutes the amount that the customer avoids paying to the distribution utility by choosing (and paying) an alternative provider. Many states denote this as the "price to beat" or the "shopping credit."

Commenters say that the price of POLR service is the most significant factor affecting whether new suppliers will enter the market and compete to serve customers.288 The POLR price is the price against which new suppliers, including unregulated affiliates of the distribution utility, must compete if they are to attract customers.289 The frequency with which the POLR service price changes, among other features of POLR service, can affect the competitive dynamics between different suppliers.

1. Contrasting Visions of POLR Service

The comments revealed two visions of how POLR service should function in the long term.290 In the first vision, POLR is a long-term option for customers. Under this view, POLR service closely approximates traditional utility service, but in a market place with other sources of supply. Under this vision, POLR service often features prices that are fixed over extended periods. Government-regulated POLR service competes head-to-head with private, for-profit retail suppliers.291 (An analogy would be the U.S. Postal Service providing parcel postage service in competition with for-profit package delivery services by United Parcel Service, DHL, and FedEx). Alternative suppliers may grow as they find additional approaches to attract customers, but POLR service will likely retain a substantial portion of sales, particularly to residential customers. This type of POLR service serves as a yardstick against which alternative suppliers compete. Most states have adopted this vision of POLR service.292

In the second vision, POLR is a barebones, temporary service consisting of retail access to wholesale supply, primarily for customers that are between suppliers. In this vision, alternative suppliers serve the bulk of retail customers. They compete primarily against each other with a variety of price and service offerings designed to attract different types of customers. This type of POLR service acts as a stopgap source of supply that ensures electric service is not interrupted when an alternative supplier leaves the market or is no longer willing to serve particular customers. Wholesale spot market prices, or prices that vary with each billing cycle, may be acceptable as the price for POLR service.293 (A supply arrangement comparable to this version of POLR service is the high-risk pool for automobile insurance operated in several states).294 Texas and Massachusetts are current examples of this vision of POLR service, as is Georgia in its design

for retail natural gas sales.295

Some profiled states incorporated aspects of both visions of POLR service for different types of customers. For example, New Jersey adopted the first approach for residential customers and the second approach for large C&I customers.296 Large C&I customers are generally expected to be well-informed buyers with wide energy procurement experience. Accordingly, some states determined they are more likely to quickly obtain the benefits of retail competition without additional help from state regulators in the form of fixed POLR prices.

2. Key POLR Service Design Decisions

The profiled states took different approaches to designing their POLR service offerings. Key design decisions involved pricing of the POLR, duration of the POLR obligation, and how to acquire POLR supply. Each of these can affect entry conditions that alternative suppliers face. This section describes each of the decisions.

a. Pricing of POLR Service

The profiled states generally set the POLR price at the regulated price for electric power prevailing before the onset of retail competition, less a discount. Discounts usually persist over a specified multi-year period. Assuming that competition generally lowers prices, one rationale for the discounts was to provide a proxy for the effects of competition on customers less able to quickly obtain such savings for themselves. The Illinois POLR service discount, for example, was developed to bring local prices into line with regional prices. When retail competition began, Illinois customers in areas with relatively low prices before customer choice did not receive discounts below the previously regulated rates. In contrast, customers in the Commonwealth Edison territory – the area with the highest cost-based rates – received
20 percent discounts to bring retail POLR prices there into line with the regional average bundled service prices prevalent prior to the restructuring legislation.297

b. The Extent and Timing of Pass-Through of Fuel Cost Changes

States also have considered the extent to which they should adjust the regulated POLR price to allow for changes in the cost of fuel to generate electricity. Some states separated fuel costs from other cost components, because fuel costs have been more volatile than other input prices. (Fuel costs are the largest variable cost component and can be calculated for each type of generation unit on the basis of public information.) These factors also suggest that a generation firm has little control over its fuel costs once it has invested in generation. For example, Texas instituted twice-yearly adjustments in the POLR service (price to beat) price calculations. By adjusting POLR prices for changes in fuel costs, Texas regulators have prevented the POLR price from slipping too far away from competitive price levels, thus maintaining the POLR price as a closer proxy for the competitive price.298 If retail prices fall too far below wholesale prices, the POLR supplier may have financial difficulties, and alternative suppliers will be unlikely to enter or remain as active retailers.299

c. POLR Price and the Shopping Credit

When a retail customer picks an alternative supplier, the distribution utility with a POLR obligation avoids the costs of procuring generation supply for that customer. The distribution utility therefore "credits" the customer's bill so that the customer pays the alternative supplier (rather than the utility) for the electricity supplied.[300] This avoided charge – the "shopping credit" – equals the regulated POLR service price. States have used two approaches to determine the level of the shopping credit. One view is that the shopping credit equals the avoided cost or the proportion of POLR procurement costs attributable to a departing customer. Maine, for example, estimated avoided costs on this basis, with no additional estimated avoided costs.301 This approach results in a lower shopping credit and lower total POLR price.

An alternative perspective is that the distribution utility also avoids "adders" (costs that are in addition to avoided procurement costs), including marketing and administrative costs.302 This view results in a higher shopping credit and higher total POLR price, creating "headroom" for potential entrants. In Pennsylvania, the POLR shopping credit included several other elements, such as avoided marketing and administrative costs.303 Some observers attributed Pennsylvania's early high volume of switching to the additional avoidable costs included in its shopping credit calculations.304

d. The Multi-Year Period for POLR Service

States that implemented retail competition also determined how long POLR service should continue at a discount from prior regulated prices. This period generally corresponded to the distribution utility's collection of stranded generation and other costs. In a competitive retail environment, utilities no longer were assured they could recover costs of all of their state-approved generation investments. Most states faced claims of stranded costs associated with generation facilities that were unlikely to earn enough revenues to recover fixed costs once customers could seek out alternative, lower-priced retail suppliers. States allowed utilities to recover stranded costs through charges on distribution services that cannot be bypassed.305

Each state that authorized the collection of stranded costs had to determine these costs and the duration of the collection period. These decisions fundamentally altered the electric power industry and were at the center of some of the most contentious issues state regulators faced. Some states (for example, Maine and New York) required some or all generation to be sold to obtain a market-based determination of the level of stranded costs.306 In other states, such as Illinois, utilities voluntarily divested generation assets. As noted above, the result of these divestitures is that generation no longer is primarily in the hands of regulated distribution utilities.307

e. Procurement for POLR Service

Because most distribution utilities no longer own generation to satisfy all of their POLR obligations, they took different approaches to acquire generation supply. For example, New Jersey utilities that offer residential POLR service acquire generation supply through three overlapping three-year contracts, with each contract covering approximately one-third of the projected load.308 This "laddering" of supply contracts reduces the volatility of retail electricity prices but does not assure that the prices paid by POLR service consumers are competitive in the short term.309 Other states used different ways to hedge the volatility in short-term energy prices. For example, New York distribution utilities have long-term supply contracts with the purchasers of their generation assets (vesting contracts) based on pre-divestiture average generation prices.310

F. Observations on How POLR Service Policies Affect Competition

One of the most contentious issues state regulators currently face is how to price POLR service once rate caps expire. This situation is especially vexing for those states that had stranded cost recovery periods during which fixed POLR prices were substantially lower than wholesale prices. Rate caps expire this year in Delaware, Illinois, Maryland, Ohio, and Rhode Island, and customers in those states that did not choose an alternative supplier face potentially substantial price

increases.

Rapid increases in fuel prices in recent years – leading to increases in wholesale prices – have made it difficult fully to discern best practices regarding retail competition. The price increases interacted dramatically with POLR service rate caps, clouding the experiences most states have had with other retail competition issues. As a result, the range of experience regarding other aspects of retail competition is narrow, primarily limited to what has occurred in New York, Texas (within ERCOT), the Duquesne distribution area within Pennsylvania, Maine, Massachusetts (recently), and the large C&I customers in New Jersey, Illinois, and Maryland. Because each state faces different electricity supply and demand conditions, it is not possible to recommend a single approach for all states considering retail customer choice. Nonetheless, given these limitations, the Task Force offers the following observations on what appears to work well (and not to work well) in retail customer choice programs.

Minimum POLR Service: POLR service (or an equivalent provision) to serve customers of a supplier that has left the market, while the customer obtains another supplier, is the least intrusive form of POLR service, yet it is consistent with concerns about potentially life-threatening effects of unanticipated loss of electric service.

Treatment of Different Customer Risk Preferences: POLR service that goes beyond short-term access to the wholesale spot market involves providing a bundle of services that electricity marketers also can provide. States that embrace a more expansive version of POLR service should recognize that this step may hamper the development of alternative suppliers. The economic rationale for taking this step usually is limited to trying to correct some identifiable and substantial market imperfections. If a state adopts a more expansive version of POLR service, it should periodically review the rationale for continuing it.

POLR Service Price Caps: It is difficult to establish a POLR service price cap that will not distort retail electricity markets and the associated development of effective competition. The best practice is to make frequent adjustments to the cap (at least so as to reflect changes in fuel costs), or to abandon the cap altogether and use an objective, competitive process to procure supply.

Treatment of Different Customer Classes: Large customers are logical pioneers for retail choice because of their familiarity with energy procurement processes and because they are comfortable with decisions to adjust input use based on input prices. For smaller, less sophisticated customers, including residential customers, issues of awareness and access to comparative pricing information should be addressed as retail customer choice is introduced.

Switching Costs: Switching is important for retail electricity competition to work. States should strive to avoid rules that make switching more expensive or slower than is necessary to avoid unauthorized switching (slamming).

Consumer Education: Becoming an informed and responsive consumer in an unfamiliar market requires that the customer be informed that he or she has choices and be provided with information about how to compare available choices and how to switch suppliers (including any constraints on switching). Texas maintains a well-organized website that appears to work well for residential price comparisons. New York's program to encourage customers to try out alternative suppliers that agree to offer a temporary discount appears to educate many residential customers effectively about the ease of switching, without subsidizing alternative suppliers.

Customer Aggregation: Customer aggregation is an approach that can reduce per-customer search and switching costs and thus generally can help to develop retail competition. Opt-out customer aggregations may be worth considering because they can minimize transaction costs without limiting customer choice.

Entry: Entry is a key concept in retail electricity competition. States should attempt to avoid rules that make entry more expensive or slower than is required to avoid fraudulent marketing activities. Areas to consider include registration fees and delays, costs and delays in interacting with the distribution utility (metering, billing, treatment of receivables), security deposits for suppliers, rules regarding disconnecting retail customers for non-payment, and exit penalties.

1. POLR Service Price to Approximate the Market Price

The POLR service price must closely approximate a competitive market price if it is to provide economically efficient incentives for consumption and supply decisions and thereby maximize welfare. This price will vary over time as supply and demand change.311 If the POLR service price does not closely match the competitive price, it will distort consumption and investment decisions312 leading to an inferior allocation of resources.313 Competitive market prices align consumers' willingness to pay for a service with the marginal cost of providing it (where, in the long run, the marginal cost includes a competitive rate of return on investments). This alignment leads to the most economically efficient allocation of resources.314

Experience within the profiled states shows that it is not easy to approximate the competitive price. Not only does the competitive price change when prices of inputs change, but the price also acts as an investment signal for new generation. The short-term competitive price for the electric generation component can move quickly and dramatically. Over the past several years, the initial fixed discounts for POLR service have resulted in below-market prices or occasionally above market prices, but never at the short-term market price for long.315 When POLR prices are below competitive levels, even efficient alternative suppliers cannot profit by entering or continuing to serve retail customers.316 Firms with the POLR obligation can become financially distressed, as they did in California during its energy crisis.317

Fuel prices are responsible for a substantial percentage of the change in the market price. A POLR service should adjust the retail electricity price for changes in the prices of fuels used by generators (at the margin). This is more efficient than using a fixed price as a proxy for the market price. Moreover, a POLR price that is adjusted only infrequently to incorporate underlying fuel price changes will usually be either above or below the competitive market price.318 A fixed or infrequently updated price creates incentives for customers to move back and forth from POLR service to alternative suppliers, based on which offers a lower rate. This repeated switching may create additional costs for both POLR and alternative suppliers. It also can reduce the certainty about procurement quantities which suppliers need to make long-term supply arrangements. Including other identifiable cost components that fluctuate widely in POLR service price adjustments will increase the likelihood that the POLR service price will be a reasonable proxy for the competitive price.

2. Lack of Market-Based Pricing Distorts Development of Competitive Retail Markets

A second issue arises when below-market POLR service prices persist during a period of rising fuel prices and correspondingly increasing wholesale supply prices. In these circumstances, customers are likely to experience a shock when POLR service prices are adjusted to reflect prevailing wholesale prices. This can create public pressure to continue the fixed POLR rates at below-market levels. For example, some jurisdictions have considered a gradual phase-in of the price increase to bring POLR prices to the market level. The shortfall between the market POLR price and the price that customers actually pay is usually deferred and collected later from the POLR provider's customers.

Although this approach reduces rate shock, it is likely to distort retail electricity markets. First, a phase-in of the price increase continues to send inaccurate price signals and undermines incentives to reduce consumption. Second, it prevents entry of alternative suppliers by keeping the POLR rate below market levels for additional years. Third, it results in higher prices in future years as the deferred revenues are recovered, so that customers who purchase electricity later are unfairly penalized (overcharged). Fourth, if surcharges to pay for deferred revenues are not designed carefully, the charges can disrupt existing competition by forcing customers with alternative suppliers to pay for part of the deferred revenues. Fifth, if wholesale prices decline, customers will choose alternative suppliers, and this migration will create a stranded cost problem as the POLR provider loses customers it had counted on to pay the higher prices. Moreover, if the state prevents the stranded cost problem by imposing large exit fees, POLR service customers will be locked in to the POLR provider, so that competition may not develop even after POLR service prices rise to market levels. Finally, continued POLR service price caps in an environment of increasing wholesale prices can endanger the financial viability of the distribution utility.

3. Different POLR Services Designed for Different Classes of Customers

Some states have different POLR service designs for different customer classes. POLR service prices offered to large C&I customers generally entail less discounting from regulated rates or competitive market-based procurement and have been based on wholesale spot market prices. Large C&I customers generally have a good understanding of price risk and of the means and costs required to reduce that risk. In addition, suppliers often can customize service offerings to the unique needs of these large customers.319 With their larger loads, large C&I customers also may be better equipped to respond to efficient price signals than other classes of customers. The result of this price response may be to improve system reliability and dissipate market power in peak demand periods.320

Large C&I customers have engaged in more switching to competitive providers in states that have implemented this division between POLR service for large C&I customers and for residential and small C&I customers.321 Many alternative suppliers reportedly have developed customized time-of-use contracts for large C&I customers.322 Moreover, the profiled states show that a substantial number of suppliers actively serve large C&I customers. Box 4-5 describes Oregon's unique sign-up period for its nonresidential customers.

It is not necessary to expose *all* customers to time-based prices to introduce price-responsiveness into retail markets.323 As a first step, customers who are the most price-sensitive could be exposed to time-based rates. Niagara Mohawk in upstate New York took this approach for its largest customers, as did Maryland and New Jersey. California is considering setting real-time pricing as the default rate for medium-sized and larger C&I customers. Another means to introduce price responsiveness is to provide customers with voluntary time-based rate programs, along with assistance in equipment purchases or financing. For example, the New York State Public Service Commission requires voluntary time-of-use pricing for residential customers, and the Illinois Legislature requires that residential customers be offered real-time pricing as a voluntary tariff. Ideally, competition provides incentives for suppliers to offer customers the mix of products and services that matches their potentially diverse preferences.

4. Use of Auctions to Procure POLR Service

As discussed above, New Jersey has used an auction process to procure POLR supply for both residential and C&I customers. Illinois proposed a similar auction for when its rate caps expire. Auctions may bring retail customers the benefit of competition in wholesale markets as suppliers compete to supply load. However, as discussed in Chapter 3, if there is a load pocket, an auction is unlikely to help this process, resulting in fewer benefits of competition.

Box 4-5

Oregon's Annual Window for Switching for Nonresidential Customers

Oregon has a unique process by which nonresidential customers of the two large investor-owned distribution utilities in Oregon can switch to an alternative supplier. Nonresidential customers must make their selections during a limited annual window. The window must extend at least five days in duration, but usually a month is allowed. In addition to picking the alternative supplier, the largest customers must select a contract duration. One option specifies a minimum duration of five years, with an annual renewal after that. As of 2005, alternative suppliers were anticipated to serve about 10 percent of load in one distribution area and about 2.1 percent in the other. One utility offered choice beginning in 2003, while the other began customer choice in 2005. Detailed descriptions are available at http://www.oregon.gov/PUC/electric_restruc/indices/ORDArpt12-04.pdf.

5. Consumer Awareness of Customer Choice and Engendering Interest in Alternative

Suppliers

Experience with restructuring in other industries indicates that consumer switching from a traditional supplier to a new one can be a slow process. It took 15 years before AT&T lost half of its long-distance service customers to alternative suppliers.324 One reason retail electric competition could be slow to develop is that expected gains from learning more about market choices may be too small to make the learning worthwhile,325 particularly for residential customers with small loads.326

Pricing of POLR service and helping consumers compute the "shopping credit" may encourage more rapid development of retail competition by motivating residential consumers to search for market choices. Some states that have low "shopping credits" have had little retail entry. Some states with retail competition have had substantial consumer education programs, including websites with orientation materials and price comparisons.327 These initiatives help promote learning about market alternatives.

New York is encouraging retail competition by helping organize temporary discounts from alternative suppliers and ordering distribution utilities to make these discounts known to customers who contact the utility.328 These efforts have increased residential switching and reduced prices, at least for the short term. Experience indicates that once residential customers switch to alternative suppliers, they seldom return to POLR service even after the temporary discounts expire.329

APPENDIX A

LIST OF COMMENTERS WHO RESPONDED TO TASK FORCE NOTICES REQUESTING COMMENTS*

* *Two notices were published in the Federal Register as FERC Docket Number AD05-17-000: (1) Notice Requesting Comments on Wholesale and Retail Electricity Competition, issued on October 13, 2005, and (2) Notice Requesting Comments on Draft Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy, issued on June 5, 2006. The actual comments can be found at FERC.gov*

The following parties filed comments in response to the notice issued October 13, 2005:

Alcoa, Inc. (Alcoa)

Allegheny Energy Companies (Allegheny)

Alliance for Retail Energy Markets

Ameren Services Company (Ameren)

American Antitrust Institute (AAI)

American Public Power Association (APPA)

Association of Large Distribution Cooperatives (Large Distribution Cooperatives)

BlueStar Energy Services, Inc. (BlueStar)

BP Energy Company (BP Energy)

California Independent System Operator Corporation (CAISO)

California Public Utilities Commission (CPUC)

Cape Light Compact

Carnegie Mellon Electricity Industry Center (Carnegie Mellon)

CenterPoint Energy Houston Electric, LLC (CenterPoint)

Los Angeles Department of Water and Power (LADWP)

7-Eleven, Inc, Big Lots Stores, Inc., Crescent Real Estate Equities, Federated Department Stores, Hines, JC Penney, Wal-Mart Stores, Inc. (collectively, Commercial End-Users)

COMPETE, Electric Power Supply Association (EPSA), Alliance for Retail Choice (ARC)

Connecticut Department of Public Utility Control (Connecticut DPUC)

Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (together, New York Companies)

Constellation Energy Group, Inc. (Constellation)

Council of Industrial Boiler Owners (CIBO)

Demand Response and Advanced Metering Coalition (DRAM Coalition)

Direct Energy Services, LLC (Direct Energy)

Dominion Resources Services, Inc. (Dominion)

Duke Energy Corporation (Duke)

Duquesne Light Company (Duquesne)

Edison Electric Institute (EEI)

Electric Power Supply Association (EPSA)

Electricity Consumers Resource Council (ELCON) and American Chemistry Council, American Iron and Steel Institute, Coalition of Midwest Transmission Customers, PJM Industrial Customer Coalition, Illinois Industrial Energy Consumers, Industrial Energy Users - Ohio, and Multiple Intervenors (collectively, Industrial Consumers)

EnerNOC, Inc. (EnerNOC)

Exelon Corporation (Exelon)

Governor of the State of Rhode Island

Idaho Public Utilities Commission (Idaho PUC)

Illinois Commerce Commission

Independent Power Producers of New York, Inc. (IPP NY)

Indiana Utility Regulatory Commission (IURC)

Industrial Consumers: Portland Cement Association, American Forest and Paper Association, American Iron and Steel Institute, California Large Energy Consumers Association, Coalition of Midwest Transmission Customers, National Lime Association, PJM Industrial Customer Coalition

ISO New England Inc. (ISO-NE or ISO New England)

ISO/RTO Council

Large Public Power Council (LPPC)

Lehigh Cement Company (Lehigh)

Maine Office of Public Advocate (Maine Public Advocate)

Midwest Independent Transmission System Operator Inc. (Midwest ISO or MISO)

Midwest Stand-Alone Transmission Companies

Mike Holly; Sorgo Fuels, Inc.

Mirant Corporation (Mirant)

Missouri Public Service Commission (Missouri State Commission)

National Association of Regulatory Utility Commissioners (NARUC)

National Association of State Utility Consumer Advocates (NASUCA)

National Energy Marketers Association (National Energy)

National Grid USA (National Grid)

National Rural Electric Cooperative Association (NRECA)

New Mexico Attorney General

New York Independent System Operator, Inc. (NYISO or New York ISO)

New York State Department of Public Service (NYPSC or New York PSC)

New York State Electric & Gas Corporation (New York G&E) and Rochester Gas & Electric Corporation (Rochester G&E)

North Carolina Utilities Commission, Public Staff - North Carolina Utilities Commission, and the Attorney General of the State of North Carolina (collectively, North Carolina Agencies)

Northeast Utilities

NUCOR Corporation, Blue Ridge Power Agency, and the East Texas Electric Cooperative (collectively, Large Power Buyers)

Orlando Utilities Commission (Orlando Utilities)

Pennsylvania Office of Consumer Advocate (PA Consumer Advocate)

Pepco Holdings, Inc. (Pepco)

PJM Interconnection, LLC (PJM)

PNM Resources, Inc. (PNM)

PPL Companies (PPL)

Progress Energy, Inc. and South Carolina Public Service Authority (together, Progress and Santee Cooper)

Public Utilities Commission of Ohio

Reliant Energy Inc. (Reliant)

Retail Energy Supply Association (RESA)

South Carolina Electric and Gas Company (South Carolina E&G)

Southern California Edison Company (SoCal Edison)

Southern Companies (Southern)

Southwest Transmission Dependent Utility Group (Southwest Transmission)

Steel Manufacturers Association (Steel Manufacturers)

Strategic Energy, LLC (Strategic Energy)

SUEZ Energy North America (SUEZ)

The Alliance of State Leaders Protecting Electricity Consumers (Alliance of State Leaders)

Transmission Access Policy Study Group (TAPS)

Transmission Agency of Northern California (TANC)

Virginia State Corporation Commission

Wal-Mart Stores, Inc. (Wal-Mart)

WPS Resources Corporation (WPS)

Xcel Energy Services, Inc. (Xcel)

The following parties filed comments in response to the notice issued June 5, 2006:

Alcoa, Inc. (Alcoa)

Allegheny Power and Allegheny Energy Supply Company, LLC (together, Allegheny)

Alliance for Retail Energy Markets

Alliance of State Leaders Protecting Electricity Consumers

American Public Power Association (APPA)

Attorney General of California

Attorney General of New Mexico

California Department of Water Resources; State Water Project

Cape Light Compact

City of Seattle; City Light Department

Coalition of Midwest Transmission Customer, NEPOOL Industrial Customer Coalition, PJM Industrial Customer Coalition, Industrial Energy Users-Ohio, Industrial Energy Consumers of Pennsylvania, and

West Virginia Energy Users Group (collectively, Industrial Coalitions)

Community Power Alliance

COMPETE, Electric Power Supply Association (EPSA), Alliance for Retail Choice (ARC)

Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (together, New York Companies)

Constellation Energy Group, Inc. (Constellation)

CP Consulting

Direct Energy Services, LLC (Direct Energy)

Duquesne Light Company (Duquesne)

Edison Electric Institute (EEI) and the Alliance of Energy Suppliers

Electric Power Supply Association (EPSA), Independent Power Producers of New York (IPP NY), Independent Energy Producers of Maine (IEPM)

Electricity Consumers Resource Council (ELCON) and American Iron and Steel Institute, Association of Businesses Advocating Tariff Equity, Coalition of Midwest Transmission Customers, PJM Industrial Customer Coalition, Industrial Energy Users – Ohio, Multiple Intervenors, and Wisconsin Industrial Energy Group, Inc. (collectively, Industrial Consumers)

Industrial Consumers: Portland Cement Association, American Forest and Paper Association, American Iron and Steel Institute, California Large Energy Consumers Association, Coalition of Midwest Transmission Customers, National Lime Association, PJM Industrial Customer Coalition

ISO New England Inc. (ISO New England)
ISO/RTO Council

Mercatus Center; George Mason University (Mercatus Center)

Midwest Independent Transmission System Operator, Inc. (MISO)

Midwest Stand-Alone Transmission Companies

Mike Holly; Sorgo Fuels, Inc.

National Association of State Utility Consumer Advocates (NASUCA)

National Grid USA (National Grid)

National Rural Electric Cooperative Association (NRECA)

New York State Electric & Gas Corporation (New York G&E) and Rochester Gas & Electric Corporation (Rochester G&E)

OMB Professionals, Inc.

Pacific Gas & Electric Company (PG&E)

PJM Interconnection, LLC (PJM)

Portland Cement Association (Portland Cement)

PPL Companies (PPL)

Progress Energy, Inc. and South Carolina Public Service Authority (together, Progress and Santee Cooper)

Public Service Commission of New York (PSC New York)

Public Service Commission of Wisconsin (PSC Wisconsin)

Public Utility Law Project of New York

Public Utilities Commission of Texas

Reliant Energy Inc. (Reliant)

Strategic Energy, LLC (Strategic Energy)

SUEZ Energy North America (SUEZ)

Transmission Access Policy Study Group (TAPS)

William D. Steinmeier

Wisconsin Power & Light, Madison Gas & Electric Company, Wisconsin Electric Power Company, Wisconsin Public Power Incorporated, and WPS Resources Corporation (collectively, Wisconsin Load Serving Entities).

APPENDIX B
TASK FORCE MEETINGS WITH OUTSIDE PARTIES

American Public Power Association – October 27, 2005
ArcLight Capital Partners LLC– November 9, 2005
Compete Coalition – October 27, 2005
Edison Electric Institute – October 26, 2005
Electric Power Supply Association – October 27, 2005
Electricity Consumers Resource Council – October 26, 2005
Fitch Ratings – November 9, 2005
Lehman Brothers – November 9, 2005
Merrill Lynch Commodities, Inc. – November 9, 2005
Moody's Investors Service – November 9, 2005
National Association of Regulatory Utility Commissioners – October 27, 2005
National Association of State Energy Officials – October 27, 2005

National Governors Association – October 26, 2005
National Rural Electric Cooperative Association – October 26, 2005
Public Utility Law Project – October 27, 2005
Standard & Poor's – November 9, 2005
SUEZ Energy North America – December 8, 2005

APPENDIX C
AN ANNOTATED BIBLIOGRAPHY OF QUANTITATIVE COST BENEFIT ASSESSMENTS OF ELECTRIC INDUSTRY RESTRUCTURING PROPOSALS

Commenters on the section 1815 study highlighted a wide variety of cost-benefit studies that seek to evaluate the electric power industry. Both proponents and opponents of electric industry restructuring have armed themselves with these types of analyses to support their respective positions. It can be challenging to understand these studies' sometimes contradictory results.

The Task Force reviewed roughly 30 cost-benefit analyses[330] in an attempt to better understand what they reveal. Based on this review, together with a review of the recent DOE Report (J. Eto, B. Lesieutre, and D. Hale, *A Review of Recent RTO Benefit-Cost Studies: Toward More Comprehensive Assessments of FERC Electricity Restructuring Policies* (December 2005) [hereinafter Eto]), the Task Force has made the following observations:

1) **Many of the existing studies address only the benefits of restructuring proposals**. To the extent studies overlook the costs associated with institutional changes, they can provide an incomplete picture of impacts, and their results should be juxtaposed to cost estimates. (*See* Appendix C: RTO West Benefits and Costs, *Economic Assessment of RTO Policy*, and *Putting Competitive Power Markets to the Test The Benefits of Competition in America's Electric Grid: Cost Savings and Operating Efficiencies*).

2) **The benefits associated with some of the most significant motivations behind restructuring** – the maintenance of system reliability and the facilitation of lowest-cost electricity production (via incentives for innovation and low-cost construction) - **are very difficult to quantify** using current technology and are often left out of benefit assessments. "It is important that technically limited studies not be interpreted to suggest that impacts that they do not analyze are not significant." Eto at 21.

3) **Existing methods and models used to estimate benefits are limited in what they can measure.** Many of these models also employ simplistic and often misleading assumptions about market behavior. Improving the models used to derive quantitative benefits is technically difficult – significant improvements would involve marrying the complexity of adequately modeling a 10,000+ bus transmission/generation system to the complexity of modeling realistic human behavior in markets. The capabilities of existing models are likely to be fairly static until computer technology advances enough to accommodate the memory needs associated with this complex modeling task.

4) **Modeling energy transmission and markets necessarily requires making a great deal of assumptions** given the significant limitations in data needed to "feed" these models. Thus, outputs of RTO modeling attempts vary widely based on the assumptions made by the parties doing the modeling – assumptions as to transmission configurations, weather, imports/exports, market behaviors, generation costs, etc. (*See* Appendix C: *Study of Costs, Benefits and Alternatives to Grid West*, versus *The Estimated Benefits of Grid West*).

5) **Another limitation of the studies is that they often only estimate the benefits to society as a whole. Determining the distribution of benefits and costs - who wins and who loses, or who wins the most - is an important piece of the decision making puzzle.** Unfortunately, it is much more difficult to measure the distribution of benefits than it is total social costs. Some efforts have been made in this direction with estimates of the end-use price impacts that restructuring has had or might have and with estimates of benefits that individual participants in electricity markets might accrue (*See* Appendix C: *Beyond the Crossroads, the Future Direction of Power Industry Restructuring* and *Competition Has Not Lowered Electricity Prices*).

6) **Characteristics of the best restructuring cost-benefit studies**, given existing technology/data, include:

- Provision of clear and precise descriptions of assumptions, data sources, methods and technical detail.
- Where econometric models are used, study write-ups should provide regression methods and equations, goodness of fit measures, and results of any tests done to detect analytical flaws.
- An attempt to address all potential costs and benefits.
- An effort to address the distribution of impacts.

STUDIES OF BENEFITS IN THE US

Beyond the Crossroads: The Future Direction of Power Industry Restructuring

Region	US

Report Date	2005
Sponsor	Cambridge Energy Research Associates
Author/Contractor	Cambridge Energy Research Associates
Model/Method	CERA constructs average counterfactual prices as an econometric function of fuel pr base, for residential and industrial customers in four geographic territories based on
Scope of Inquiry	Real price impacts on consumers of electric industry restructuring (study also addres policy issues on a non-quantitative basis)
Period Studied	1997-2004
Conclusion	U.S. residential electric consumers paid about $34 billion less for the electricity they seven years than they would have paid if traditional regulation had continued. Regional distribution of these benefits: NE $ 8 billion Midwest: $ 8 billion South: $24 billion West: -$7 billion
Alternate Views	• APPA thinks figures are inflated: http://www.appanet.org/newsletters/washingtonreportdetail.cfm?ItemNumbe • Comments to Electric Energy Market Competition Task Force by NRECA, • H. Spinner, *A Response to Two Recent Studies that Purport to Calculate El Benefits Captured by Consumers*, ELECTRICITY JOURNAL, Volume 19, N 2006) at 42-47.

Electricity Markets: Consumers Could Benefit from Demand Programs, but Challenges Remain

Region	US
Report Date	August, 2004
Sponsor	Report to the Chairman, Committee on Governmental Affairs, U.S. Senate
Author/Contractor	US GAO
Model/Method	Reviewed the literature, analyzed industry and participant data, and conducted interviews with state and federal officials (in FERC, the DOE , and the GSA), industry experts, representatives from utilities, and customers

Scope of Inquiry	Examines the current and potential role for demand-response programs. Identifies (1) the types of demand-response programs currently in use; (2) the benefits of these programs; (3) the barriers to their introduction and expansion; and (4) where possible, instances in which these barriers have been overcome.
Period Studied	

Conclusion	Demand-response programs can benefit customers in regulated and restructured markets by improving market functions and enhancing the reliability of the electricity system Recent studies show that demand-response programs have saved millions of dollars—including about $13 million during a heat wave in New York State during 2001. A FERC-commissioned study reported that a moderate amount of demand-response could save about $7.5 billion annually in 2010.
Web Reference	http://www.gao.gov/new.items/d04844.pdf

Staff Report on Cost Ranges for the Development and Operation of a Day One RTO (FERC Docket No. PL04-16-000)

Region	Based on data from PJM, MISO, SWPP, and ERCOT
Report Date	October, 2004
Sponsor	FERC
Author/Contractor	FERC Staff
Model/Method	The analytical base for this Study rests largely on information gleaned from audit staff, FERC Form No. 1 data and interviews with and data responses from existing RTOs and Independent System Operators (ISOs).
Scope of Inquiry	To estimate the cost of developing a Day One RTO that provides independent and non-discriminatory transmission service and satisfies the minimum requirements of Order No. 2000 to operate as an RTO. Also estimates operating cost of a Day One RTO.
Period Studied	Various
Conclusion	• The average annual operating expense of a new Day One RTO would impact the average retail customer by approximately 0.02¢/KWh, or less than 0.3 percent of the customer's total bill. • Day One RTOs have required an investment outlay of between $38 million and $117 million and an annual revenue requirement of between $35 million and $78 million**.** • Cost overruns can result from changing plans mid-course, poor project management and extensive delays. • Cost data are not accounted for in a standardized way.
Web Reference	http://www.ferc.gov/EventCalendar/Files/20041006145934-rto-cost-report.pdf

Alternate Views	• M. Lutzenhiser, *RTO Dollars and Sense: Financial Data Raises Doubts About Whether Deregulation Benefits Outweigh Costs*, PUBLIC UTILITIES FORTNIGHTLY (December, 2004). • Alliance of State Leaders Protecting Electricity Consumers, *Commentary on FERC Staff Report on Day-1 RTO Cost* (November, 2004), *available at* http://www.pacifier.com/~ppcpdx/Tx/Alliance%20Cost%20Study%20Report%2011 22-04%20FINAL.pdf

Impacts of the Federal Energy Regulatory Commission's Proposal for Standard Market Design

Region	United States

Report Date	April 30, 2003
Sponsor	US DOE Report to Congress
Author/Contractor	In addition to DOE staff, participants included contractors who supported the modeling (GE Power Systems Energy Consulting, OnLocation, Inc) and those who supported the analysis (Charles River Associates, Neenan Associates, and Ken Rose of NARUC).
Model/Method	DOE's Policy Office Electricity Modeling System (POEMS) was used to assess wholesale and retail price impacts of SMD. GE MAPS was used to assess how the use of transmission networks will change under SMD. POEMS is an amalgam of several economic models (including EIA's National Energy Modeling System and TRADELEC) which forecasts trading volume and prices by NERC region. GE MAPS is an engineering model used to simulate the effects of a security constrained LMP market model on transmission patterns.
Scope of Inquiry	Assess the impacts of implementing FERC's Standard Electricity Market Design (SMD), as presented in FERC's July 31, 2002 proposed rule
Period Studied	
Conclusion	1. Estimated annual cost of implementing FERC's SMD Rule: $760 million ($.21/MWhr) 2. Average wholesale prices under SMD are estimated to decrease by 1 percent in 2005, increasing to 2 percent by 2020, relative to the non-SMD case. 3. The net benefit to all consumers of implementing SMD is estimated to be $1 billion/year for the first six years, dropping to $700 million by 2020. These figures are net of the $760 million estimated annual cost. (This implies total annual benefits of $1.46 to $1.76 billion, though this figure is not cited in the document). 4. Positive results are not consistent across regions – modeling suggests that end-use prices would rise in some regions and decrease in others.
Alternate Views	Alliance of State Leaders Protecting Electricity Consumers, *Commentary on DOE's Study of Standard Market Design* (June, 2003), *available at* http://www.pulp.tc/Alliance_Commentary_on_DOE_Study.pdf

Impact of the Creation of a Single MISO/PJM/SPP Power Market

Region	Midwest & Northeastern US
Report Date	2002
Sponsor	MISO-PJM-Southwest Power pool
Author/Contractor	Energy Security Analysis, Inc. (ESAI)
Model/Method	ZPM

Scope of Inquiry	Analyzes the impact of establishing a joint, common electricity market encompassing 26 states, the District of Columbia and the Canadian province of Manitoba (baseline is 2002 mix of ISOs and vertically integrated utilities
Period Studied	2002-2012
Conclusion	Benefits : $1.7 billion/year

Economic Assessment of RTO Policy

Region	United States
Report Date	2/26/2002
Sponsor	FERC
Author/ Contractor	ICF Consulting
Model/Method	ICF's IPM (Integrated Planning Model) computer simulator. • Simulates current inefficiencies through cross-CA hurdle rates, then eliminates those hurdle rates and measures the efficiency impacts. • Assumes 5 percent improvement in transmission transfer capability and measures production cost impacts. • Capacity sharing benefits simulated. • Decreased reserve requirements (from 15 percent to 13 percent) • Assumes generator efficiency improvements in RTO Policy case.
Scope of Inquiry	Assesses economic costs and benefits of a national move toward RTOs, including improvements in transmission system operations with resulting enhancements to inter-regional trade, congestion management, reliability and coordination, and improved performance of Energy markets.
Period Studied	2002-2021
Conclusion	* $1-$10 billion/year in system production cost savings * NPV of production cost savings over 20 years: about $1 trillion • About 4 percent savings off of base case for 20 year period • NPV of start up costs: $4.2-$7.3 billion (based on start up comparison of operating ISO/RTOs). Net operating costs (as compared with base case) assumed to be near zero .
Web Reference	http://www.ksg.harvard.edu/hepg/Papers/FERC%20ICF%20rtostudy_final_0226.pdf

Alternate Views	• Comments of the California Electricity Oversight Board Proposed Pricing Policy for Efficient Operation and Expansion Of the Transmission Grid, FERC Docket No. PL03-01-000 (March 13, 2003), *available at* http://www.eob.ca.gov/attachments/PL03-1-000Comments.doc • Comments of the New England Conference of Public Utilities Commissioners on Electricity Market Design and Structure, FERC Docket No. RM01-12-000. • Comment of the Staff of the Bureaus of Economics and Competition and the Office of the General Counsel of the Federal Trade Commission on Electricity Market Design and Structure, FERC Docket No. RM01-12-000, http://www.ftc.gov/be/v020014.pdf

STUDIES OF BENEFITS IN THE MIDWEST

An RPM Case Study: Higher Costs for Consumers, Windfall Profits for Exelon

Region	PJM / Northern Illinois
Report Date	October 18, 2005
Sponsor	Illinois Citizens utility Board
Author/Contractor	Synapse Energy Economics / Ezra Hausman, Paul Peterson, David White, and Bruce Biewald
Model/Method	Comparison of baseline capacity revenues (derived from historical market data) with proposed RPM PJM price
Scope of Inquiry	Determine potential wealth transfer effects of proposed Reliability Pricing Model (RPM) by examining capacity revenues that might accrue to Exelon's Nuclear facilities in Northern Illinois if RPM is implemented.
Period Studied	June 2004 – June 2005
Conclusion	At the target RPM price, Exelon's nuclear plants in northern Illinois stand to gain almost $390 million in additional capacity revenues, compared to the 2004 capacity market price, at ratepayers' expense. At the maximum RPM price, these plants would receive a $1.2 billion increase in capacity revenues. At PJM's target price, RPM would amount to a rate increase for PJM ratepayers as a whole of over $5 billion every year, paid mostly to existing base load generation.
Web Reference	http://www.synapse-energy.com/Downloads/SynapseReport.2005-10.IL-CUB.RPM-Study--Higher-Costs-Windfall-Profits-for-Exelon.04-20.pdf

The Benefits and Costs of Wisconsin Utilities Participating in Midwest ISO Energy Markets

Region	Wisconsin
Report Date	March 26, 2004
Sponsor	MISO
Author/Contractor	Science Applications International Corporation
Model/Method	Production Cost/ Power Flow Modeling: PROMOD IV
Scope of Inquiry	Evaluates proposed financial transmission right allocations and overall impact of market participation on Wisconsin consumers.
Period Studied	2005 Calendar Year
Conclusion	Wisconsin and Michigan Upper Peninsula customers to save $51 million annually in wholesale power costs, net of costs of participating in markets.
Web Reference	http://www.midwestmarket.org/publish/Document/573257_ffe0fcee0f_-7f570a531528/_.pdf?action=download&_property=Attachment
Alternate Views	See comments of Wisconsin Load Serving Entities to Draft EPAct 2005 Section 1815 Report on Competition – FERC Docket AD05-17 – 6/26/06

STUDIES OF BENEFITS IN THE NORTHEAST

Putting Competitive Power Markets to the Test The Benefits of Competition in America's Electric Grid: Cost Savings and Operating Efficiencies

Region	Eastern Interconnection
Report Date	July, 2005
Sponsor	BP Energy Company, Constellation Energy, Exelon Corporation, Mirant Corporation, NRG Energy, Inc., PSEG, Reliant Energy Inc., Shell Trading Gas and Power Company, Williams, and Suez Energy North America
Author/Contractor	Global Energy Decisions
Model/Method	Global Energy calculated the benefits of wholesale competition for the Eastern Interconnection as they occurred. Those results were compared with a simulation of market conditions without the changes in market rules that enabled wholesale competition. Consumers benefited if the study showed a positive difference between current market conditions and the simulation of the traditional market rules prior to wholesale competition. Model: EnerPriseTM Strategic Planning *powered by MIDAS Gold®* software
Scope of Inquiry	To identify and quantify the existing and foreseeable consumer benefits of competitive electricity markets.
Period Studied	1999-2003
Conclusion	Wholesale customers in the Eastern Interconnection have realized a $15.1 billion benefit during the time period measured due to electricity competition. This benefit derives primarily from differences in the cost of generation construction under the two scenarios.
Web Reference	http://www.globalenergy.com/competitivepower/competitivepower.pdf
Alternate Views	Global Energy Decision, *Putting Competitive Power Markets to the Test: An Alternative View of the Evidence*, *available at* http://www.nreca.org/Documents/PublicPolicy/NRECAAD0517final.pdf

Electricity Prices in PJM: A Comparison of Wholesale Power Costs in the PJM Market to Indexed Generation Service Costs

Region	PJM Interconnection
Report Date	June 3, 2003
Sponsor	PJM
Author/Contractor	Synapse Energy (Biewald, Steinhurst, White, Roschelle)

Model/Method	estimates and compares two sets of annual prices: (1) the actual wholesale power costs (WPC) in the PJM market, and (2) prices in a scenario with economic regulation continued from the mid-1990s to today so that the generation service costs (GSC) are the unbundled generation portion of the pre-restructuring cost-of-service rates
Scope of Inquiry	To illuminate the effect of restructuring on prices in the PJM interconnection.
Period Studied	1999-2003

Conclusion	while PJM deregulated costs fluctuate year-to-year, on average, the wholesale power costs over the five year period 1999 to 2004 have been lower than the indexed generation service costs.
Web Reference	http://www.pjm.com/documents/downloads/reports/synapse-report-pjm-electricity-prices.pdf

Erecting Sandcastles From Numbers: The CAEM Study of Restructuring Electricity Markets

Region	PJM
Report Date	Dec. 3, 2003
Sponsor	NRECA
Author/Contractor	Christiansen Associates (Moray, Kirsch, Braithwait, Eakin)
Model/Method	Analysis of CAEM study assumptions/ inputs
Scope of Inquiry	To review and critique the Center for Advancement of Energy Markets' (CAEM) study entitled *Estimating the Benefits of Restructuring Electricity Markets: An Application to the PJM Region* (Sept. 22, 2003) (hereinafter CAEM Study).
Period Studied	1997-2002
Conclusion	The CAEM Study's quantitative results fail to demonstrate any relationship between these price changes and the economic effects of restructuring.
Web Reference	http://www.ksg.harvard.edu/hepg/Papers/Christensen.crit.restruct.mkts.in.pjm.03-Dec.03.pdf
Alternate Views	See below: *Estimating the Benefits of Restructuring Electricity Markets: An Application to the PJM Region*, *available at http://www.caem.org/website/pdf/PJM.pdf*

Market Simulation – GE MAPS	
Scope of Inquiry	Estimates the impact of implementing a Northeast RTO on regional spot market prices in the near term. Stephen Stoft Website Library:
Period Studied	Simulation year: 2001 Carnegie Mellon Electric Industry Center (CEIC): http://wpweb2.tepper.cmu.edu/ceic/publications.htm

Conclusion Books	Net Benefits of $299 million. RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (MIT Press 1999). $188 to PJM SALLY HUNT, MAKING COMPETITION WORK IN ELECTRICITY (Wiley Publishing 2002). <$22> to NYISO STEVEN STOFT, POWER SYSTEM ECONOMICS: DESIGNING MARKETS FOR ELECTRICITY (IEEE Press, Wiley-Interscience 2002). $96 to NE

Assessing Short Run Benefits from a Combined Northeast Market

Region	Northeast
Report Date	October 23, 2001
Sponsor	NYISO
Author/Contractor	A. Hartshorn, S Harvey – LECG Consulting

Model/Method	Replicated Mirant methods: Statistical / econometric analysis using historic prices and flows. Looked at unconstrained transmission to determine correlation between prices. Extended the EEA analysis in time, improved on some elements of their methodology, and undertook some sensitivity analysis of Mirant estimates.
Scope of Inquiry	Potential benefits from implementing an interregional real-time dispatch in the Northeast. (Response to Mirant study of 2001)
Period Studied	10/00-8/01

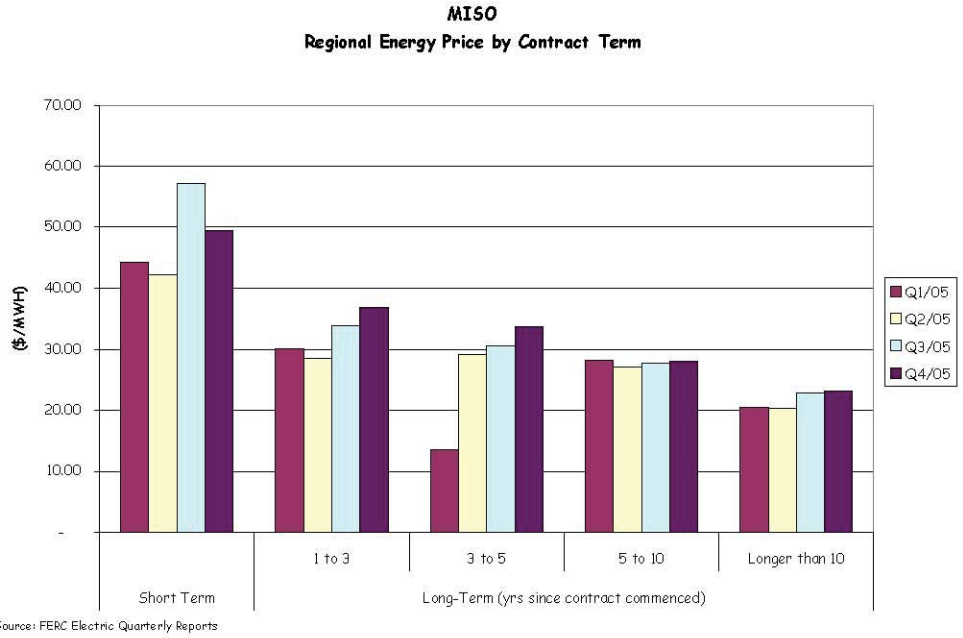
Conclusion	Found that improvements in data and assumptions in Mirant study led to a material overstatement of the short-run benefits to New York consumers. Found large price impact benefits to PJM customers but little or negative price impacts for New York energy customers. Found overall decrease in energy payments for the combined region of $139 million for New York and $50 million for PJM on an annual basis.
Web Reference	http://www.ksg.harvard.edu/hepg/Papers/Assessing%20Short-Run%20Benefits%20from%20Combined%20NE%20Market%2010-23-011.pdf

The higher proportion of long-term contracts at SERC may suggest more effective long-term price signals than at non-organized markets. However, many of these long-term contracts are legacy contracts entered into before competitive markets were introduced. Some of these contracts are pegged to index prices that are formed with few reported transactions and therefore questionable liquidity.

Estimating the Benefits of Restructuring Electricity Markets: An Application to the PJM Region Region The following graphs show the price patterns by contract vintage in 2005.

PJM

Report Date



October, 2003

Sponsor

CAEM This analysis shows that prices under long-term contracts were somewhat lower than short-term prices in MISO and SERC, but not in NYISO. The short-term price changes are reflected in sales under long-term contracts. These changes may occur because some long-term contracts use indexed prices (i.e., short term published reference prices).

Author/Contractor It is difficult to draw definite conclusions on prices with only a quarter's worth of data. Furthermore, organized markets are evolving and will include capacity markets that could provide stronger price signals for long-term investment.

R. Sutherland, CAEM

Model/Method A BIBLIOGRAPHY OF PRIMARY INFORMATION

Measures decline in electricity prices during restructured period. **ON ELECTRIC INDUSTRY RESTRUCTURING IN THE U.S.**

Scope of Inquiry
Estimates benefits of restructuring the electricity market in the PJM region. The process of understanding the ins and outs of restructuring markets for electricity and transmission in the U.S. has been running full bore since the early 1990s. Accordingly, a large number of documents have been published intending to explain the basic engineering, economic and regulatory theories that support restructuring ideas. The intended audience of these studies has been various – from state regulators and legislators, to academics, public power managers, and the general public.
Period Studied The Task Force members have *not* attempted to generate another primer on restructuring as part of its competition study. Instead, the Task Force refers the interested reader to a variety of sources that will allow him/her to learn more about the subjects that are of the most interest.
1997-2002
Conclusion
Ultimate customers in the PJM region saved about $3.2 billion in 2002 from current restructuring efforts
NOTE: Inclusion of articles does not indicate the Task Force's endorsement of the theories presented.
Web Reference General Restructuring Information Documents Available on the Web:
http://www.caem.org/website/pdf/PJM.pdf
Alternate Views
Erecting Sandcastles From Numbers: The CAEM Study of Restructuring Electricity Markets (see above at Matthew Brown and Richard P. Sedano, *A Comprehensive View U.S. Electric Restructuring with Policy Options for the Future*, National Council on Electricity Policy (2003), *available at http://www.ksg.harvard.edu/hepg/Papers/Christensen.crit.restruct.mkts.in.pjm.03-Dec.03.pdf)*
http://www.ncouncil.org/pdfs/restruc.pdf

Northeast Regional RTO Proposal: Analysis of Impact on Spot Energy Prices U.S. Department of Energy, Energy Information Administration, *The Changing Structure of the Electric Power Industry 2000: An Update* (October, 2000), *available at* http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/
Region
Northeast William W. Hogan, *Competitive Electricity Market Design: A Wholesale Primer* (December, 1998) (working paper), *available at* http://stoft.com/metaPage/lib/Hogan-1998-Primer.pdf
Report Date William W. Hogan, *Market Design and Electricity Restructuring* (November 1, 2005) (presentation at the Association of Power Exchanges 2005 Annual Conference in Orlando FL), *available at* http://ksghome.harvard.edu/~whogan/hogan_apex_110105.pdf
April, 2002
Sponsor
PJM Paul L. Joskow, *Restructuring, Competition, and Regulatory Reform in the U.S. Electricity Sector*, J. ECON. PERSPECTIVES 11(3), at119-38.
Author/Contractor On-Line Libraries of Electric Industry Restructuring Documents:
PJM
Model/Method http://www.ksg.harvard.edu/hepg/papers.htm

Mirant Study*

Region	Northeast
Report Date	September 2001
Sponsor	Mirant
Author/Contractor	Energy and Environmental Analysis, Inc.

Model/Method	Statistical / econometric analysis using historic prices and flows. Looked at unconstrained transmission to determine correlation between prices. Assumes centralized dispatch would eliminate measured uneconomic flows.
Scope of Inquiry	Potential efficiency benefits that could be achieved by creating a single market for electricity in the Northeast. Model does not address net costs of establishing/operating a single Northeast RTO.
Period Studied	6/00-12/00
Conclusion	Net benefit of $440 million. $76 to PJM, $256 to NYISO, $108 to NE ISO.

** Not publicly available. Review based on secondary references.*

Competition Has Not Lowered U.S. Industrial Electricity Prices

Region	Connecticut, Massachusetts, Maine, New Hampshire, New York, and Rhode Island
Report Date	2005 (Published in the Electricity Journal, Vol. 18, No. 2 (2005) at 52-61)
Sponsor	Jay Apt
Author/Contractor	Jay Apt, Carnegie Mellon University
Model/Method	Used EIA price data to perform regression analysis on prices before and after competition.
Scope of Inquiry	Examines the effect of restructuring on prices paid by US industrial customers for electricity
Period Studied	1990-2004

Conclusion	Competition does not produce statistically significant price effects – rates in all states studied other than Maine increased an average of .8 percent per year prior to competition and they increased by 2 percent per year after competition.
Web Reference	http://wpweb2.tepper.cmu.edu/ceic/papers/ceic-05-01.asp

Economic Assessment of AEP's Participation in PJM

Region	PJM combined with AEP
Report Date	December, 2003
Sponsor	AEP
Author/Contractor	Cambridge Energy Research Associates
Model/Method	?
Scope of Inquiry	Quantifies the costs and benefits of AEP's integration into PJM markets.
Period Studied	?
Conclusion	$245 M in 2004 declining to $188M in 2008

Economic and Reliability Assessment of a Northeastern RTO

Region	NYISO, ISO-NE
Report Date	August 23, 2002
Sponsor	NYISO, ISO-NE
Author/Contractor	NYISO/ISO-NE
Model/Method	GE MAPS
Scope of Inquiry	Assesses wholesale electricity market impacts and organizational impacts of establishing a Northeastern RTO (NERTO), including expected costs of implementation, savings from market efficiencies, savings from operational consolidation.
Period Studied	?
Conclusion	$220M/yr in 2005 $150M/yr in 2010

STUDIES OF BENEFITS IN THE NORTHWEST

Bonneville Power Administration Grid West Benefit Assessment for Decision Point 2

Region	Northwest US
Report Date	August 4, 2005
Sponsor	Bonneville Power Administration
Author/Contractor	Internal Bonneville Power Administration staff report
Model/Method	Partially based on modeling conducted by Grid West (see "Estimated Benefits of Gri derive benefits of control area consolidation and economic redispatch. Other analyti common regulation, reliability improvements, economic reserve markets, increased t model), etc.
Scope of Inquiry	Potential benefits of adopting proposed Grid West design as compared with status qu

Period Studied	Various – primarily examined 1 year historical period.
Conclusion	Reliability Benefits: $27 - $62 million annually Increased Transmission Capacity: $9 to $15 million annually Regulating Reserve benefits: $5-$8 million annually Redispatch Efficiencies: $41-$56 million annually Contingency Reserve Market Efficiencies: $20 to $30 million/year De-pancaking of transmission rate efficiencies: $4-$10 million **TOTAL**: $106 to $108 million
Web Reference	http://www.bpa.gov/corporate/business/restructuring/Docs/2005/benefit%20assessm

The Estimated Benefits of Grid West

Region	Pacific Northwest
Report Date	July, 2005
Sponsor	Grid West Regional Representatives Group
Author/Contractor	Grid West Risk Reward Workgroup
Model/Method	PowerWorld, Gridview, miscellaneous spreadsheet analyses, surveys
Scope of Inquiry	Estimate the benefits related to Grid West formation
Period Studied	Various

Conclusion	Results presented as a menu: • The capacity cost savings associated with Grid West-managed contingency reserves range from $20 million to $73 million per year. • The estimated capacity cost savings associated with Grid West reducing the amount of regulating reserves range from $5 million to $26 million per year • The estimated production cost savings associated with Grid West-managed real-time energy balancing redispatch range from $41 million to $385 million per year • The estimated annualized value to the region of avoiding cascading disturbances ranges from $27 million to $83 million per year. • Avoiding momentary (less than 5 minutes) or sustained events (longer than 5 minutes but shorter than 12 hours) related to non-cascading transmission events has an estimated annualized value to the region ranging from $17 million to $203 million per year • The estimated increase in production costs from the existing practice of charging multiple or pancaked rates ranges from $4 million to $61 million per year. • The estimated reduction in production costs from more efficient prescheduled interchange facilitated by the RCS ranges from $18 million to $52 million per year. • The estimated savings associated with energy conservation, non-wires expansion, and demand-side measures facilitated by Grid West range from $1 million to $61 million per year.

Study of Costs Benefits and Alternatives To Grid West

Region	Northwestern US
Report Date	October 15, 2004
Sponsor	Snohomish PUD
Author/Contractor	Henwood Energy & Margot Lutzenhiser of the Public Power Council
Model/Method	*Benefits*: MarketSym used to estimate the short term dispatch benefits associated wit rate de-pancaking and more liquid operating reserve markets *Costs*: Applies apply the average cost/MWh of operating PJM, NYISO, ISO NE, CA and ERCOT to Grid West's projected annual demand.
Scope of Inquiry	Study the costs, benefits and alternatives to forming Grid West
Period Studied	2004
Conclusion	Gross annual benefits to the region of $78 million Grid West Annual costs of $200 million. Net Benefits of <122 million>
Web Reference	http://www.snopud.com/content/external/documents/gridwest/henwood_gridwestfina

RTO West Benefit/Cost Study

Region	Northwestern US
Report Date	March 11, 2002
Sponsor	RTO West
Author/Contractor	Tabors Caramanis and Associates
Model/Method	GE MAPS
Scope of Inquiry	This study looked at the impacts that removing pancaked transmission rates and sharing reserves would have on the cost of generation in the Northwest.
Period Studied	2004
Conclusion	• The net benefits of eliminating transmission rate pancakes and sharing reserves would be $305 million/year in the RTO West footprint, and $410 million for all of RTO West. • 40 percent of this benefit can be attributed to the elimination of rate pancaking, 60 percent to reserves sharing.

RTO West Potential Benefits and Costs

Region	Northwest
Report Date	October 23, 2000
Sponsor	RTO West
Author/Contractor	RTO West Benefits/Cost Team
Model/Method	Aurora for production cost modeling, spreadsheet analyses for others

Scope of Inquiry	Identify and quantify benefits and costs to the regional electric power system that would occur as a result of implementing RTO West
Period Studied	Various
Conclusion	• Inconclusive production cost savings • Regulating reserve savings of $28 million annually over the RTO footprint. • Reliability benefits of anywhere from $33 million to $328 million annually • RTO Annual Costs of $63-$76 million • Misc. qualitative benefits

STUDIES OF BENEFITS IN THE SOUTHEAST

Cost Benefit Study of the Proposed GridFlorida RTO

Region	Peninsular Florida
Report Date	December 12, 2005
Sponsor	Grid Florida, LLC
Author/Contractor	ICF Consulting
Model/Method	Production cost modeling using GE MAPS
Scope of Inquiry	Examined the costs and benefits to Peninsular Florida consumers of transforming the current decentralized market to a centrally organized market under two modes of operation – a Day-1 only RTO and a Delayed Day-2 RTO.
Period Studied	2004-2016

Conclusion	• The quantitative benefits to Peninsular Florida consumers of Day-1 Only RTO operation is $71 million over this period, while the quantitative start-up and operating costs of a "greenfield" Day-1 RTO is $775 million. Thus, the Day-1 RTO configuration reflects an estimated net loss of $704 million. • Whereas the quantifiable benefits under Delayed Day-2 RTO operation were substantial, and ranged from approximately $810 million in the Market Imperfection Case to almost $968 million in the Reference Case, the cost of a "greenfield" Delayed Day-2 RTO with wholly new systems, physical facilities and personnel, designed along FERC's Standard Market Design principles, is also very significant at $1.25 billion. • The GridFlorida Delayed Day-2 RTO could breakeven under the scenarios examined in this study if the net benefits from the qualitative factors and the change in utility operational costs should be within the range of $285 million and $443 million over the 13-year forecast period. • This study also indicates that the non-jurisdictional consumers would receive net positive benefits of $798 million from the implementation of a GridFlorida Delayed Day-2 RTO while jurisdictional consumers would receive a net loss of $1.1 billion.
Web Reference	http://www.icfi.com/Markets/Energy/doc_files/gridflorida-rto-report.pdf

Cost Benefit Analysis Performed for the SPP Regional State Committee

Region	Southwest Power Pool
Report Date	April 23rd, 2005, revised July 27, 2005
Sponsor	SPP Regional State Committee
Author/Contractor	Charles River Associates

Model/Method	a) Wholesale Energy Modeling using GE MAPS b) Allocation of Energy Market Impacts and Cost Impacts c) Qualitative Assessment of Energy Imbalance Impacts d) Qualitative Assessment of Market Power Impacts e) Aquila Sensitivity Cases

Scope of Inquiry	(1) an analysis of the probable costs and benefits that would accrue from consolidated services and functions (which include reliability coordination and regional tariff administration) and (2) the costs and benefits of SPP's implementation of an Energy Imbalance Service (EIS) market.
Period Studied	2006-2015
Conclusion	* In the Stand-Alone case, implementation of intra-SPP wheeling rates leads to a less efficient dispatch and thereby increases system-wide production costs in comparison with the Base case. * The EIS market is estimated to provide considerably more benefits than costs, with the net benefits being $373 million to the transmission owners under the SPP tariff over the 10-year study period
Web Reference	http://www.spp.org/Publications/CBARevised.pdf

Electric Competition in the States of Arkansas, Louisiana and Mississippi - Is There An Opportunity?

Region	Arkansas, Louisiana and Mississippi
Report Date	2004
Sponsor	Tractebel
Author/Contractor	Tractebel
Model/Method	Spreadsheet
Scope of Inquiry	?
Period Studied	?
Conclusion	Fuel savings: $610M/yr Fixed O&M savings: $280M/yr

The Benefits and Costs of Dominion Virginia Power Joining PJM

Region	Virginia
Report Date	June 25, 2003
Sponsor	Dominion Virginia Power (DVP
Author/Contractor	Charles River Associates
Model/Method	GE MAPS
Scope of Inquiry	Assesses net benefits (to VG retail customers & to all retail and wholesale customers in DVP control) of DVP joining PJM to
Period Studied	2005-2014
Conclusion	Net Benefit to Virginia Retail Customers: $110.3 million for '05-'10: $476.6 million for '05-'14. Net Benefit to DVP customers: $127.4 million for '05-'10: $557.2 million for '05-'14.

The Benefits and Costs of Regional Transmission Organizations and Standard Market Design in the Southeast

Region	SE (SeTrans, Grid South, Grid Florida)
Report Date	11/6/02
Sponsor	Southeastern Association of Regulatory Commissioners
Contractor	Charles River Associates / GE Power Systems Engineering
Model/Method	GE MAPS (OPF/Production cost model) and a Financial Evaluation Module.
Scope of Inquiry	Net benefits of instituting SMD in SE (GridSouth, SeTrans & GridFlorida) of the US.
Period Studied	2004 – 2013
Conclusion	Mixed +150 to +$1,421for SeTrans; -$286 to +$84 for Grid South; -$25 to +248 for Grid Florida: ($Million 2003 dollars, PV over 10 years) *Note: Total Benefits are Net of Estimated Costs of Operating RTO*
Web Reference	http://www.crai.com/pubs/pub_2901.pdf

STUDIES OF BENEFITS IN TEXAS

Electric Reliability Council Of Texas, Market Restructuring Cost Benefit Analysis.

Region	ERCOT/ Texas
Report Date	11/30/2004
Sponsor	ERCOT
Author/Contractor	TCA/KEMA
Model/Method	a) **Energy Impact Assessment (EIA)**—quantified impacts to the energy market, system dispatch, energy prices, and resulting production system costs. (GE MAPS) b) **Backcast**—quantified optimized generation dispatch results for the ERCOT system for 2003 for comparison with those actually experienced. c) **Implementation Impact Assessment (IIA)**—provided quantitative and qualitative treatment of implementation startup costs, ongoing costs, and other transition-related impacts for ERCOT and its market participants. d) **Other Market Impact Assessment (OMIA)**—provided qualitative treatment of a variety of other measures of impact of market designs not captured directly in the EIA.
Scope of Inquiry	focused on two alternative market design choices: a zonal market design (extant at the time of the study) and a nodal market design
Period Studied	2005-2014
Conclusion	Did not draw single conclusion – "the potential savings found in the Energy Impact Assessment, relative to the Implementation costs found in the Implementation Impact Assessment, suggest that the benefits of the TNM could outweigh the costs for the ERCOT region as a whole.
Web Reference	http://oldercot.ercot.com/TNT/default.cfm?func=documents&intGroupId=83&b

APPENDIX D
STATE RETAIL COMPETITION PROFILES[331]

Illinois: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: Customer choice in Illinois began in December 1997 with the enactment of the Electric Service Customer Choice and Rate Relief Act of 1997 (HB 362). HB 362 required a phase-in of retail competition, with larger customers able to choose an alternate generation supplier earlier in the transition. Specifically, customers eligible to choose their electric supplier as of October 1, 1999, included industrial and commercial customers with a demand of greater than 4 MW,332 commercial customers with businesses at ten or more sites with an aggregate coincident peak demand of 9.5 MWs or greater, and non-residential customers accounting for one-third of the remaining electricity use of their customer class. All other non-residential customers were allowed to choose a supplier as of December 31, 2000, and all residential customers as of May 1, 2002.333 The mandatory transition period ends January 1, 2007.334

The Illinois Commerce Commission (ICC) oversees the transition to competition in the electric industry. On January 24, 2006, the ICC approved proposals from Commonwealth Edison, the Ameren companies, Central Illinois Public Service, Central Illinois Light Company and Illinois Power, to procure generation (for retail customers who do not switch to an alternative retail supplier) through a joint competitive reverse auction process. In order to reduce price increases after the transition period ends, the utilities have offered to phase in price increases at the end of the transition period for residential customers.

Services Open to Competition: Generation and metering services: The ICC promulgated rules that permit non-residential customers to choose a meter service provider other than the distribution utility.

The ICC permitted Commonwealth Edison to designate customers with a demand exceeding 3 MW as a competitive customer class.335 No other classes of customers have been declared competitive to date. Competitive services are defined as those services provided under special contract, not provided under tariff, and any tariffed service that the ICC decides is competitive. A service is declared competitive only if it is offered by a provider other than the utility or its affiliate, to a defined customer group or area, at a competitive price, if the utility is likely to or has lost business to the competitor, and if there is adequate transmission system capacity.336

Consumer Options: Consumers have two options for service:

> (1) They may either remain with the utility as a bundled customer (i.e., receiving generation, transmission and distribution services); or
> (2) They may choose to become a delivery services customer (i.e., they only take distribution and transmission services from the utility). Delivery services customers may purchase generation services from another electric utility, from a competitive supplier, or from their own utility using the power purchase option (PPO).337

The PPO is a transitional option that is provided by distribution utilities as long as they are recovering stranded costs from customers (*see* Recovery of Stranded Costs/Transition Costs). Under PPO service, a non-residential delivery services customer (such as an industrial customer) can purchase electric power from the utility at a price that reflects wholesale costs. These customers may then assign the power purchased under the PPO to an alternative supplier. Under this option, the suppliers to whom customers have assigned PPO rights are, in effect, purchasing electricity from the utility and selling it to their customers.

Alternative Suppliers Licensed to Provide Service: All suppliers wishing to provide competitive supply service must have a certificate of service authority. In order to receive certification, a supplier must show technical, financial, and managerial capability.338 A competitive supplier is required to maintain a license or permit bond in the amount of $30,000 if the supplier intends to serve only non-residential customers with maximum demand greater than 1 MW; $150,000 if the supplier intends to serve non-residential customers with annual electric consumption greater than 15,000 kWh; or $300,000 if the supplier wishes to be certified to serve all eligible retail customers.

In general, retail competition is much more active in the Commonwealth Edison territory than elsewhere in the state. In 2005, the number of active suppliers in each distribution utility's territory ranged from zero for MidAmerican, to nine for ComEd.339 Over the 2000 to 2005 period, the number of suppliers increased in the AmerenCIPS service territory from 3 to 4. An alternative supplier entered the AmerenCILCO area for the first time in 2003 and the only alternative supplier left the MidAmerican area in 2001. The retailers have focused only on non-residential customers.

Retail Pricing Trends: As Table 1 shows, retail prices for the residential sector rose about 7 percent from 1988 to 1997. Commercial and industrial prices rose by lesser amounts during that decade. Prices for all classes of customers declined after that decade through 2004, with the largest declines taking place in the residential sector due to mandatory rate reductions.

Price Changes for POLR Service for Residential Customers: In accord with the restructuring legislation, there were mandatory residential POLR service rate reductions instituted in 1998, which depended on how the utility's residential rate compared to the residential rate for all large investor owned utilities in the region at the time of the restructuring legislation. The rationale behind the restructuring legislation was that competition would tend to bring higher local rates down to the regional average, but there was uncertainty about whether residential customers would obtain these benefits of competition in a timely manner because of the relatively high expected marketing costs associated with residential customers. No mandated retail price reductions were applied to POLR service for non-residential customers.

There are six major utilities in Illinois with required residential rate reductions for customers that have not selected an alternative supplier. Rate reductions were designed to bring residential rates in line with regional rates at the time of the restructuring legislation and are shown in Table 2.340 The larger discount rates were applied in two phases.

Table 2. Price Reductions from 1997 Cost-Based Rates by Distribution Utility	
Distribution Utility	**Reduction from 1997 Regulated Prices**

Commonwealth Edison	20% (15% August 1999, 5% October 2001)
AmerenIP	20% (two increments)
AmerenCILCO	5%
AmerenCIPS	5%
AmerenUE	5%
MidAmerican Energy	1.7%

Non-residential customers were able to elect "real-time pricing" beginning on October 1, 1998; residential customers were able to elect real-time pricing beginning on October 1, 2000.[341] Real-time pricing is defined as pricing which varies hour by hour for non-residential customers, and on a periodic basis during the day for residential customers.[342] The largest residential real-time pricing effort is a pilot program involving 1,500 customers in the Commonwealth Edison territory operated by the Community Energy Cooperative.[343] Some non-residential customers may also have real-time pricing or other time of use rates, but statistics are unavailable.

Table 1. Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Residential	9.7	10	9.9	9.9	10.3	10.3	10	10.4	10.3	10.4	9.9	8.8	8.8	8.7	8.4	8.4	8.4
Commercial	7.5	7.8	7.8	7.9	8.1	8	7.7	7.9	8	7.9	7.8	7.4	7.2	7.4	7.5	7.3	7.5
Industrial	5.2	5.4	5.4	5.5	5.5	5.5	5.2	5.3	5.2	5.3	5.1	5	4.2	4.7	4.9	4.9	4.7
All Sectors	7.3	7.5	7.5	7.6	7.7	7.8	7.4	7.7	7.7	7.7	7.5	7	6.6	6.9	6.9	7.1	6.8

Source: Energy Information Administration

POLR Service Provider: Utilities must provide traditional, bundled service for those customers who choose not to shop for a competitive supplier.[344] The POLR (standard offer) price is the price for bundled service (i.e., service including generation, transmission, and delivery), which was set by the utility's last rate proceeding, less the amount of any rate reduction required in the restructuring law. This rate is frozen until January 1, 2007.

Recovery of Stranded Costs/Transition Costs: Utilities collect stranded costs from both POLR service customers as part of the rates and through a separate charge from retail customers with an alternative supplier.[345]

Switching Restrictions and Minimum Stay Requirements: Customers purchasing power from an alternate supplier are allowed to return to the utility after paying an administrative fee. A utility may require a returning customer with usage less than 15,000 kWh annually to stay with the utility for two years.[346]

Switching Activity: The degree to which customers have switched to delivery service from bundled service varies greatly between distribution franchise territories and classes of customers. Table 2 provides the switching statistics for the largest utility franchise areas, separated by customer type, as of November 2005. As Table 3 indicates, the vast majority of switching activity is centered on the Commonwealth Edison distribution territory (which also has the largest load in the state). Lower levels of switching have taken place in the AmerenCILCO and AmerenIP areas, and there has been very little switching outside of these three areas.

Table 3. Illinois Switching to Alternative Suppliers as of November 30, 2005
% of Customers and (% of Load)

Firm and Usage In million kWh	Residential	Small C&I	Large C&I	Total
AmerenCILCO 461	0.0% (0.0%)	0.0% (0.1%)	2.2% (33.3%)	0.0% (15.4%)
AmerenCIPS 952	0.0% (0.0%)	0.2% (0.8%)	7.1% (4.1%)	0.0% (2.2%)
AmerenIP 1,496	0.0% (0.0%)	0.8% (8.9%)	29.8% (41.7%)	0.1% (23.2%)
AmerenUE 265	0.0% (0.0%)	0.0% (0.0%)	2.5% (0.2%)	0.0% (0.1%)
ComEd 91,508	0.0% (0.0%)	6.0% (36.6%)	73.9% (58.3%)	0.6% (32.8%)
MidAmerican 139	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)

Source: Illinois Commerce Commission

Table 4 shows the patterns of switching for the 2003 to 2006 period. Residential switching has remained dormant over the whole period while large non-residential customers have switched much of their load to alternative suppliers. Small non-residential customers have been slower in switching to alternative suppliers and the load served declined slightly in 2006, but the share of alternative suppliers continue to be well above the levels in 2003.

Table 4. Illinois Retail Aggregate Customer Migration Statistics, 2003 to January 2006
% of Customers and (% of Load) Served by Alternative Suppliers

	2003	2004	January 2005	January 2006
Residential	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)
Small C&I	3.8% (30.2%)	4.4% (31.5%)	5.7% (38.4%)	5.9%) (36.7%)
Large C&I	58.6% (54.6%)	64.1% (56.6%)	73.0% (58.3%)	71.9% (58.7%)

Note: The 2003 and 2004 figures are annual aggregates while the 2005 and 2006 figures are for the month of January. The 2005 and 2006 figures are estimated from the statistics for the Commonwealth Edison territory. Load in Commonwealth Edison accounts for approximately 96.5 percent of the load of IOUs. To be conservative, it was assumed that there was no switching outside of Commonwealth Edison, hence the Commonwealth Edison statistics for 2005 and 2006 were reduced by 3.5 percent to create the proxy for the state-wide value.
Source: Illinois Commerce Commission

Public Benefits Programs: The restructuring act establishes three public benefits funds which are slated to expire at the end of 2006. Table 5 contains information about the public benefits program in Illinois.

Table 5. Illinois Public Benefits Programs*

	Research & Development	Energy Efficiency	Low Income	Renewable Energy	Total
Million $		3.0	75.0	5.0	83.0
Mills/kWh		0.03	0.60	0.04	0.67
% revenue		0.03%	0.87%	0.06%	0.96%
Admin.		DCEO	DCEO	DCEO	

Note: Trust Funds are administered by the Illinois Department of Commerce and Economic Opportunity (DCEO).
Source: American Council for an Energy-Efficient Economy, Summary Table of Public Benefit Programs and Electric Utility Restructuring (December 2005) available at http://www.aceee.org/briefs/mktabl.htm.

* In December 1997, PA 9D-551 was signed. It provided funding for EE, RE, LI (although EE and RE are at low levels) using non-bypassable, flat monthly charges on customer bills. (mills/kWh) equiv. includes $ from gas & elect. Also one-time ComEd $250 million Clean Energy Trust Fund approved by legislature in May, 1999 (not in table).

Separation of Generation and Transmission: Illinois did not require divestiture or functional separation. Thus, utilities may engage in both competitive and non-competitive services without forming a separate affiliate. All of the major utilities in Illinois chose to transfer generation assets to affiliates with the exception of Commonwealth Edison, which divested its fossil fuel generation plants.

State RTO Involvement: The restructuring legislation required Illinois utilities with transmission assets to join an RTO or ISO. Illinois utilities have joined either the Mid-West ISO or PJM West. Commonwealth Edison, for example, joined PJM West. The Ameren utilities joined the Mid-West ISO. MidAmerican has not joined an ISO, although it has received FERC authorization to engage an independent transmission operator.

Generation Capability:347 Prior to the restructuring legislation (1997), utilities operated 97 percent of the generation capability in Illinois. By 2002, that figure dropped to 9.1 percent. The difference reflected the transfers and sales of generation assets to utility-affiliated entities and entry or expansion by independent power producers. Between 1997 and 2002, generation output in the state increased from 135 million MWhs to 188 million MWhs, a nearly 40 percent increase. During the 1993 to 1997 period, output in the state had shrunk by more than 5 percent .

Use of Customer Information: No customer-specific information can be given to a supplier without customer authorization.348

Standardized Labeling:349 "The 1997 Illinois restructuring law includes provisions for disclosing fuel mix and emissions by retail electricity suppliers. Final rules issued by the Illinois Commerce Commission (ICC) require retail suppliers to provide a bill insert to customers each quarter with a table and pie chart representing the sources of electricity used in the previous year, beginning in January 1999. Suppliers must also provide a table showing total emissions of carbon dioxide, nitrogen oxides, and sulfur dioxide, as well as the amount of high- and low-level nuclear waste attributable to the sources of electricity."

Renewable Energy Portfolio Standard: On July 19, 2005, the ICC adopted a voluntary renewable portfolio standard target for bundled retail load starting at 3 percent in 2007 and rising by one percent each year until it reaches 8 percent in 2013.350 The ICC's resolution also includes targeted reductions in future load growth.

Maryland: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: The Maryland General Assembly enacted the Maryland Electric Customer Choice and Competition Act (SB 300) on April 8, 1999. The Act allowed for a three-year phase-in approach to electric competition, but the Maryland Public Services Commission (PSC) allowed the utilities to start electric competition all at once for all customers on July 1, 2000. The PSC oversees the customer choice program.351

Services Open to Competition: Generation, billing, and metering.

Consumer Options: Customers may choose to remain with the distribution utility at PSC regulated prices until the end of the transition period; they may choose a competitive supplier; or they may choose to be aggregated with other customers. The transition period ended for most consumers in Maryland as of July 2006. In other areas, the period ends in 2008.

Alternative Suppliers Licensed to Provide Service: All alternative suppliers must be licensed by the PSC, and must show proof of technical and managerial competence, compliance with FERC requirements, and compliance with state and federal environmental laws.352 A supplier must also give proof of financial integrity,353 and the PSC assesses each competitive supplier's application for a license on a case-by-case basis to determine whether a letter of guarantee, bond, or letter of credit is needed, and in what amount.354 Registered suppliers and registered suppliers seeking additional customers are available on the Maryland PSC's website. There are numerous registered and active suppliers for C&I customers. For residential customers, there are numerous registered suppliers but only two suppliers in three of the four major utility territories and none in the Allegheny Power territory before the end of the transition period.

Pricing Trends: As Table 6 shows, prices rose throughout the early 1990s for all sectors, then declined until 2002. Prices rose in 2003 and 2004. With the end of the transition period for most residential and small C&I customers in the state, POLR service is scheduled to be priced at market rates. Procurement contracts for POLR service starting in July 2006 are scheduled to result in price increases above existing POLR rates. For example, the scheduled price increase for customers in the BG&E distribution territory is reported to be 72 percent.355 Because of concerns about the size of the expected price increase, a number of alternative proposals were developed to break the increase into smaller steps. Legislation just prior to the end of the transition period included deferrals of revenues and dismissal of the members of the PSC. At the time of this writing, litigation regarding the latter provision is taking place.356

Price Changes for POLR (or Regulated) Service: Individual distribution utility plans vary, but a cap for all distribution utilities was put into effect through 2004 and then extended for two to four years. During the initial four years, distribution utilities were required to decrease prices 3-7.5 percent.357 During this period, if the distribution utility's POLR price increased, transition charges decreased by a corresponding amount, so that standard offer customers did not have an overall price increase.358

POLR Service Provider: The distribution utilities provide POLR service in their respective territories until the end of the transition period (or longer if the PSC extends the period). A distribution utility can procure the electricity for its POLR customers from any supplier, including an affiliate. Individual utility settlements require the utility to be the POLR service provider for the entire rate cap/freeze period (which varies in length per utility) unless the Commission orders otherwise. POLR service rates and the respective terms were set in the individual utility settlements and have been in effect for the entire rate cap/freeze period.

Recovery of Stranded Costs/Transition Costs: Distribution utilities were given an opportunity to recover all prudently incurred and verifiable net transition costs, subject to full mitigation.359 Transition costs eligible for recovery include those that would be recoverable under rate-of-return regulation, but are not recoverable in a restructured electric market and costs that result from the creation of customer choice.360 Stranded costs have been recovered through a competitive transition charge, and may be recovered over different lengths of time for each distribution utility. The PSC determines the amount of recoverable transition costs, as well as the amount of the charge to be levied on customers.

Table 6. Maryland Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Residential	6.7	6.9	7.2	7.9	8.0	8.2	8.4	8.4	8.3	8.3	8.4	8.4	8.0	7.7	7.7	7.7	7.8
Commercial	6.5	6.6	6.7	7.0	7.1	7.2	7.2	6.9	6.8	6.9	6.8	6.8	6.6	6.4	6.3	7.0	7.6
Industrial	4.4	4.7	5.1	5.5	5.4	5.5	5.3	4.2	4.2	4.2	4.1	4.3	4.1	4.4	4.0	4.9	6.0
All Sectors	5.8	6.0	6.3	6.8	6.8	7.0	7.0	7.1	7.0	7.0	7.0	7.0	6.8	6.6	6.2	6.5	7.2

Source: Energy Information Administration

Switching Activity: Table 7 shows the proportion of customers and load taking service from alternative suppliers in each major utility distribution territory.

Table 7. Retail Customers and Load Supplier by Alternative Providers in February 2006 % of Customers and (% of Load)				
Firm	Residential	Small C&I	Medium C&I	Large C&I
Allegheny Power	0.0% (0.0%)	0.1% (0.9%)	18.0% (19.3%)	58.1% (29.5%)
Baltimore G&E	0.0% (0.0%)	0.9% (1.7%)	17.2% (19.8%)	87.1% (93.4%)
Delmarva P&L	0.0% (0.0%)	1.9% (4.1%)	22.5% (28.6%)	91.0% (95.7%)
Potomac El.	5.8% (7.1%)	10.8% (14.0%)	14.2% (13.2%)	75.8% (83.3%)
Source: Maryland PSC				

Table 8 shows the state aggregate level of switching as of December for each year from 2000 to 2005.

Table 8. Maryland Retail Aggregate Customer Migration Statistics, 2001-2005. % of Customers and (% of Load) Served by Alternative Suppliers										
	Dec. 2000	Dec. 2001	Dec. 2002	Dec. 2003	Dec. 2004		Dec. 2005			
Residential	0.6% (0.7%)	2.6% (3.4%)	3.3% (4.1%)	3.1% (3.8%)	2.2% (2.9%)		1.5% (1.9%)			
Small C&I	1.2% (3.2%)	4.1% (9.8%)	6.2% (30.4%)	5.7% (27.8%)	3.6% (4.2%)		2.8% (3.4%)			
Medium C&I					21.7% (24.6%)	17.7% (21.0%)				
Large C&I					58.0% (75.1%)	78.6% (87.4%)				
Note: Prior to 2004, Non-residential data were combined into a single category. *Source*: Maryland PSC										

Public Benefits Programs: Funds for a Universal Service Program have been collected from all customers, and may not be assessed on a per kilowatt-hour basis.[361]

Table 9. Maryland Public Benefits Programs

MD's restructuring law was signed in April 1999 including a $34 M/yr. tax funded Universal Service Fund. Additional funds from individual utility settlements.		Research & Develop.	Energy Efficiency		Low Income	Renewable Energy	Total
	Million $		Up to 1.0	34.0		34.0+	
	Mills/kWh			0.51		0.51+	
	% revenue			0.82		0.82+	
	Admin.		Utility	State			

	Source: American Council for an Energy-Efficient Economy, *Summary Table of Public Benefit Programs and Electric Utility Restructuring* (December 2005), *available at* http://www.aceee.org/briefs/mktabl.htm.	

Separation of Generation and Transmission: Divestiture of generation assets was not required, but functional, operational, structural or legal separation of regulated and non-regulated businesses or non-regulated affiliates was required by July 1, 2000.[362] Distribution utilities must provide a code of conduct to prevent their regulated service customers from subsidizing services of unregulated businesses.[363] A distribution utility can transfer any of its generation facilities or assets to an affiliate, if it desires.[364] Power generation affiliates can only sell power on the wholesale market, except for standard offer service suppliers. Retail sales affiliates may only buy power from the wholesale market.

State RTO Involvement: Maryland belongs to the multi-state PJM RTO.

Generation Capability: Prior to the restructuring legislation, utilities operated 95.4 percent of generating capability in Maryland. By 2002, that figure dropped to 0.1 percent. Between 1997 and 2002, generation capability increased from 11,713 to 11,859 MW accompanied by growth in the proportion of dual fired capacity.

Usage of Customer Information: Customer information cannot be released without a customer's consent, except for bill collection and credit rating purposes.[365] Customer lists containing names, addresses, and telephone numbers of customers may be sold to competitive suppliers. If a distribution utility intends to release such a list, it must inform its customers, and advise customers of their opportunity to prevent disclosure of their identifying information.[366]

Standardized Labeling:

- **Content:** Distribution utilities and competitive suppliers must provide customers with a uniform set of information on fuel mix and emissions. When actual data is unavailable, a regional average may be used. Labels have to include comparison of emissions and fuel mix to the regional average when information is available.[367]

- **Timing:** Labels must be provided to customers every six months.[368]

Renewable Energy Portfolio Standard: Maryland enacted a renewable energy portfolio standard in 2004. The standard gradually increases to 7.5 percent in 2019. A separate standard of 2.5 percent including hydroelectric and waste-to-heat generation applies throughout the period.

Massachusetts: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: Electricity Restructuring in Massachusetts was initiated and is administered by the Department of Telecommunications and Energy (DTE). Retail competition began March 1, 1998, in accordance with the restructuring legislation enacted November 25, 1997.

Services Open to Competition: Generation only. Metering and billing are provided by the distribution utility.

Consumer Options: During the transition to competition, consumers had three types of choices to obtain their electricity supply: a) standard offer service, b) service through an aggregator, or c) service from a competitive supplier. If a supplier was unable to provide services, consumers then received a "default" service. Unlike most states that provided POLR service, Massachusetts named its POLR service as standard offer service, and developed another regulated price for those customers for which their supplier no longer provided service (default service). The transition ended in February 2005, at which time standard offer service was discontinued for all customers. Currently, customers who have not chosen a competitive supplier receive default service from the distribution utility that procures generation services from

wholesale suppliers. All retail customers are eligible for default service at any time, and may remain on default service indefinitely. Customers can also select an alternative supplier or be part of a group of customers served by an aggregator. For purposes of this summary, default service will be referred to as a type of POLR service.

Alternative Suppliers Licensed to Provide Service: All alternative suppliers must be licensed to provide service to customers in Massachusetts.[369] Licensing regulations require a supplier to show technical and financial capability.[370] Massachusetts maintains a roster of registered competitive electricity suppliers including brokers and direct competitive suppliers. The roster in February 2006 included 30 direct suppliers and twice as many brokers.[371] Ten of the suppliers offered service to residential customers as did a comparable number of brokers.

Pricing Trends: As Table 10 shows, prices for the residential and commercial sectors for the 1988 to 2004 period rose intermittently before peaking in 1997 and then declined before peaking again in 2001. Prices for the industrial sector rose intermittently in the 1990s and also peaked in 2001.

Table 10. Massachusetts Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Residential	8.5	9.1	9.7	10.4	10.6	11.0	11.1	11.3	11.3	11.6	10.6	10.1	10.8	12.5	10.9	11.7	11.75
Commercial	7.7	8.1	8.6	9.2	9.3	9.7	9.8	9.9	9.9	10.3	9.4	8.9	9.0	11.6	10.0	10.5	11.0
Industrial	6.8	7.3	7.9	8.5	8.6	8.7	8.5	8.4	8.4	8.8	8.2	7.7	8.1	9.4	8.3	9.1	8.5
All Sectors	7.8	8.3	8.8	9.5	9.7	10.0	10.0	10.1	10.1	10.5	9.6	9.1	9.5	11.6	10.1	10.6	10.8

Source: Energy Information Administration

Price Changes for Standard Offer Service: Massachusetts set a minimum 10 percent reduction of the entire bill for all customers receiving standard offer service during the transition period. On September 1, 1999, the reduction increased to at least 15 percent, in order to adjust for inflation. These rate reductions applied to all distribution utilities.[372] Distribution utilities were authorized to use securitization to meet the second rate reduction effective September 1, 1999.[373]

Standard Offer Service Provider: Standard offer service was provided until February 2005 for customers who had not chosen a competitive supplier during the transition period. It was offered by the distribution utility, at rates which were set in advance, but subject to some adjustments.[374]

POLR (default service) is offered currently to customers who are not receiving service from a competitive supplier or aggregator. Former standard offer customers were offered POLR service at the end of the transition. The price for POLR service is based on the price of procuring it in the wholesale markets through fixed price short-term (three or six months) supply contracts. Distribution companies must procure electricity for default generation service through competitive bidding, although the DTE also may authorize a competitive supplier to provide POLR service.[375]

POLR service prices cover the energy portion of the total bill. Distribution rates, taxes, and fees are additional. POLR service prices follow wholesale prices. The default prices applicable to January of each year for the northern portion of the Boston Edison distribution area (Table 11) illustrate the pattern.

Table 11. Default Prices Applicable in January by Year, Boston Edison (north)

	1999	2000	2001	2002	2003	2004	2005	2006
Residential	3.7	4.5	7.0	6.4	5.0	6.5	7.5	12.7
Commercial	3.7	4.5	7.0	6.6	5.2	6.6	7.3	12.3
Industrial	3.7	4.5	7.0	6.5	5.1	6.6	9.0	18.1

DTE, Fixed Default Service Prices in cents/kWh

Recovery of Stranded Costs/Transition Costs: The restructuring legislation provided for the recovery of

stranded costs through a non-bypassable charge to all customers.376 This charge was capped by the DTE, and the DTE determined, on a case-by-case basis, the time period for recovery.377

Switching Restrictions and Minimum Stay Requirements: Customers can switch to or from POLR (default/basic) service.378

Switching Activity: Table 12 shows the proportion of customers and load taking service from alternative suppliers in each utility distribution territory. In the Commonwealth territory, switching by residential customers is much higher than in any other area of the state. Much of this residential switching is attributable to community aggregations, principally the Cape Light Compact.379

Table 12. Retail Customers and Load Supplied by Alternative Providers in January 2006
% of Customers and (% of Load)

Firm and load in MWh	Residential	Small C&I	Medium C&I	Large C&I
Boston Edison 1,498,476	0.3% (0.6%)	2.0% (3.5%)	7.9% (13.6%)	34.0% (50.0%)
Cambridge 154,540	0.2% (0.3%)	6.7% (13.5%)	8.4% (12.4%)	33.6% (52.6%)
Commonwealth 403,108	54.2% (51.8%)	55.0% (57.5%)	44.3% (46.2%)	65.6% (70.5%)
Fitchburg 47,256	0.0% (0.0%)	3.8% (2.9%)	4.8% 15.5%	72.7% (86.6%)
Mass. Electric 1,995,096	2.1% (2.4%)	7.4% (12.2%)	31.1% (29.3%)	58.1% (66.2%)
Nantucket 12,547	0.2% (1.3%)	4.4% (6.6%)	23.6% (29.3%)	50.0% (53.2%)
Western Mass.	0.5% (0.7%)	6.6% (11.9%)	32.4% (36.8%)	60.2% (76.3%)

Source: Mass. Department of Telecommunications and Energy

Table 13 shows the state aggregate levels of switching from January 2001 to January 2006. Although all customers of Massachusetts distribution utilities were eligible for retail access as of March 1, 1998, switching remained at minimum levels for residential and small C&I customers. Larger commercial and industrial customers were more likely to switch, but sometimes switched back to default service if default prices fell below prices from alternative suppliers. Subsequent to February 2005, the proportion of load served by alternative suppliers increased for all classes of customers.

Former standard offer customers either switched to competitive generation suppliers or started receiving POLR service at the end of February 2005. In December 2004, standard offer service applied to approximately 1.5 million customers with load of 1,959,705 MWh. The share of load served by competitive generators increased from 23.7 percent to 30.4 percent between December 2004 and December 2005 following the end of the standard offer service.

Table 13. Massachusetts Retail Aggregate Customer Migration Statistics, 2001-2006
% of Customers and (% of Load) Served by Alternative Suppliers

Date	Jan. 2001	Jan. 2002	Jan. 2003	Jan. 2004	Jan. 2005	Jan. 2006
Residential	0.1% (0.2%)	0.4% (0.4%)	2.8% (2.5%)	2.9% (2.6%)	2.7% (2.3%)	9.1% (7.6%)
Small C&I	0.6% (0.6%)	2.6% (4.4%)	8.8% (10.7%)	7.2% (11.3%)	6.8% (10.2%)	13.9% (21.2%)
Medium C&I	1.5% (2.1%)	7.4% (11.0%)	10.8% (17.2%)	11.3% (17.8%)	10.1% (16.5%)	14.9% (24.3%)
Large C&I	7.2% (13.3%)	20.1% (31.9%)	28.6% (43.1%)	32.4% (50.7%)	32.6% (48.9%)	45.7% (59.4%)

Source: Massachusetts Department of Telecommunications and Energy

Public Benefits Programs: The Massachusetts Public Benefits Programs are summarized in Table 14.

Table 14. Massachusetts Public Benefits Programs

In Nov. 1997, comprehensive legislation was signed bringing retail access to all customers in 1996, included a non-bypassable wires charge for EE, RE and LI. LI must get at least .25 mills of the EE. In Feb. 2002, legislation was signed extending the SBC for five years, through Dec. 2007.		Research & Development	Energy Efficiency	Low Income	Renewable Energy	Total
	Million $		130.0	Incl.	26.0	156.0	
	Mills/kWh		2.50	In	0.50	3.00	
	% revenue		2.81%	EE	0.58%	3.38%	
	Admin.		Utility	Utility	MTPC		
	Note: MTPC is part of the Massachusetts Technology Collaborative. *Source*: American Council for an Energy-Efficient Economy, *Summary Table of Public Benefit Programs and Electric Utility Restructuring* (December 2005), *available at* http://www.aceee.org/briefs/mktabl.htm.					

Separation of Generation and Transmission: The Massachusetts restructuring law required distribution utilities to divest their generation facilities (either by sale or by transfer to an affiliated company), if they sought to recover stranded costs.380 If a distribution utility opted to transfer its generation assets to an affiliate, the two companies had to be strictly separated,381 and distribution utilities were not be permitted to sell electricity at retail except to provide their customers with standard offer service (which has now ended).382 Almost all of the distribution companies divested their assets to only one company.

State RTO Involvement: Massachusetts distribution utilities are within the footprint of the Independent System Operator of New England. Established in 1997, ISO-NE is responsible for managing energy markets and operating the transmission system in New England.

Generation Capability:383 Prior to the restructuring legislation, utilities operated 86.6 percent of generating capability in Massachusetts. By 2002, that figure dropped to 9.0 percent with 91 percent of generation belonging to independent power producers. Between 1997 and 2002, generation capability increased from 11,328 MWs to 12,159 MWs. Most of the new capacity uses natural gas.384

Usage of Customer Information: The distribution utility cannot release proprietary customer information to the affiliate without written consent of the customer. Historical usage information will be provided to a supplier who has received customer authorization to initiate service.385

Standardized Labeling:386 "In February 1998, the Massachusetts Department of Telecommunications and Energy (DTE) issued final rules (220 CMR 11.06) requiring electric retailers to provide customers with a standard disclosure label containing information on price, fuel mix, emissions, and labor characteristics of generating sources on a quarterly basis, beginning September 1, 1998. Suppliers must also issue notices in all advertisements stating that disclosure labels are available upon request. Supply mix information must be based on market settlement data or equivalent data provided by the ISO available for the most recent one-year period. Data on carbon dioxide, nitrogen oxides, and sulfur dioxide emissions must be presented in a format comparing them to the regional average. Electricity providers are also required to report the percentage of power generated from sources that have union contracts with their employees and the percentage generated from sources that use replacement labor during labor disputes. Suppliers must submit a report to the DTE annually containing "statements of verification by the ISO or an independent auditor." Massachusetts is working with other New England states to develop a Generation Information System that will supply data for implementing the disclosure requirement."

Renewable Energy Portfolio Standard: Massachusetts enacted a minimum renewable energy portfolio standard on April 26, 2002. The standard started at 1 percent in 2003 and increases to 4 percent in 2009 in one half percent increments. After 2009, the standard is scheduled to increase in 1 percent increments at least through 2014.[387]

New Jersey: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: The New Jersey Electric Discount and Energy Competition Act provided for retail choice to begin August 1, 1999, but the New Jersey Board of Public Utilities (BPU) delayed the start date to November 14, 1999, to give utilities more time to modify their computer systems to interact with competitive retail suppliers in order to ease customer switching.

Services Open to Competition: Generation is open to competition. Work on a policy to permit competition for other customer services, such as metering and billing, was suspended on June 23, 2004, for a minimum of two years.[388]

Consumer Options: New Jersey consumers can pick their own alternative supplier or join an aggregation of customers to contract with an alternative supplier. Customers received a "shopping credit" on their electric bill if they choose an alternative supplier. The shopping credit was also known as the "price to compare" and was the amount on a customer's bill that was credited to the customer if he chose an alternate supplier and did not receive basic generation service from the distribution utility.[389]

Customers that are not served by an alternative supplier receive Basic Generation Service (BGS), which is procured through periodic auctions. Large industrial customers with BGS are charged hourly prices that track wholesale spot market prices. BGS for other customer classes is laddered on a three year cycle.

Alternative Suppliers Licensed to Provide Service: New Jersey licensing standards provide that before receiving a license, new suppliers must show financial integrity and maintain a surety bond of $250,000 for an initial license. For a renewed license, suppliers have to maintain a bond at a level determined by the BPU.[390] Competitive suppliers must renew their licenses annually. The BPU website provides lists of alternative suppliers serving residential, commercial and industrial retail customers. As of February 2006, active alternative suppliers for residential customers range from 3 in the JCP&L territory, to 1 each in the Conectiv and PSE&G territories. None offer service to residential customers in the Rockland territory. For C&I customers, there are 6 active suppliers in the Rockland territory and 19 or 20 in each of the other territories.

Pricing Trends: As Table 15 shows, prices in all three sectors rose throughout the early part of the decade, reaching a peak in 1997. Prices for residential and commercial customers fell over the next several years before rising again, but not as high at the 1997 peak. For industrial customers, the same pattern is evident except that the 2004 price exceeded the 1997 peak.

Price Changes for POLR (Basic Generation Service) Service: All customer classes were granted an initial 5 percent rate reduction with an additional reduction of at least 5 percent over the first three years of the transition period for POLR service. This entailed a reduction of at least 10 percent from April 1997 levels. The reductions were from the distribution portion of the customer's bill, so that even those customers that switched to a new supplier obtained the price reductions. Retail price caps expired in the summer of 2003.[391]

Beginning in 2002, New Jersey instituted the Basic Generation Service (BGS) Auction "to meet the electric demands of customers who have not selected an alternative supplier and to make BGS available on a competitive basis… The Internet BGS Auction, the first of its kind in the nation, was a descending clock auction…"[392] The bidding process for hourly priced electricity is separate from that for fixed price service and the latter involves three year supply contracts that supply one third of the anticipated load of fixed BGS. Table 16 shows the auction results for 2003 to 2005.

Table 16. Auction Results for Three Year Contracts Used to Ladder Fixed BGS Rates

	Feb. 2003	Feb. 2004	Feb. 2005
Conectiv	5.529 cent/kWh	5.513	6.648
JCP&L	5.587	5.478	6.570
PSE&G	5.560	5.515	6.541
Rockland	5.601	5.597	7.179

Source: BPU Press Releases of Feb. 5, 2003; Feb. 11, 2004; and Feb. 16, 2005. The Feb. 9, 2006, press release did not list the winning bid prices, but indicated that the average residential bill would increase 12% to 13.7% as a result of increases in the 2006 component of the laddered prices.

POLR Service (BGS) Provider: Generation services were provided by the distribution companies for three years following the opening of retail competition.[393] Through BGS, all customer classes are eligible for generation service overseen by the BPU.[394] Non-residential customers who return to BGS are generally required to remain with that service for one year.[395] The auction system for procuring BGS has been in place since 2002, although rate caps applied until mid-2003.

Table 15. New Jersey Average Annual Price per KWh by Sector (nominal cents)																	
	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Residential	9.8	10.1	10.4	10.8	10.9	11.4	11.5	12.0	12.0	12.1	11.4	11.4	10.8	10.2	10.4	10.7	11.2
Commercial	8.4	8.8	8.9	9.3	9.3	9.7	9.8	10.2	10.3	10.4	10.1	9.7	8.6	9.1	8.9	9.3	10.0
Industrial	6.8	7.2	7.4	7.7	7.7	8.1	7.9	8.2	8.2	8.1	7.9	7.7	6.8	8.3	7.7	7.5	9.0
All Sectors	8.5	8.8	9.1	9.5	9.5	10.0	10.1	10.4	10.5	10.5	10.2	10.0	9.1	9.3	9.3	9.5	10.9
Source: Energy Information Administration																	

Recovery of Stranded Costs/Transition Costs: The BPU determined the recoverable amount of stranded costs, and distribution utilities recovered most stranded costs over a maximum of 8 years, through a market transition charge (MTC).396 All customers were be assessed this charge, except for off-grid customers who are exempt from exit fees.

Switching Restrictions and Minimum Stay Requirements: Customers can switch suppliers or return to their distribution company at any time, in accordance with the terms and conditions of their service agreement with their supplier or distribution company. A customer may not be charged a fee for switching suppliers.

Switching Activity: The Table 17 provides the switching statistics for large C&I customers in the major distribution territories as of December 2005.

Table 17. Customer Switching by Distribution Utility (December 2005) % of Customers and (% of Load) Served by Alternative Suppliers				
	Combined Residential and Non-Residential Fixed Rate	Residential Fixed Rate	Non-Residential Fixed Rate	Large C&I Hourly
Conectiv	0.0% (12.4%)	0.0%	0.3%	87.2% (95.7%)
JCP&L	0.1% (11.6%)	0.0%	0.4%	62.7% (87.7%)
PSE&G	0.1% (15.3%)	0.0%	0.7%	64.0% (84.0%)
Rockland	0.0% (4.4%)	0.0%	0.3%	55.0% (70.3%)
Note: New Jersey does not report separate residential and small C&I load of alternative suppliers. *Source*: New Jersey BPU and *Restructuring Today* (January 27, 2006), p. 3.				

The number of residential customers served by alternative suppliers is and has remained very low with the peak of less than 6 percent in the Conectiv (Atlantic) distribution area in December 2000.397 As of December 2005, less than 1,000 residential customers had alternative suppliers in the entire state.398 As with the residential sector, the number of small C&I customers served by alternative suppliers peaked in December 2000 with 8.6 percent of customers and 16.3 percent of load for this class of customer served by alternative suppliers.399 As of December 2005, less than 1 percent of small C&I customers had alternative suppliers, but they tended to be larger than average customers because the share of load exceeds the share of customer served by alternative suppliers.

The POLR service available to large C&I customers in New Jersey is priced on an hourly basis, CIEP, that tracks the wholesale spot market prices. Hence, large C&I customers wishing to hedge price volatility must do so by selecting an alternative supplier. New Jersey's experience has been that many large C&I customers prefer to buy from alternative suppliers when POLR service is priced on an hourly basis.

Table 18 provides aggregate switching data for residential and non-residential customers from 2003 to the end of 2005.

Table 18. New Jersey Retail Aggregate Customers Migration Statistics, 2003-2005 % of Customers and (% of Load) Served by Alternative Suppliers				
Year	2003 pre August	November 2003	December 2004	December 2005
Residential and Small C&I	(1 to 2%)	3.3% (12.5%)	0.3% (15.4%)	0.0% (13.6%)
Residential		3.6%	0.0%	0.0%

Small C&I		0.8%	1.8%	0.6%
Large C&I	~ 10%	66%		64.7% (83.9%)

Note: Archives of New Jersey BPU switching statistics are not available.
Source: *Restructuring Today* various issues.

Public Benefits Programs: Table 19 identifies the elements and New Jersey's public benefit programs.

Table 19. New Jersey Public Benefits Programs

		Research & Development	Energy Efficiency	Low Income	Renewable Energy		Total
Restructuring law passed in Jan. 99. Requires funding for EE/RE at same level as existing DSM costs (approx. $235million/yr.) Full SBC is 3.6 mills. Half would pay for costs from prior year, half for programs. 25% of new must be RE. Numbers in table are new programs only set in BPU order Mar/01. LI separately funded at prior levels.	Million $		89.5	10.1	30.0	129+	
	Mills/kWh		1.22	0.14	0.41	1.76	
	% revenue		1.31%	0.15%	0.44%	1.89%	
	Admin.		NJ BPU	Utility	NJ BPU		
	Source: American Council for an Energy-Efficient Economy, *Summary Table of Public Benefit Programs and Electric Utility Restructuring* (December 2005), *available at* http://www.aceee.org/briefs/mktabl.htm.						

Separation of Generation and Transmission: The restructuring act does not mandate divestiture, though the BPU may require a distribution utility to functionally separate its generation assets to the distribution utility's holding company or a related competitive business segment if there are market concentration concerns.400 Electric distribution utilities had three options: divestiture, structural separation or functional separation. Of the four major distribution utilities in New Jersey, two divested nearly all of their generation, one divested most (but not all) of its generation, and the fourth transferred its generation assets to an unregulated affiliate.401 In August 2000, PSE&G transferred approximately 10,200 MW of its electric generating facilities to PSEG Power, LLC, an unregulated power generation affiliate. The BPU approved the sale of Rockland Utility's generation assets to Southern Energy Affiliates in June 1999.402

State RTO Involvement: New Jersey is within the multi-state PJM region, an RTO that includes Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, and parts of Virginia. In recent years, the PJM RTO has significantly expanded its geographic scope to the West and South of its original footprint. The PJM region is responsible for the operation of the region's wholesale electric market.

Generation Capability:403 Prior to the restructuring legislation, utilities operated 81.2 percent of the generation capability in New Jersey. By 2002, that figure dropped to 6.8 percent after divestitures, transfers, and entry of new generators. Between 1997 and 2002, generation capability in the state increased from 16,855 MWs to 18,384 MWs, an increase of 9.1 percent . Nearly all of the increase was in dual fueled generators built by IPPs. During the 1993 to 1997 period, generating capability had increased by less than 3 percent .

Usage of Customer Information: Neither power suppliers nor distribution companies can disclose proprietary information, including historical payment and energy usage information without the written consent of the customer. Any third party who receives such information can only use it in order to provide continued electric service to the customer.404

Standardized Labeling:405 "The New Jersey Board of Public Utilities (BPU) adopted an interim disclosure rule on July 26, 1999, in accordance with the state's restructuring law. The rule requires electricity suppliers to provide consumers with a uniform disclosure label containing information on fuel mix, carbon dioxide, sulfur dioxide, and nitrogen oxides emissions, as well as energy-efficiency efforts twice a year, effective August 1, 1999. Air pollutant emissions must be compared to the regional average. Suppliers should use data from the most recent 12-month period with a 3-month lag, unless such data are unavailable (as in the case of a new market entrant). Information must be provided for each product offered and verified by an independent auditor."

Renewable Energy Portfolio Standard: The New Jersey Board of Public Utilities adopted renewable energy portfolio standards on February 1, 2005. The standard starts at 3.25 percent for 2005 and rises to 6.5 percent by 2009. On August 31, 2005, the BPU authorized specific standards for two classes of renewable energy sources in addition to continuation of the existing solar requirements.

New York: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: Restructuring in New York State has taken place through orders of the New York State Public Service Commission (NYPSC), rather than through legislative initiatives. Because the PSC phased in restructuring through PSC-approved utility restructuring plans over a three year period, each utility had a different timetable to transition to retail competition.

In 2004, the NYPSC identified a number of "best practices" and ordered distribution utilities to submit plans to foster the development of retail competition.406 Subsequently, the NYPSC adopted statewide guidelines, based on the program developed by Orange and Rockland (O&R).407 Under the guidelines, the distribution utility notifies any customers who contact the utility that they may try an alternative supplier for a two-month period without any penalty for leaving or returning to POLR service after the trial period. Alternative suppliers participating in the program offer a one-time 7 percent discount for the trial period. Customers can either pick an alternative supplier or have one randomly assigned and customers are can return to POLR service or to another alternative supplier at the end of the trial period. As the table on retail switching indicates below, switching levels in the O&R distribution territory are higher than in other territories.

On September 23, 2005, the PSC determined that the pace of development of real-time pricing was insufficient to moderate the effects of rising fuel costs.408 To speed the development of real-time pricing, the PSC ordered that existing real-time pricing programs in some distribution territories be expanded to include all territories and that POLR service for large C&I customers be tied to real-time pricing.

Services Open to Competition: Generation, metering and billing. Distribution companies were required to file unbundled metering tariffs and calculate a "backout" credit for customers who choose a different meter service provider. The PSC's competitive metering and meter reading rules allow customers who choose a competitive supplier and customers who remain with the distribution utility to choose competitive metering services. Customers who choose competitive metering services must procure both meter and meter data services competitively. Distribution utilities are the providers of last resort for metering and meter data services.409

Consumer Options: New York retail electricity customers can select an alternative supplier or be part of an aggregation of consumers that obtain electric power from an alternative supplier. Customers not served by an alternative supplier receive POLR service from the distribution utility. POLR service for large C&I customers is offered on an hourly price basis that tracks wholesale spot market prices.

Alternative Suppliers Deemed Eligible to Provide Service: The New York PSC website provides lists of alternative suppliers in each distribution territory. For example, in February 2006, the number of alternative suppliers serving residential customers ranged from 6 in the Central Hudson and O&R territories to 13 in the National Grid (Niagara Mohawk) distribution territory. C&I customers generally had more alternative suppliers to choose from.

Pricing Trends: As shown in Table 20, prices generally increased through 1997 and then wavered before increasing to higher levels in 2003 and 2004.

Price Changes for POLR Service: Each distribution utility's restructuring plan laid out different POLR rate reduction plans:

- Central Hudson basic electric rates were frozen at 1993 levels through June 30, 2001, for all customers. In addition, large industrial customers who chose to remain with Central Hudson for their generation services received 5 percent per year rate reductions until mid-2001.

- Con Edison industrial customers received a 25 percent immediate rate decrease, which remained fixed for five years. All other customers received a 10 percent rate decrease, phased in over five years.

• Orange and Rockland residential customers received a 4 percent decrease in rates during 1995 and 1996, while industrial and commercial customers received rate reductions of 4-14 percent . On December 1, 1997 and on December 1, 1998, residential rates were reduced an additional 1 percent . Large industrial customer rates were reduced by approximately 8.5 percent on December 1, 1997.

Table 20. New York Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Residential	10.5	10.9	11.4	12.0	12.4	13.2	13.6	13.9	14.0	14.1	13.7	13.3	14.1	14.0	13.6	14.3	14.5
Commercial	9.6	9.9	10.5	10.9	11.2	11.7	11.7	11.9	12.1	12.1	11.6	11.2	12.5	12.9	12.3	12.9	13.0
Industrial	4.9	5.3	5.8	6.2	6.5	6.7	6.8	5.8	5.6	5.2	5.0	4.8	4.9	5.6	5.2	7.1	7.0
All Sectors	8.5	8.9	9.4	9.6	10.2	10.7	10.9	11.1	11.1	11.1	10.7	10.4	11.2	8.8	8.7	12.4	12.6

Source: Energy Information Administration

• Rochester Gas and Electric residential and small commercial customers received a 7.5 percent rate decrease. Other commercial and most industrial customers received an 8 percent decrease. Large industrial customers received an 11.2 percent decrease. All decreases are being phased in over 5 years.

• New York State Electric and Gas industrial and large commercial customers (greater than 500 kW capacity) received a 5 percent per year rate decrease, for five years. Residential and small commercial and industrial customers have had their rates frozen at current levels for two years, bills reduced 1 percent in the third year of the plan, and a total decrease of 5 percent by the fifth year of the plan. Industrial and commercial customers who are not eligible for the 5 percent decrease received financial incentives for load growth to encourage business expansion.

• National Grid (Niagara Mohawk) customers received an overall rate decrease of an average of 4.3 percent . Residential and commercial customers were to have a 3.2 percent decrease phased in over three years. Industrial customers were to have decreases of approximately 13 percent . In addition, Niagara Mohawk rates for electricity and delivery were set until September 1, 2001. In 2001 and 2002, Niagara Mohawk was allowed to request limited rate increases for distribution services, and prices for some of the electricity sold to all customers will fluctuate with changes in market prices.

POLR Service Provider: The distribution companies provide regulated POLR service for customers who do not choose a competitive supplier or who return to POLR service.[410]

Recovery of Stranded Costs/Transition Costs: Distribution utilities recover stranded costs (net of proceeds from selling generation assets) through a non-bypassable distribution charge. Distribution utilities were required to use creative means to reduce the amount of stranded costs before they are considered for recovery. Stranded cost calculations and timing of recovery were determined on a case-by-case basis for each distribution utility.[411]

Switching Restrictions and Minimum Stay Requirements: The NY PSC is currently implementing a number of policies designed to encourage consumers to try alternative suppliers.[412] One of these, known at "ESCO Referral Programs," places limits on the ability of alternative suppliers to levy charges against departing customers.[413]

Switching Activity: The switching statistics for December 2005 in each distribution territory appear in the Table 21.

Table 21. New York Retail Customers and Load Supplied by Alternative Providers as of December, 2005
% of Customers and (% of Load)

Firm and Load in MWh	Residential	Small C&I	Large C&I	Total
NY IOUs 8,614,367	6.7% (9.0%)	18.4% (45.4%)	55.6% (75.7%)	8.3% 38.5%
Central Hudson 465,350	.8% (1.0%)	3.0% (15.6%)	49.2% (74.7%)	1.2% (26.9%)
Con Ed 3,425,765	4.6% (5.5%)	14.1% (40.2%)	77.5% (85.1%)	5.9% (37.4%)
National Grid 2,644,403	6.0% (7.7%)	22.9% (53.6%)	69.2% (69.2%)	7.8% (38.4%)
NYSE&G 1,100,064	6.8% (9.6%)	23.1% (54.6%)	51.7% (88.3%)	9.1% (40.7%)
O&R 349,282	30.4% (34.6%)	32.4% (49.5%)	19.7% (27.5%)	30.6% (37.6%)
Rochester G&E 629,504	17.5% (21.5%)	39.5% (58.8%)	62.2% (71.5%)	20.0% (49.5%)
Source: NYPSC				

The aggregate switching statistics for the utility distribution territories in the state from 2000 to 2005 appear in Table 22. Load served by alternative suppliers has increased each year with the largest increases in 2004 and 2005. The percentage of customers served by alternative suppliers increased from 1999 to 2002, declined in 2003, and resumed growing in 2004 and 2005.

Table 22. New York Aggregate Customer Migration Statistics, 1999-2005
% of Customers and (% of Load) Served by Alternative Suppliers

Year	1999	2000	2001	2002	2003	2004	2005
Residential	~1.6%	3.4%	4.8% (5.0%)	5.0% (5.6%)	4.2% (5.9%)	5.1% (7.2%)	6.7% (9.0%)
Small C&I	~4.3%	5.3%	6.2% (26.0%)	7.1% (30.0%)	8.0% (26.0%)	13.0% (36.2%)	18.4% (45.4%)
Large C&I					23.7% (45.1%)	48.1% (66.8%)	55.6% (75.7%)
Source: NYPSC, Electric Retail Access Migration Reports							

Public Benefits Programs: New York's public benefit programs are charted in Table 23 below.

Table 23. New York Public Benefits Programs

In May95, the PSC issued Order 96-12 requiring all IOUs to file restructuring plans. A July98 Order set $78 million/year for an SBC, administered by NYSERDA. In Jan01 the PSC raised the SBC to $150 million/yr and extended it for 5 years. (Table shows allocation minus 10% held open.) R&D incl. $14 million/yr for RE. Table does not include $100 million/yr EE by Power Authorities		Research & Development	Energy Efficiency	Low Income	Renewable Energy	Total	
	Million $	26.0	87.0	22.0		150.0	
	Mills/kWh	0.26	0.83	0.21		1.42	
	% revenue	0.20%	0.69%	0.17%		1.18%	
	Admin.	NYSERDA	NYSERDA	NYSERDA			
	Notes: The administrator is the New York State Energy Research and Development Authority, supervised by the PSC. On December 14, 2005, the PSC ordered that the System Benefit Charge be increased to $175 M annually and that the program be extended for five years. NYPSC, System Benefits Charge (Mar. 2, 2006), *available at* http://www.dps.state.ny.us/SBCIII_Amended_Plan_3-2-06.pdf. *Source*: American Council for an Energy-Efficient Economy, Summary Table of Public Benefit Programs and Electric Utility Restructuring (December 2005) available at http://www.aceee.org/briefs/mktabl.htm.						

Separation of Generation and Transmission: The PSC encouraged total divestiture of generation, and it instructed distribution utilities to separate generation and energy service functions from transmission and distribution systems.414 Each distribution utility company's restructuring agreement established different requirements for separation of generation and transmission.415

State RTO Involvement: New York distribution utilities belong to the New York ISO, formed in 1998. The New York ISO exercises operational control over most of New York's transmission systems, administers the ISO transmission tariff, and operates the New York Open Access Same Time Information System (OASIS).416

Generation Capability:417 Prior to the restructuring regulations, utilities in New York operated 84.3 percent of the generation capability in the state. By 2002, that figure dropped to 32.4 percent. The difference reflected mandatory divestitures of generation to independent generation firms and entry or expansion of independent power producers. Between 1997 and 2002, generation capability in the state increased from 35,576 MWs to 36,041 MWs. In the previous 5-year

period, generation capability had decreased. Dual fueled generation increased as a proportion of generation from 34.1 percent to 39.5 percent.

Use of Customer Information: Historical customer data will be provided by distribution companies to customers or their authorized designees. All historical data that a competitive supplier receives from the distribution company must be kept confidential, unless authorized for release by the customer. A distribution company cannot disclose customer information to competitive suppliers if the customer has notified the distribution company in writing that he does not authorize release. Thereafter, customer information can only be released to a competitive supplier with the customer's written authorization.418

Standardized Labeling:419 On December 15, 1998, the New York Public Service Commission (PSC) issued an order requiring electric suppliers to use a standardized label to provide information to customers regarding the environmental impacts of electricity products semi-annually. Suppliers must disclose fuel mix compared to a statewide average and emissions of sulfur dioxide, nitrogen oxides, and carbon dioxide. Fuel source and emissions information are calculated by the Department of Public Service (DPS) and provided to retail suppliers quarterly. Calculations are based on a rolling annual average with data supplied from the Independent System Operator and the EIA and verified by the DPS. The most recent reports of each load serving entity (2004) are available at http://www3.dps.state.ny.us/e/energylabel.nsf/ViewCat?ReadForm&View=LabelInfo&Cat=January+2004+-+December+2004&Count=80.

Renewable Energy Portfolio Standard: The New York PSC adopted a renewable energy portfolio standard on September 24, 2004. The policy calls for an increase in renewable energy used in the state from the then current level of 19 percent (mostly hydro) to 25 percent by 2013.

Pennsylvania: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: The Electricity Generation Customer Choice and Competition Act was enacted on December 3, 1996. The Pennsylvania Electric Choice Pilot Program began in the fall of 1997, with 230,000 customers participating. These customers were able to begin shopping for their electric generation supplier beginning September 1, 1998. By January 2, 2000, electric choice was fully implemented in nearly all of Pennsylvania.420 Retail competition is administered by the Pennsylvania Public Utility Commission (PUC).

Services Open to Competition: Generation. Generally the distribution company provides metering and billing services, although there are some areas in Pennsylvania in which the alternative supplier may provide these services.421 Pennsylvania's efforts to allow licensed generation suppliers to provide metering and billing services to retail customers were suspended on August 12, 2002.422

Consumer Options: Pennsylvania consumers can select an alternative supplier or be part of an aggregation of consumers buying power from an alternative supplier. Consumers not served by an alternative supplier receive POLR service arranged by the local distribution utility.

Alternative Suppliers Licensed to Provide Service: Competitive suppliers must be licensed by the PUC to provide service to Pennsylvania customers.423 As of February 2006, the Duquesne Light territory had 4 alternative suppliers serving residential customers and 20 serving C&I customers. In the PECO territory, 6 alternative suppliers were available for residential customers and 28 for C&I customers. Outside of these two territories, residential customers only have available premium priced green generation products while C&I customers had several alternative suppliers offering service.

Pricing Trends: Table 24 displays average retail prices in Pennsylvania by customer class from 1988 to 2004. Residential, commercial, and industrial retail prices have fluctuated within a narrow range since 1991.

Price Changes for POLR Service: POLR rates for distribution service were capped at January 1, 1997 levels until July 1, 2001. Rates for generation, including transition charges, were capped at January 1, 1997 levels until January 1, 2006.424 In some distribution utility service areas, generation caps are in place until 2008-2011 because these distribution utilities will be collecting stranded costs over these longer periods. Many distribution utilities also extended distribution rate caps until 2003-2005. Pennsylvania did not require rate reductions, although several distribution utilities agreed to reduce rates in the first year of retail choice. These reductions were to be lowered and phased out over a two to three year period.425

Table 24. Pennsylvania Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2000	2003	2004
Residential	8.7	8.9	9.2	9.6	9.7	9.6	9.6	9.7	9.7	9.9	9.9	9.2	9.1	9.7	9.7	9.6	9.6
Commercial	7.5	7.8	8.1	8.3	8.5	8.3	8.3	8.3	8.3	8.4	8.3	7.9	6.3	8.6	8.5	8.1	8.5
Industrial	5.5	5.8	6.0	6.3	6.2	6.0	5.9	5.9	5.9	5.9	5.6	5.2	4.3	5.8	5.8	6.1	5.9
All Sectors	7.1	7.4	7.7	8.0	8.0	7.9	7.9	7.9	8.0	8.0	7.9	7.4	6.6	8.0	8.1	8.0	8.0

Source: Energy Information Administration

Overall rate reductions, Table 25 for the first year ranged from 2.5 percent to 8 percent for the major utilities operating in Pennsylvania:426

Table 25. First Year Rate Reductions by Distribution Utility

Distribution Utility	First Year Rate Reductions
APS	2.5%
MetEd	2.5%
PECO	8.0%
Penelec	3.0%

PPL	4.0%

Shopping credit rates are the rates that a customer pays for generation if he receives generation service from the utility rather than from a competitive supplier. Shopping credit rates increased over time, but fuel cost increases have been greater and the base rates are not adjusted under the Pennsylvania settlements with distribution utilities. This has resulted in the declining market shares for alternative suppliers and the exit of alternative suppliers.

POLR Service Provider: The distribution company provides POLR service for customers who do not choose a competitive supplier, for those who are unable to obtain service from a competitive supplier, or for customers whose suppliers do not deliver service. Distribution utilities must offer standard offer service as long as the distribution utility is collecting transition charges or until 100 percent of its customers have electric choice.427 In June 2000, the PUC issued a change in the provision of POLR service, in order to prevent "gaming" of the system by customers who were returning to their distribution utility. During the summer, market prices rose, while POLR rates remained stable, below market rates. This caused customers to be either returned to POLR service by their suppliers or to return themselves to POLR service. Many distribution utilities require customers to remain with the distribution utility for a 12-month period after switching back to the POLR provider.

Competitive POLR Service: Some distribution utilities have arranged for competitive bidding to supply the generation services portion of POLR service for customers who do not affirmatively choose an alternative supplier. This option is known as Competitive Default Service (CDS). The PUC approved additional consumer protections for the initial phase-in of CDS, including bidder qualifications, established creditworthiness, and bond limits. The PUC also reviewed the CDS annually to ensure that it is still benefited consumers.428 The largest CDS effort took place in the PECO territory. PECO awarded a contract for 20 percent of its POLR service customers to The New Power Company. Additionally, 50,000 PECO customers were assigned to Green Mountain Energy, Inc. PECO customers assigned to the CDS provider received a two-percent discount on the shopping credit (the capped generation service rate). The CDS provider also provided no less than two percent of its supply from renewable resources and increased the use of renewable resources by one-half of a percent annually.429 Due to concerns that POLR prices were insufficient to cover procurement costs, the CDS suppliers withdrew from this service. No alternative suppliers have been willing to supply on these terms at present. On December 10, 2005, the PUC decided to reopen POLR service issues for comment in preparation for the end of the transition period in distribution areas in addition to Duquesne.430

Recovery of Stranded Costs/Transition Costs: Stranded costs have been administratively determined by the PUC on a case-by-case basis. Utilities were not required to establish market-based valuation by selling generation assets. Stranded costs are fully recoverable through a non-bypassable charge to all consumers, collectible for up to nine years, unless the PUC orders an alternative payment period.431 Table 26 shows each utility's allowable stranded costs recovery and the seven to 10 year recovery periods to collect there costs from customers.

Table 26. Transition/Stranded Costs:

Company	Allowable Stranded Cost Recovery	Length of Recovery
Allegheny Power	$670 million	10 years
Duquesne Light	$1,331 million	7 years
GPU Energy (Met Ed.)	$975 million	10 years
GPU Energy (Penelec)	$858 million	8 years
PECO	$5,024 million	8 ½ years
Pennsylvania Power and Light	$2,864 million	9 years
Pennsylvania Power Company	$234 million	9 years
UGI Utilities	$32.5 million	
West Penn Power Company	$524 million	7 years

Source: Company Restructuring Orders and Tables

Switching Restrictions and Minimum Stay Requirements: Customers can switch suppliers at any time, although they are advised to check their supply agreement for any penalties which may apply for early termination of a supply contract. If a customer leaves POLR service and then returns, some POLR service providers require a minimum stay of 12 months.432

Switching Activity: At this point in time, retail switching activities are largely limited to the Duquesne Light distribution territory and to a lesser degree the PECO territory, as shown in Table 27.

Table 27. Pennsylvania Retail Customers and Load Supplied by Alternative Providers as of January 1, 2006 % of Customers and (% of Load)				
Firm and Load in MWh	Residential	Small C&I	Large C&I	Total
Allegheny Power	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)	0.0% (0.0%)
Duquesne Light	19.7% (18.5%)	20.3% (52.3%)	43.4% (83.6%)	19.8% (48.0%)
MetEd/Penelec	0.0% (0.0%)	0.0% (0.0%)	(0.1%) (5.6%)	0.0% (1.6%)
PECO	0.9% (1.0%)	23.8% (13.2%)	2.0% (1.2%)	3.2% (4.9%)
PennPower	0.0% (0.0%)	0.0 (0.0%)	0.0 (0.0%)	0.0 (0.0%)
PPL	0.0 (0.0%)	0.2 (0.7%)	0.3 (0.3%)	0.1 (0.3%)
UGI	0.0 (0.0%)	0.0 (0.0%)	0.0 (0.0%)	0.0 (0.0%)
Source: Pennsylvania Office of the Consumer Advocate				

The first quarter aggregate switching statistics for the utility distribution territories in Pennsylvania from 2000 to 2006 appear in Table 28. Load served by alternative suppliers has decreased since 2000 with the exception of an increase in 2004. Alternative suppliers served a declining number of customers from 2001 to the present (with the exception of 2004).

Table 28. Pennsylvania Retail Aggregate Customer Migration Statistics, 1999-2006 % of Customers and (% of Load) Served by Alternative Suppliers							
Year	2000	2001	2002	2003	2004	Oct. 2005	2006
Resident.	~7.8% (~7.6%)	~9.2% (~8.6%)	~10.3% (~9.1%)	~4.9% (~4.7%)	~8.2% (~7.9%)	2.9% (2.7%)	~2.3% (~2.1%)
C&I	~17.6% (~41.9%	~16.9% (~32.6%)	~3.7% (~7.8%)	~4.8% (~12.4%)	~13.5% (~13.9%)	9.6% (15.5%)	~8.9% (~14.5%)
Note: Keystone Connection (Autumn 2005) provides the percentage of customers and load served by alternative suppliers as well as the total number of customers and load for residential customers and C&I customers separately for October 2005. Calculations for the other years take the number of shoppers or shoppers' load reported in January of that year and divides them by the related Pennsylvania totals from Oct. 2005. The resulting calculations are approximations because the total number of customers and the total load in the state may have changed from year to year. *Source*: Pennsylvania Office of the Consumer Advocate							

Public Benefits Programs: Table 29 identifies the Pennsylvania public benefit programs.

Table 29. Pennsylvania Public Benefits Programs

In Dec., 1995, a restructuring law was signed with retail access to be phased-in over 2 yrs starting in Jan99. The restructuring law resulted in PUC-approved restructuring settlement agreements for each electric company. Each settlement agreement created a system benefits fund for LI programs and a Sustainable Energy Fund (except for Duquesne).		Research & Development	Energy Efficiency	Low Income	Renewable Energy	Total	
	Million $	5.0		85.0	6.0	96.0	
	Mills/kWh	0.04		0.68	0.05	0.77	
	% revenue	0.05%		0.85%	0.06%	0.96%	
	Admin.	SEF	Utility	SEF			

	Note: Administrators are Sustainable Energy Funds in each area of the state. *Source*: American Council for an Energy-Efficient Economy, Summary Table of Public Benefit Programs and Electric Utility Restructuring (December 2005) *available a*t http://www.aceee.org/briefs/mktabl.htm.	

Separation of Generation and Transmission: Generation must be separated from transmission and distribution, but distribution utilities are not required to divest facilities or reorganize corporate structure.433 However, several utilities voluntarily divested generation assets either to independent companies or to unregulated affiliates.

State RTO Involvement: The restructuring legislation directs the PUC to encourage interstate power pools to enhance competition and to complement restructuring. Much of Pennsylvania belongs to the PJM RTO. In order to meet electric load in the PJM region, PJM coordinates with member companies and uses bilateral contracts and the spot market to secure power.434 In March 2001, Allegheny Power and PJM filed with FERC a request to expand PJM by forming PJM-West.435

Generation Capability:436 Prior to the restructuring legislation, utilities in Pennsylvania operated 92.3 percent of generation capability in the state. By 2002, that figure dropped to 12.3 percent, despite the lack of a requirement for generation divestitures or transfers. The difference reflected voluntary divestitures to independent generators and transfers of generation to affiliates as well as expansion and entry of independent power producers. Between 1997 and 2002, generation capability in the state increase from 36,650 MWs to 39,783 MWs. Most of increase consisted of dual fueled generation.

Use of Customer Information: A customer can restrict the disclosure of his telephone number and his historical billing data. A distribution utility or supplier who intends to supply a third-party with this information must provide a customer with the means of restricting the release of this information, either through a signed form, orally, or electronically.437 Customer information cannot be given preferentially by a distribution utility to its affiliate.438 During the initial phase -in period of electric restructuring, a customer's name, address, telephone number, rate class, account number and load data were given to competitive suppliers as a result of the customer's enrollment into the electric choice program. The customer had the option of restricting the release of his telephone number and load data to suppliers. After this initial phase-in period, to assure that customers retain the ability to restrict disclosure of certain information to suppliers, the PUC directed distribution utilities to send forms to customers to give them the opportunity to restrict the release of load data, or of all information (name, address, rate class, and account number). Telephone numbers would not be released to suppliers under any circumstances.439

Standardized Labeling:440 The Pennsylvania Public Utility Commission (PUC) issued final rules in April 1998 requiring retail electricity suppliers to "respond to reasonable requests made by consumers for information concerning generation energy sources." Suppliers must respond to such requests "by informing consumers that this information is included in the annual licensing report and that this report exists at the Commission." Requests for information on energy efficiency must be handled in a similar manner. Suppliers must verify fuel mix data through an independent auditor and submit this information in an annual report to the Commission. Suppliers that market electricity as "having special characteristics" such as being environmentally friendly, must have information available to substantiate their claims.

Renewable Energy: Pennsylvania enacted a renewable portfolio standard through Act 213 in December 2004. The standard includes a gradual increase in generation from renewables to 18 percent over 15 years. Qualified renewables are divided into two groups: traditional (solar, wind, hydro, geothermal, biomass, and coal-mine methane) and other (waste coal, distributed generation, demand-side management, large-scale hydro, municipal waste, wood processing waste, and integrated combined coal gasification). Separate standards are set for the two groups– -8 percent and 10 percent respectively.

Texas: Overview of Retail Competition Plan and Market Response

Administrator and Start Date: The Texas restructuring bill was signed June 18, 1999. The Public Utility Commission of Texas (PUC) administers the transition to retail competition, which began with a pilot program on June 1, 2001. Retail competition for all customer classes within ERCOT began January 1, 2002.441 Competition is not open as yet in areas outside of ERCOT because the PUC is not convinced that retail competition is feasible without a regional transmission organization in these areas.442

Services Open to Competition: Generation and billing (retail sales). Competitive metering for certain commercial and industrial customers began January 1, 2004.

Consumer Options: Customers within ERCOT have the option of choosing a competitive supplier, choosing an aggregator, and, in the case of residential and small commercial customers, choosing POLR service (termed "price to beat" default service).

Alternative Suppliers Licensed to Provide Service: In order to be licensed to provide service in Texas, competitive suppliers must meet financial creditworthiness and technical standards.443 There are numerous suppliers marketing to all classes of customers in Texas that are open for retail customer choice. In addition to the Texas POLR default service offer, there are several alternative suppliers actively serving retail residential customers in each distribution territory. The figure below is from the "August 2005 Report Card on Retail Competition"444 showing the number of alternative suppliers available to residential customers, the number of products offered by these suppliers, and the number of alternative "green" offers for residential customers in the major distribution territories within ERCOT.

TDSP	# of REPs Serving Residential Customers	# of Residential Products (Incl. PTB)	# of Renewable Products
TXU ED	13	20	5
Center Point	14	21	6
AEP Texas Central (CPL	13	17	5
TNMP	11	16	6
AEP Texas North (WTU)	10	12	3

Pricing Trends: Retail price averages in Texas have wavered over time with peaks occurring in 1994 and 2001, as shown in Table 30. Prices increased in 2003 and 2004 after declining in 2002.

Price Changes for POLR (Default) Service: Distribution utility rates were frozen from September 1, 1999, levels until January 1, 2002.[445] On January 1, 2002, rates for residential and small commercial customers were reduced approximately 6 percent from January 1, 1999, levels. The January 1, 2002, reduced rate is called the "price to beat."[446] It is subject to adjustment twice per year, to reflect changes in fuel costs. Because Texas primarily relies on natural gas fueled generation, the increases in natural gas prices have resulted in substantial increases in the "price to beat." POLR (default) service is available from the distribution utility's competitive retail affiliate until January 1, 2007. Prior to January 1, 2005, affiliates of distribution utilities could offer services other than POLR (default) service only if at least 40 percent of residential or small commercial customers chose a competitive supplier not affiliated with the local distribution utility. Since January 1, 2005, affiliates of distribution utilities have been allowed to offer any service they wish in addition to POLR (default) service.

Table 30. Texas Average Annual Price per KWh by Sector
(nominal cents)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2030	2004
Residential	6.9	7.0	7.2	7.6	7.7	8.0	8.1	7.7	7.8	7.8	7.7	7.5	7.9	8.9	8.1	9.2	9.7
Commercial	6.0	6.1	6.2	6.6	6.7	6.9	7.0	6.6	6.7	6.7	6.6	6.5	6.8	7.7	7.0	7.8	7.9
Industrial	4.1	4.1	4.0	4.1	4.2	4.3	4.3	4.0	4.0	3.9	3.9	4.0	4.5	5.3	4.7	5.3	5.9
All Sectors	5.6	5.7	5.8	6.1	6.2	6.4	6.4	6.1	6.2	6.1	6.1	6.0	6.5	7.6	6.6	7.5	8.0

Source: Energy Information Administration

The Texas PUC provides information on the price to beat and on alternative supplier's prices in each distribution territory. The information includes a comparison of each alternative supplier's price to the POLR (default) price for different levels of consumption. Table 31 shows the POLR (default) price and the range of offers from alternative suppliers for a consumer using 1000 kWh or 2000 kWh. The premium price is generally for a 100 percent wind generation product.

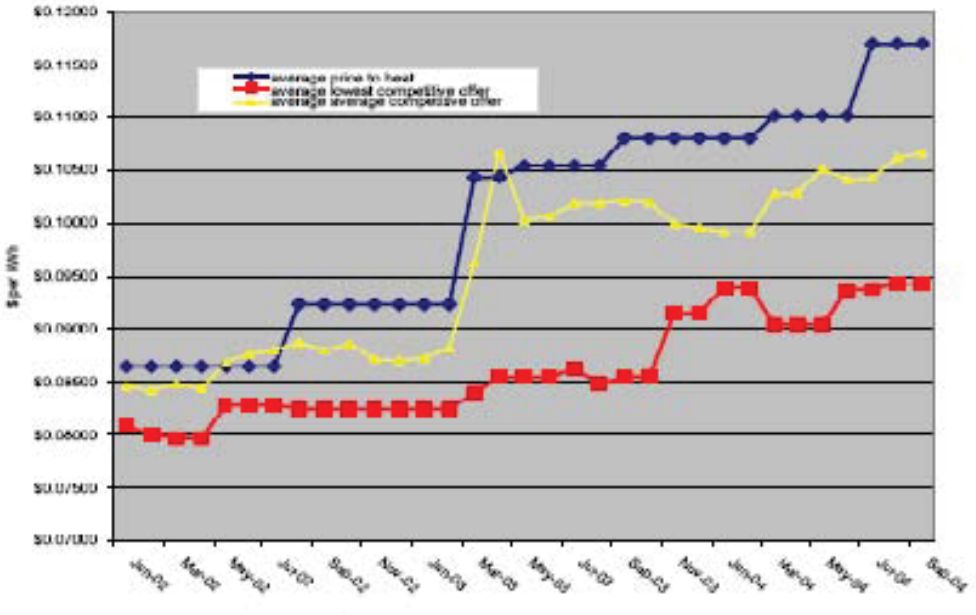
Table 31. Texas POLR Service Price Compared to Alternative Suppliers 1000 kWh Consumption (January 2006)

	POLR Price (cents/kWh) For 1000 kWh	Lowest Alternative % discount	Highest Alternative % premium	POLR Price (cents/kWh) For 2000 kWh	Lowest Alternative % discount	Highest Alternative % premium
West Texas Utilities	19.06	19%	4%	18.95		
TXU-SESCO	14.62	8%	10%	13.97	11%	8%
Texas-NM Power	14.48	8%	10%	14.77	11%	6%
Central Power	17.67	18%	6%	17.48	20%	6%
Centerpoint Energy	16.04	15%	9%	15.89	17%	8%

Source: Texas PUC, Retail Electric Service Rate Comparisons (January 2006 bill comparison)

The PUC also has produced an aggregate comparison between the price to beat, the average offer of alternative suppliers, and the lowest offer of alternative suppliers. The figure below, from the PUC report to the 79th Texas Legislature, illustrates these comparisons.[447]

Figure 2: Average Residential Price to Beat vs. Average Competitive Offer vs. Average Lowest Competitive Offer, 2002 - 2004



Source: Average Annual Rate Comparison for Residential Electric Service, Entergy Gulf States, Inc. Tariff Rates, PUC Electric Division

POLR (Default) Service Provider: Until December 31, 2001, POLR (default) service was provided by the distribution utility. When competition for all customers began in 2002, POLR (default) customers were transferred to the retail affiliate of the distribution utility. The affiliates and independent retail suppliers are termed "retail electric providers" (REPs). Prices for POLR (default) service were fixed at the "price to beat" plus fuel adjustments until January 1, 2007. Affiliated retail electric providers were allowed to offer only POLR (default) service (at the "price to beat") unless alternative suppliers attained a market share of 40 percent of residential or small commercial customers. In 2004, all but one of the affiliated retail electric providers within ERCOT (the separate transmission interconnection system in Texas) were granted permission to offer additional products.448 Starting in 2005, all affiliated retail electric suppliers were allowed to offer other products in addition to POLR (default) services to all residential and small commercial customers.

Analysis by the Texas PUC concluded that POLR (default) service pricing has been below the pricing that would have prevailed under the prior cost-of-service regulatory regime. The tables below summarize the estimated regulated rates, the average of the five lowest competitive prices, the best competitive price, and the Price to Beat for the CenterPoint and TXU Service areas.

CenterPoint Energy Services Area	**2002**	**2003**	**2004**	**2005**
Estimated Regulated Price	11.1	12.0	12.7	13.9
Average of Lowest 5 Competetive Prices (actual)	8.2	9.0	9.8	11.4
Percentage Difference from Estimated Regulated price	26%	25%	23%	18%
Best Competetive Price	8.0	8.5	9.4	10.6
Percentage Difference from Estimated Regulated price	28%	29%	26%	24%
Reliant Energy Price to Beat	8.8	10.3	11.1	12.9

TXU Electric Delivery Service Area	2002	2003	2004	2005
Estimated Regulated Price	9.4	10.5	10.7	12.1
Average of Lowest 5 Competetive Prices (actual)	8.0	8.7	9.1	10.7
Percentage Difference from Estimated Regulated price	15%	17%	15%	12%
Best Competetive Price	7.8	8.4	8.7	10.1
Percentage Difference from Estimated Regulated price	17%	20%	19%	17%
TXU Energy Price to Beat	8.4	9.6	10.5	11.9

Source: PUC legislative report # 32198, *Electricity Pricing in Competitive Retail Markets in Texas* (March 3, 2006), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/32198_7_504891.PDF

POLR Service Provider for other than Default Service: POLR service customers have been divided into three classes: residential, small non-residential, and large non-residential. POLR service providers supply customers in any or all of the three classes who either request POLR service or are assigned to POLR service because they are not receiving service from a REP, for any reason. The rates for this POLR service are established first through a competitive bidding process and, if no qualified bids are obtained, are then allocated to existing suppliers via a lottery process. A bidder to supply POLR service may bid for any customer class, or for more than one class. An affiliate of a distribution utility cannot bid to be the POLR service supplier in its own service territory during the period while the price to beat is in effect.449

The Texas PUC is currently reviewing its POLR service rules.450

Recovery of Stranded Costs/Transition Costs: Distribution utilities can recover all of their net non-mitigated stranded costs through a transition charge. The PUC determines the amount of stranded costs eligible for recovery, which includes uneconomic generation related assets, and purchased power contracts.

Switching Restrictions and Minimum Stay Requirements Process: A customer can switch suppliers at any time subject to the terms of his contract with the competitive supplier. There are no switching fees unless a customer requests a special meter reading.451

Switching Activity: Retail customers have been migrating to alternative suppliers in all of the distribution territories with the highest switching rates in the AEP Central and North areas, as shown in Table 32.

Table 32: Retail Customers and Load Supplied by Alternative Providers as of January 1, 2006
% of Customers and (% of Load)

Firm and Load in MWh	Residential	Small C&I	Total
TXU	26.3% (26.2%)	30.7% (64.7%)	26.4% (50.4%)
Centerpoint	26.8% (27.3%)	34.5% (60.7%)	27.5% (47.8%)
AEP Texas Central	27.0% (31.3%)	45.8% (81.4%)	29.4% (63.8%)
AEP Texas North	33.2% (39.3%)	34.0% (78.7%)	31.9% (64.9%)
Texas NM Power	25.8% (29.9%)	35.0% (66.8%)	26.4% (56.0%)

Note: Texas does not provide separate distribution area statistics for large C&I customers.
Source: Texas Public Utility Commission

Retail customers have switched to alternative suppliers in increasing numbers and with an increasing proportion of load, as shown in Table 33.

Table 33. Texas Retail Aggregate Customer Migration Statistics, 2002-2005 % of Customers and (% of Load)				
Year	2002	2003	2004	2005
Residential	7.4% (7.3%)	14.1% (15.0%)	19.9% (21.0%)	26.7% (27.5%)
Small C&I	11.5% (33.0%)	19.0% (44.1%)	26.7% (55.5%)	34.2% (65.1%)
Large C&I	19% (54%)	35% (60%)	42% (69%	53% (68%)

Note: The large C&I figures are for December 2002, December 2003, September 2004, and June 2005. The Residential and Small C&I figures are all from January except the 2005 figure which is from September.
Source: Texas Public Utility Commission

Public Benefits Programs: The Texas public benefit programs are presented in Table 34.

Table 34. Texas Public Benefits Programs							
Restructuring Law signed in June 1999. Requires utilities to administer EE programs to achieve saving equivalent to 10% of annual load growth by 2004. PUC has established rates and procedures. Est. total annual cost is %80 million in 2003. Also a 10% LI rate discount & small SBC for customer educ. and LI assistance. Total LI is set at statutory maximum of .65 mills/kWh.[452]		Research & Development	Energy Efficiency	Low Income	Renewable Energy	Total
	Million $		80.0	166.2	246.2	
	Mills/kWh		0.28	0.58	0.83	
	% revenue		0.43%	0.89%	1.28%	
	Admin.		Utility	PUCT		
	Source: American Council for an Energy-Efficient Economy, *Summary Table of Public Benefit Programs and Electric Utility Restructuring* (December 2005), *available at* http://www.aceee.org/briefs/mktabl.htm.					

Separation of Generation and Transmission: By January 1, 2002, utilities were required to separate their

business activities into three units: a wholesale electric power generation company, a retail electricity company (REP), and a transmission and distribution company. This separation could take place either through the sale of assets to a third party, or by the creation of separate non-affiliated companies or separate affiliated companies owned by a common holding company.453 After the beginning of retail competition, a distribution utility may not sell electricity or participate in the market for electricity except to procure electricity to serve its own needs.454 Wholesale electric power generation companies that are affiliated with a distribution utility are required to auction off 15 percent of their installed generation capacity,455 and no wholesale generator can own more than 20 percent of the installed capacity that can be sold in a region.456 Before 2005, REP affiliates of transmission and distribution utilities could not offer competitive rates to residential and small commercial customers in the territory of the distribution utility, except as the POLR (default) service provider, until 40 percent of the residential or small business load in the territory is buying electricity from competitive suppliers.457 The transmission system for most of Texas is operated independently from the owners of the transmission assets by ERCOT under PUC supervision.

State RTO Involvement: Most of Texas (approximately 85 percent) is in the ERCOT interconnection.458 ERCOT began operations as an independent system operator in 1996. It is regulated by the Texas PUC rather than by FERC.459 Transmission operations of distribution utilities outside of ERCOT are regulated by FERC.

Generation Capability:460 Prior to the restructuring legislation, utilities operated 88.3 percent of generation capability in Texas. By 2002, that figure dropped to 41.2 percent, as divestitures, transfers to affiliates, and entry and expansion of independent generators took place. Between 1997 and 2002, generation capability in the state increased from 73,454 MWs to 94,488 MWs, an increase of 28.6 percent . Much of the growth in generation was fueled by natural gas. The share of generation capability fueled by natural gas increased from 21.4 percent to 38.5 percent . Natural gas fueled generation more than doubled during the period.

Use of Customer Information: When the retail market opened to competition, distribution utilities were required to include customer name, address, and usage information on a list of eligible customers given to competitive suppliers.461

Standardized Labeling:462 “On December 7, 2000, the Texas Public Utility Commission (PUC) issued rules requiring retail electric providers to use an Electricity Facts Label to disclose information twice a year on fuel mix and environmental impacts to their retail and small residential customers, in accordance with the state's restructuring law. The label must also be included in promotional material soliciting new customers. Fuel mix data must be compared to the state average, with energy generated from renewable resources to be listed under a single category. Emissions of carbon dioxide, sulfur dioxide, nitrogen oxides, and particulates, as well as the amount of nuclear waste generated, must be presented relative to the statewide average. According to rules adopted in August 2001, the Commission is developing a "generator scorecard" database with data on fuel mix and environmental impacts by generator to facilitate implementation of the disclosure requirements. The label is to be updated each year. Retail providers can also opt to purchase and retire "renewable energy credits" from generators to meet their disclosure requirements. Providers can project their fuel mix and emissions data for new products or products offered during the first year of competition. Any product marketed as "renewable" must include the renewable fuel mix percentage, unless it is supplied exclusively from renewable sources. Products marketed as "green" may contain some natural gas fuels along with renewable fuels if it can be shown that the natural gas was produced in Texas.”463

Renewable Energy Portfolio Standard: Texas adopted a renewable energy portfolio standard on February 24, 2004. The standard establishes yearly new generation from renewables levels through 2019, rather than percentage requirements. The levels are 850 MW in 2004 and 2005, 1400 MW in 2006 and 2007, and 2000 MW in 2009 through 2019. In 2005, the RPS requirements were expanded to a total of 5,000 MW by 2015. Additional non-mandatory targets for renewables were established at the same time, along with a process that will allow the PUC to prioritize transmission development to facilitate delivery of energy from renewable sources.464

The original electric restructuring bill included many environmental protections, including that 50 percent of new generating capacity must come from natural gas, and that a percentage of electricity sold in Texas must come from renewable resources. The bill requires 50 percent reductions in nitrous oxide emissions and 25 percent reduction in sulfur dioxide emissions from power plants that were grandfathered when air permits were introduced under the Federal Clean Air Act. There reductions must be achieved by 2003 by retrofitting or shutting down the grandfathered units. In addition, distribution utilities that upgrade older generation facilities to meet emissions standards may recover the costs from retrofitting as stranded costs.465 The PUC has adopted a renewable energy credit trading program to encourage cost-effective new renewable generation facilities.

APPENDIX E
ANALYSIS OF CONTRACT LENGTH AND PRICE TERMS
COMPARISON OF NYISO, MISO AND SERC MARKETS USING 2005 EQR DATA

This analysis compares the short-term versus long-term sales volumes and prices in three regions using reported sales information from Electric Quarterly Reports (EQR), which are filed electronically on a quarterly basis at FERC by all holders of market-based-rate authorizations (MBRA). EQR data is available to the public on FERC’s website. However, EQR data include only jurisdictional wholesale physical and booked out sales. The “physical” sales are power sales by MBRA holders physically delivered during the quarter. “Booked out” sales are power quantities that are sold, then repurchased at a later date, effectively undoing the prior sale. Depending on changes in market prices in the interim, the repurchase may produce profits or limit losses for the seller.

EQR limitations are best explained with the help of the diagram below, which is conceptual, not scaled, where the sales reported to EQR represent only a subset of all market transactions. Retail sales may be reportable to state commissions. Sales by non-jurisdictional entities may appear in some EIA reports.

Financial transactions done on NYMEX are reportable to CFTC, but other financial transactions do not need to be reported. Sales reportable to EQR could have been transacted bilaterally, on RTO/ISO's, through ICE or through voice brokers, and credit cleared through ICE-LCH or NYMEX-ClearPort. Other transaction venues may develop. There is no complete aggregated market picture. Analysts can only try to make inferences from the partial market picture.

Use of EQR data must recognize that EQR captures only a subset of all market transactions

Power Sold in Region X*
- Retail Sales to Native Load
- Wholesale Sales by Non-Jurisdictional Entities
- "Financial" Transactions

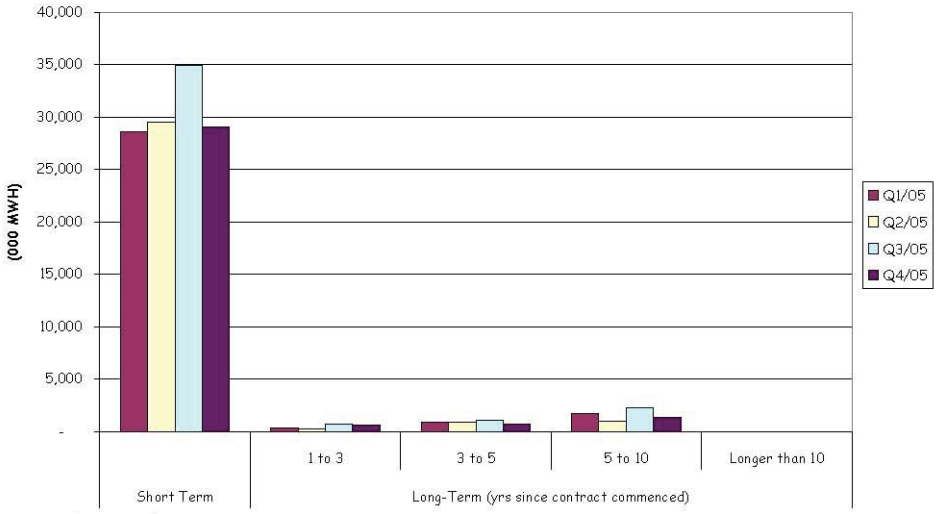
= Sales Reported in the EQR



Though limited, this comparative analysis is informative. The Task Force selected NYISO, MISO and SERC as representative markets for the following reasons. NYISO provides a consistent data set for sales in its established, single-state organized market. MISO provides a consistent data set for sales in its new, multi-state organized part of the market (sales in Q1/05 occurred before the organized market started). SERC is an example of a purely bilateral wholesale market with relatively few participants (which increases the likelihood of consistent dataset).

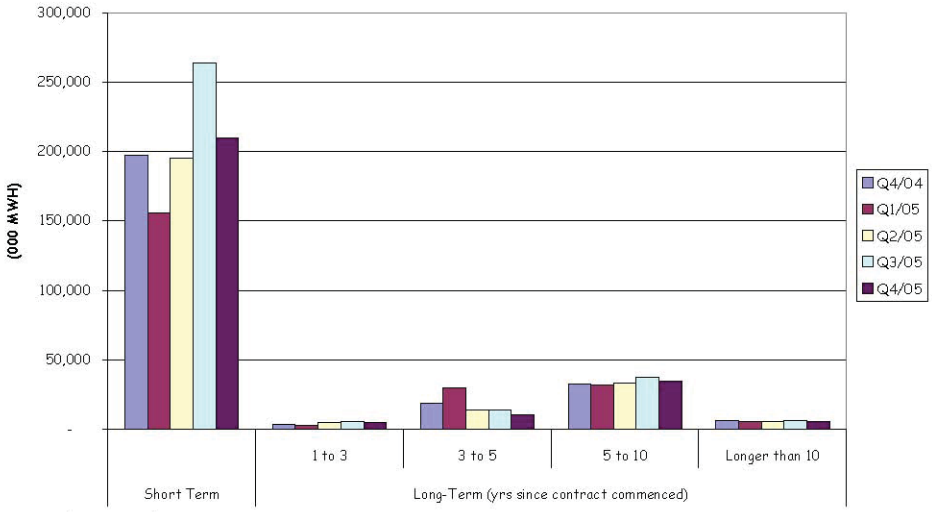
The three graphs below show transaction volumes by vintage for each representative region.

NYISO
Regional Energy Sales by Contract Term

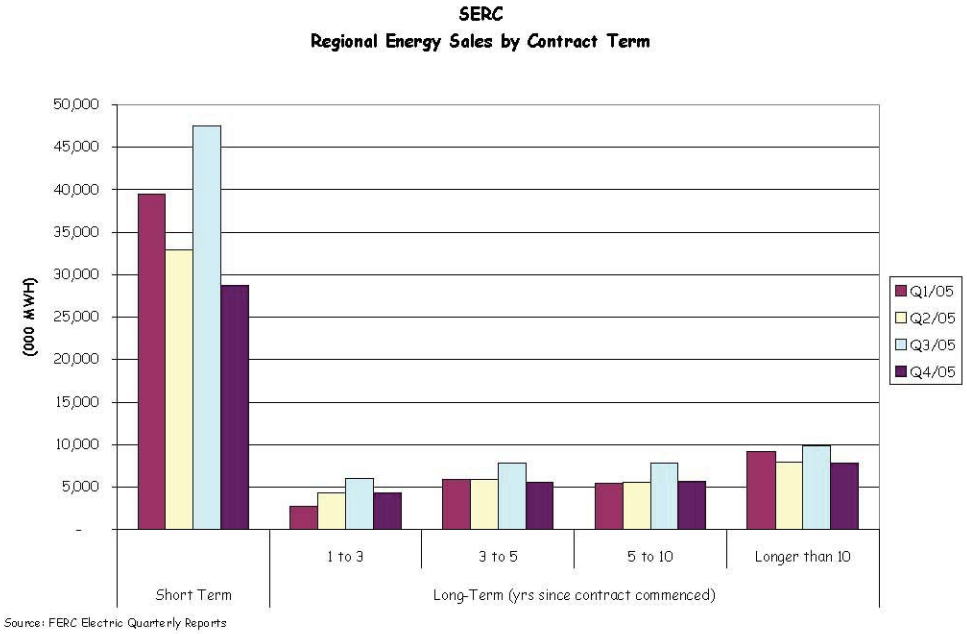


Source: FERC Electric Quarterly Reports

MISO
Regional Energy Sales by Contract Term



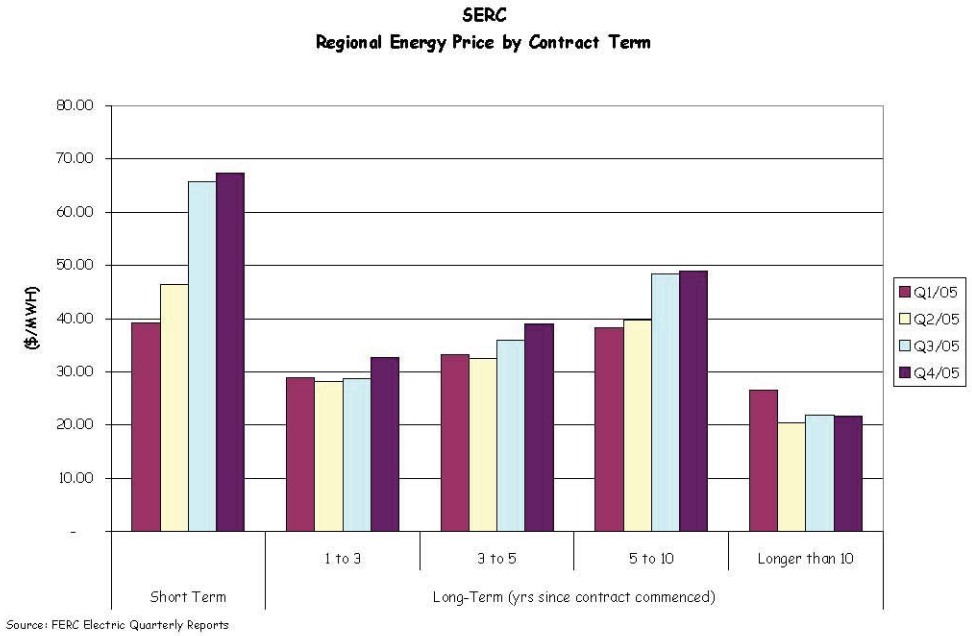
Source: FERC Electric Quarterly Reports



As noted earlier, EQR consists of sales transactions for power delivered during each quarter. Short term transactions are defined as transactions under contracts of one year or less or sales into organized markets, such transactions include bilateral sales as well as sales to NYISO and MISO. Long-term transactions occur under contracts lasting more than a year. For example, a contract initiated four years ago and still delivering power would be grouped under the 3 to 5 year vintage. A contract initiated 11 years ago would be grouped under the Longer than 10 years vintage. While there is a field in the EQR form for termination date, it is often not relevant in this context because many contracts are either evergreen, effective until cancelled or master agreements (with no time limits) with attachments for term-limited transactions. Major observations on the reported volumes are:

- a higher percentage of sales were short term in organized markets (91 percent in NYISO, 77 percent in MISO, 60 percent in SERC);
- relatively few contracts were older than 10 years (0 percent in NYISO, 2 percent in MISO, 16 percent in SERC);
- quarterly variation in quantities occurred primarily in sales under short term contracts.

Organized exchange markets like NYISO and MISO are designed to produce efficient and reliable daily or real-time spot market prices, with heavy reliance on bilateral financial and physical transactions to fill longer term needs between parties who would then settle these bilateral transactions using organized market spot prices as "index price." The high visibility of the spot markets, along with non-reportable financial transactions would naturally lead to a high percentage of short term transactions using EQR numbers in organized markets such as NYISO and MISO. The trend towards capacity or reliability pricing products in organized markets (e.g., RPM in PJM) also suggests that that organized markets may not rely on short term markets alone to give long-term price signal for investment.



APPENDIX F

Some of these sources are older and contain slightly outdated references – but their theoretical arguments remain applicable to current debates.

American Public Power Association, *Restructuring at the Crossroads, FERC Electric Policy Reconsidered*, (December 2004), *available at* http://www.appanet.org/files/PDFs/APPAWhitePaperRestructuringatCrossroads1204.pdf
Matthew Brown and Richard P. Sedano, *Electricity Transmission, A Primer*, National Council on Electricity Policy (June 2004), *available at* http://www.ncouncil.org/pdfs/primer.pdf

Center for the Study of Energy Markets (CSEM) at the University of California Energy Institute (UCEI) at UC Berkeley: http://www.ucei.berkeley.edu/pubs-csemwp.html
http://stoft.com/p/S2.html

Paul L. Joskow, *Markets for Power in the United States: An Interim Assessment*, ENERGY J. (forthcoming 2006), *available at* http://stoft.com/metaPage/lib/Joskow-2006-power-market-assessment.pdf

Harvard Electricity Policy Group

APPENDIX G
CREDIT RATINGS* OF MAJOR AMERICAN ELECTRIC GENERATION COMPANIES** AS OF JULY 24, 2006

Name	Credit Rating	Sales ($bil)	Profits ($bil)	Assets ($bil)	Market Value ($bil)
AES Corp.	B+	10.64	0.56	29.65	11.33
Allegheny Energy Inc	BB+	3.04	0.07	8.56	5.82
Alliant Energy Corp.	no rating	3.28	-0.01	7.78	3.87
Ameren Corp.	A-	6.78	0.63	18.16	10.33
American Electric Power Co., Inc.	BBB	11.9	0.81	36.17	14.36
Atmos Energy Corp.	BBB	5.89	0.15	6.62	2.13
CALPINE Corp.	D	9.23	-0.24	27.09	0.13
CenterPoint Energy, Inc.	BBB-	9.72	0.22	17.12	4.02
Cinergy Corp.	BBB	5.41	0.49	17.2	8.75
CMS Energy Corp.	B+	6.41	-0.08	16.02	3.1
Consolidated Edison	A	11.69	0.73	24.85	11.26
Constellation Energy	BBB+	17.13	0.63	21.47	10.48
Dominion Resources Inc	BBB+	18.04	1.04	52.58	25.59
DTE Energy Co.	BBB	9.02	0.54	23.36	7.7
Duke Energy Corp.	BBB	16.75	1.83	54.59	26.3
Edison International	BB	11.2	1.24	35.51	14.45
Energy East Corp.	BBB	5.3	0.26	11.45	3.7
Entergy-Koch	BBB-	10.11	0.92	29.97	15.04
Exelon Corp.	BBB+	15.36	0.97	42.39	38.06
FirstEnergy Corp.	BBB-	11.99	0.89	31.84	16.85
FPL Group, Inc.	A	11.85	0.89	33	16.56
KeySpan Corp.	A-	7.66	0.4	13.81	7.11
Kinder Morgan, Inc.	BBB	1.59	0.55	17.38	11.34
MDU Resources Group, Inc.	A-	3.46	0.28	4.42	4.23
Mirant Group	B+	3.7	NA	12.88	7.38
NiSource Inc.	BBB	7.89	0.31	17.96	5.6
Northeast Utilities	BBB	7.4	-0.25	12.57	3
NRG Energy Inc	B	2.36	0.11	7.8	3.76
NStar	A-	3.24	0.2	7.65	3.14
OGE Energy	A	6.98	0.17	5.72	2.6
Pepco Holdings, Inc.	BBB	7.73	0.32	14.22	4.5
Pacific Gas & Electric	BBB	11.7	0.92	34.07	13.02
Pinnacle West Capital Corp.	BBB-	2.99	0.18	12.07	4.05
PPL Corp.	BBB	6.22	0.69	18.04	12.09
Progress Energy Inc	BBB-	10.11	0.7	27.07	11.14
Public Service Enterprise Group, Inc.	BBB	12.43	0.68	29.82	17.43
Reliant Energy	B	9.73	-0.35	13.54	3.07
SCANA Corp.	A-	4.78	0.33	9.32	4.65
Sempra Energy	A	11.74	0.92	29.21	12.29
Sierra Pacific Resources	B+	2.96	0.09	8.12	2.61
Southern Co.	A	13.55	1.59	39.88	25.24
TECO Energy, Inc.	BB+	3.01	0.27	7.17	3.55
TXU Corp.	BBB-	10.44	1.78	24.91	25.17
Williams Companies, Inc.	BB+	12.58	0.32	33.66	12.36
Wisconsin Energy Corp.	A-	3.82	0.31	10.46	4.78
Wisconsin Public Service	no rating	6.96	0.16	5.45	1.99

Resources					
Xcel Energy Inc.	BBB	9.63	0.51	21.65	7.49

*credit rating is the "Long Term Issuer Default Rating" from Fitch Ratings (www.fitchratings.com)

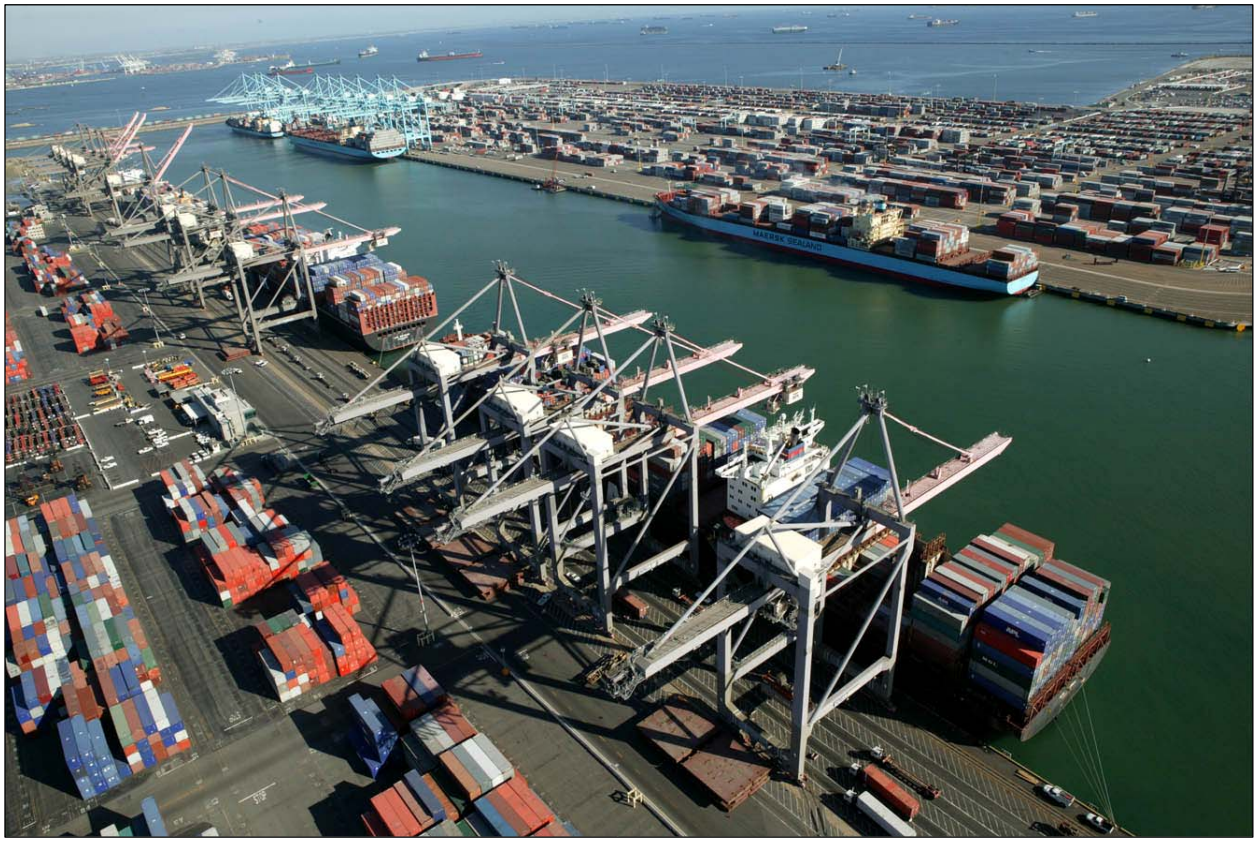
**list drawn from United States-based generation companies on Forbes list of the top 2000 global firms (http://www.forbes.com/2006/03/29/06f2k_worlds-largest-public-companies_land.html)

National Strategy

for the

Marine Transportation System:

A Framework for Action



By the

Committee on the Marine Transportation System

July 2008

12f-001073

National Strategy for the Marine Transportation System:

A Framework for Action

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Cover image: Aerial view in Los Angeles of Pier 300 / APL Container Terminal (foreground) and Pier 400 / APM Terminal (background). Photo courtesy Port of Los Angeles.

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

July 10, 2008

It gives me great pleasure, as Chair of the Committee on the Marine Transportation System, to announce publication of the *National Strategy for the Marine Transportation System: A Framework for Action*.

As one of the world's leading maritime and trading nations, the United States relies on an effective and efficient Marine Transportation System (MTS) to facilitate commerce and protect our national security. On December 17, 2004, President Bush directed a cabinet-level committee, the Committee on the Marine Transportation System (CMTS), to create a partnership of Federal agencies. Currently, 18 different Federal agencies serve on the CMTS. The President charged the CMTS with providing high-level leadership and improved coordination to promote the safety, security, efficiency, economic vitality, sound environmental integration, and reliability of the MTS for commercial, recreational, and national defense requirements.

The CMTS developed the *National Strategy for the Marine Transportation System: A Framework for Action* to serve as both a policy framework for the next five years and as a structure upon which to build an implementation plan for that policy. It presents the most pressing, current challenges facing marine transportation, and calls for coordinated Federal action in five priority areas: capacity, safety and security, environmental stewardship, resilience and reliability, and finance and economics.

To identify the priority areas and Federal actions needed, the CMTS actively sought perspectives and ideas from a diverse group of stakeholders. The *National Strategy* responds to issues raised by and incorporates recommendations from commercial, national defense, and recreational interests. This *Framework for Action* helps ensure that America's Marine Transportation System serves the needs of the Nation now, and will grow to meet the challenges projected for the future.

We have made great progress, but to achieve the goals set in the *National Strategy*, the CMTS is relying on you for support and leadership.

Mary E. Peters

12f-001075

Committee on the Marine Transportation System

Secretary of Transportation ……..…….……Mary E. Peters, Chair

Secretary of Agriculture ……...…….…….Ed Schafer

Secretary of Commerce ……..…….……...Carlos M. Gutierrez

Secretary of Defense ……...…….……..Robert M. Gates

Secretary of Energy ……..……..Samuel W. Bodman

Secretary of Homeland Security …….……...…… Michael Chertoff

Secretary of the Interior ……...…..…… Dirk Kempthorne

Attorney General …….……...Michael Mukasey

Secretary of Labor …….…….Elaine L. Chao

Secretary of State ……...…….……... Condoleezza Rice

Secretary of the Treasury …….…....…...… Henry M. Paulson, Jr.

Commander, U.S. Transportation Command
Joint Chiefs of Staff ……...……...…. Norton A. Schwartz, General, USAF

Administrator of the Environmental Protection Agency ... Stephen L. Johnson

Commissioner of the Federal Maritime Commission …… Rebecca Dye

Ex Officio:

Office of Management and Budget ……...…….… Jim Nussle

Council of Environmental Quality …….…… James L. Connaughton

Domestic Policy Council ……..…..... Karl Zinsmeister

Economic Policy Council …….……...….. Dr. Edward P. Lazear

Homeland Security Council …….……..Ken Wainstein

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PREFACE

"The United States Marine Transportation System will be a safe, secure, and globally integrated network that, in harmony with the environment, ensures a free-flowing, seamless, and reliable movement of people and commerce along its waterways, sea lanes, and intermodal connections."
(CMTS Coordinating Board, October 2006)

America's Marine Transportation System (MTS) moves people and goods through U.S. ports, utilizing a system of harbor channels and waterways to final delivery points or connections to highways, railways, and pipelines, and it is thriving. The MTS allows the worldwide distribution of our Nation's agricultural and manufactured products. The MTS also carries 43.5 percent by value and 77.6 percent by weight of all U.S. international trade.[1] The Department of Transportation (DOT) predicts that between 2010 and 2020 the value of freight carried by water will increase 43 percent domestically and 67 percent internationally.[2] In 2006, 27 million 20-foot equivalent units (TEUs) of containerized cargo (an international industry standard) were loaded and unloaded at U.S. ports.[3] If all of these containers were placed end to end, they would circle the globe four times.

America's MTS, which relies on unimpeded freedom of the seas throughout the world, is critical to our national economy and our national security.

The MTS is at a crossroad. While MTS trade is thriving, segments of the MTS are showing signs of strain, which will intensify as cargo and passenger traffic increases. Large containerized cargo ports, which are beginning to experience capacity problems, will be pressured to keep up with the growth in trade. The MTS physical infrastructure will experience increased strain and become prone to failures. The U.S. military's reliance on MTS ports to deliver equipment and supplies to defense forces abroad adds to the strain. Globalization and international trade, U.S. security commitments overseas, and treaty and Federal law requirements to protect human health and the marine environment pose critical planning challenges for the MTS in the areas of

[1] Bureau of Transportation Statistics, Pocket Guide to Transportation 2007, Tables 5-5 and 5-6.
[2] Federal Highway Administration Freight Analysis Framework, 2002.
[3] U.S. Water Transportation Statistical Snapshot (2007), Maritime Administration, US DOT.

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capacity, safety and security, environmental stewardship, resilience and reliability, and finance and economics.

To address these critical issues, the Committee on the Marine Transportation System (CMTS), composed of 18 Federal Cabinet Secretaries, Agency Administrators, and representatives from the Executive Office of the President, all with maritime jurisdictions, has ratified a *National Strategy for the Marine Transportation System: A Framework for Action (National Strategy)*. Through the *National Strategy*, the CMTS will communicate information about challenges that need to be addressed to improve the MTS and ensure that policies and actions of its Agencies are synchronized, coordinated with other policy facilitation structures such as the Committee on Ocean Policy, focused on the future, and targeted to the most critical issues. This *National Strategy* supports the President's U.S. Ocean Action Plan to improve the MTS portion of the Nation's precious ocean resources.

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EXECUTIVE SUMMARY

The National Strategy for the Marine Transportation System: A Framework for Action (*National Strategy*) was prepared by the Committee on the Marine Transportation System (CMTS), which is composed of 18 Federal Cabinet Secretaries, Agency Administrators, and representatives from the Executive Office of the President.[4] The *National Strategy* is the policy framework for the Marine Transportation System (MTS) for the next five years, with a view to addressing issues 20 years and more into the future. It presents the most pressing, current challenges to marine transportation, and calls for Federal action and leadership in five priority areas: capacity, safety and security, environmental stewardship, resilience and reliability, and finance and economics.

Capacity

The MTS consists of ocean, coastal, and inland waterways, ports, intermodal connections (connecting points for changes in modes of transportation), vessels, and commercial, military, and recreational users. DOT projects that by 2020 total freight volumes will increase by more than 50 percent and international container traffic will double from 1998 levels.[5] Growth in use of the MTS, particularly at containerized cargo ports, brings with it the demand for additional staging areas, expanded landside access, and logistics technologies. The development and increased use of flow-through models and technologies can improve productivity without expanded infrastructure, but to accommodate all projected growth, additional infrastructure would be needed. Inland and intracoastal waterway systems are generally viewed as reliable but face increasing operational and maintenance challenges as locks age, repairs become more extensive and expensive, and dredging becomes more expensive. Current financing mechanisms are not providing sufficient revenue to keep pace with construction, replacement, expansion, and rehabilitation projects, as the majority of the commercially active inland waterway locks and dams have been in place more than 50 years. Dockside cargo infrastructure and roadway improvements are needed, yet some ports are constrained by the lack of available land for expansion. Rail shipments to or from the ports can be delayed due to inadequate intermodal

[4] A full list of the 18 Departments and Agencies that have jurisdiction over the MTS is provided in Annex I.
[5] USDOT Freight Analysis Framework National Summary: 1998, 2010, 2020. fhwa.dot.gov/freight/freight_news/faf/talkingfreight_faf.htmFAF1

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connections or rail chokepoints far from marine terminals. Maintenance dredging and the costs of deepening a channel are significant infrastructure challenges in some waterways and ports. DOT predicts that between 2010 and 2020 the value of freight carried by water will increase by 43 percent domestically and 67 percent internationally.[6] Capacity expansion in key cargo ports is critical for economic growth. Even more than other parts of the Nation's transportation system, marine transportation is a joint private- and public-sector enterprise. The private sector owns and operates the vessels and most of the terminals; it is responsible for the commerce that flows through the system. The public sector provides much of the infrastructure at ports and on the waterways; it keeps the system functioning in support of commerce in a safe, secure, and environmentally sound manner.[7] Therefore, expansion of MTS capacity requires significant collaboration among Federal, State, and local governments, the formation of public-private partnerships, and efforts to improve the efficiency of the system. A comprehensive look at innovative approaches will be necessary because of the complexity and diversity of structure and ownership, both public and private. This comprehensive look must include the existing Inland Waterways and Harbor Maintenance Trust Funds, as well as existing fees and taxes.

To address capacity issues, improve the efficiency of the MTS, and reduce transportation congestion, the CMTS recommends the following eight actions:

- Work collaboratively to address Federal statutory, regulatory, and institutional requirements in order to improve MTS performance;
- Encourage the expansion of shipping on the Marine Highways, including the establishment of a pilot program to designate Marine Highway Corridors to relieve congestion on roadways;
- Propose economic incentives for private sector investment in MTS infrastructure and operational technologies to make the MTS more efficient for existing and future needs;
- Collaborate with State, local, and private entities to ensure environmental and National Environmental Policy Act (NEPA) compliance, and to plan for land use in and near ports;
- Share best practices and create incentives to encourage private sector interests and local governments to pursue initiatives for increased efficiency and environmental sustainability;

[6] Federal Highway Administration Freight Analysis Framework, 2002.
[7] Transportation Research Board, The Marine Transportation System and the Federal Role, Special Report 279, 2004.

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- Publish valid, reliable, and timely data on the MTS including cargo movements, capacity, and productivity;
- Facilitate standardized terminologies, interpretations, and flow-through models to foster increased productivity; and
- Develop performance measures to assess the productivity of the MTS and the risk of potential infrastructure failures to the MTS.

Safety and Security

The expected increase of commercial and recreational vessel traffic, continued ocean and inland water research from vessels, and the operation of U.S. military vessel traffic will place burdens on waterway and port safety and security services, and raise the risk of accidents. The challenge is to ensure that the business, recreational, safety, military, and security needs of vessels on our oceans, harbors, ports, Great Lakes, and inland waterways are met. Security mandates including the Maritime Transportation Security Act of 2002 and the Safe Port Act of 2006, among other legislative initiatives, have created additional pressures on the MTS to balance operational requirements and security needs with limited public and private resources. Maritime security issues are currently being addressed via a number of existing Federal strategies and plans that are outside the scope of this document. Overarching directives guiding this effort are contained in the National Strategy for Homeland Security, Presidential Directive NSPD-41/HSPD-13, the National Strategy for Maritime Security, and HSPD-7. The priority of the *National Strategy* is to be aligned with the Nation's security strategies. Many safety, resiliency, environmental, and efficiency improvements will have synergies with security, and the *National Strategy* will leverage these whenever possible.

The Federal government provides a network of services that improve safety and security for the MTS. For instance, the National Oceanic and Atmospheric Administration's (NOAA) Office of Coast Survey provides hydrographic surveys, charts, and information on hazards to navigation and channel conditions; U.S. Customs and Border Protection (CBP) collects import duties, enforces trade laws, apprehends individuals attempting to enter the U.S. illegally, and protects ecological, agricultural, and economic interests from harmful pests and diseases; and the U.S. Coast Guard (USCG), through its Vessel Traffic Service (VTS), provides active monitoring of

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and advice to vessels in congested waterways to prevent vessel collisions, allisions,[8] and groundings. The USCG also approves port and facility security plans, inspects and examines inbound ships, and provides rapid reaction forces to deter and respond to security threats. The Minerals Management Service (MMS) collects and maintains up-to-date location data on offshore energy infrastructure such as platforms and pipelines. Publicly available on the MMS web site and on navigational charts produced by NOAA, the data are crucial to ensuring the safe passage of vessels through, and while anchoring within, offshore waters regulated by the U.S. The provision of the highest-caliber information and services to navigate America safely and securely into the future is a challenge to the continued growth and vitality of the MTS.

To ensure and strengthen the marine safety of the MTS, and to coordinate maritime security, the CMTS recommends the following seven actions:

- Coordinate existing Federal navigation programs to ensure collaboration, reduce duplication, and standardize terminology and presentation;
- Deliver timely, relevant, accurate navigation safety information to mariners, including real-time information systems such as the Physical Oceanographic Real Time Systems (PORTS), e-navigation, under-keel clearance, High Frequency Radar (HFR) air gap technology, Real Time Current Velocity systems at locks, and those systems associated with development of the Integrated Ocean Observing System to improve navigation safety and efficiency and reduce the risk of accidents;
- Encourage, coordinate, and support navigation technology research and development to enhance navigation safety;
- Enhance and improve existing frameworks that plan for, operate, maintain, and mitigate risks to vessels and the environment, and respond to accidents and natural disasters;
- Ensure coordination among maritime transportation and maritime security policy-making bodies and programs;
- Consider ways in which security measures impacting the movement of trade by water can be streamlined, and where economies and coordination can be realized between safety and security imperatives; and

[8] An allision is when a vessel strikes a fixed object.

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- Work closely with State and local boating authorities and entities, recreational boating organizations, commercial shipping interests, and ports to reduce accidents resulting from competing uses of navigation channels, and increase and manage safety of the MTS.

Environmental Stewardship

The economic health of the MTS and the natural health of the Nation's ocean, coastal, and freshwater ecosystems must co-exist in a way that supports transportation while protecting and sustaining human health and the environment. The MTS, including its ocean and coastal shipping routes, ports, and inland waterways, crosses, intersects with, and is in close proximity to sensitive and valuable natural resources, including wetlands, estuaries, drinking water sources, recreational waters, watersheds, critical habitats, fisheries, coral reefs, and marine mammals.

Approximately 100,000 tons of oil from sources other than natural seeps are released annually into North America's waterways and sea lanes.[9] Petroleum products spilled into waterways can have both short- and long-term effects on water quality and living resources. Engines of ocean-going vessels, as well as diesel-powered vehicles and engines at the ports, emit significant amounts of air pollutants (e.g. particulate matter, sulfur oxides, nitrogen oxides, and greenhouse gases) that increase public health risks and contribute to global warming. Large cruise ships generate large volumes of black and grey water that must be disposed of properly. Any discharge of oil or refined petroleum products, hazardous substances, garbage, marine debris, human waste, and the transport and introduction of non-indigenous invasive species into the marine environment create health concerns for all citizens, and adversely affect marine and coastal ecosystems. Additional environmental concerns arise from dredging and dredged material management, sediment, storm water runoff, and point-source discharges. Changes to shipping lanes and increased traffic levels could have implications for managing and protecting marine habitats and migration patterns of fisheries and marine mammals. Management of these concerns requires better science and management of invasive species, and interagency coordination to reduce the risks of groundings, allisions, and hazardous cargo spills.

[9] Oil in the Sea III, Inputs, Fates and Effects, 2003. U.S. National Academy of Sciences.

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Coastal and inland waterway navigation crosses, intersects with, and is in proximity to sensitive and valuable natural resources, including wetlands, coral reefs, estuaries, drinking water supplies, recreational areas, critical habitats, fisheries, and marine life. Jurisdiction over laws and regulations protecting the MTS environment is distributed among 18 Federal Agencies, 50 States, Territories, and many local and some Tribal governments. While the Federal government sets national standards for the protection of air, land, and water, States and localities also regulate pollution, wetlands, and land use. A goal of the *National Strategy* is to foster a system-wide approach to planning for environmental protection, and provide for effective implementation of environmental regulations. This will support a dynamic and synergistic program of environmental stewardship.

To protect the environmental health of communities and ecosystems that may be affected by the MTS, the CMTS recommends the following eight actions:

- Advocate transportation projects, technologies, and mitigation activities that improve air quality, reduce greenhouse gas emissions, and reduce congestion in port areas and other MTS components;
- Work collaboratively to foster the collection of data and information that will underpin environmental impact assessments and decision-making in MTS planning and development;
- Support research and develop and implement practical strategies to control and mitigate effects on the marine environment from pollutants, invasive species, and anthropogenic sound, and to reduce negative interactions between ships and marine mammals;
- Ensure environmentally appropriate dredged material management;
- Promote coordinated regional and watershed efforts of States, Federal Agencies, and other partners to manage sediment, dredging and dredged material, point source discharges and storm water runoff, oil or hazardous material spills, harmful anti-fouling systems, and sources of marine debris to restore habitats, reduce pollution, and plan for conservation and mitigation;
- Support harmonization of State, Federal, and international environmental standards, policy, laws, and regulations through work with Federal interagency bodies, in the International Maritime Organization and other organizations, and implement international treaties such as those regarding prevention of maritime pollution at sea;
- Support national and international solutions to environmental problems related to ship decommissioning and dismantling; and

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- Encourage use of industrial land banks and formerly polluted industrial areas for MTS and intermodal transportation system facilities, and promote MTS development that avoids disproportionate impacts on minority and low-income communities.

Resilience and Reliability

Natural and human-caused disruptions to ports and waterways not only threaten the continuity of operations on the MTS but also have an adverse ripple effect throughout the U.S. economy. New streamlined supply-chain networks with strong links to providers, suppliers, and customers have minimized inefficiencies, bringing products to customers faster, but this efficiency has been achieved at the cost of increased vulnerability. Companies may have leaner supply chains, but are now exposed to significant disruptions by external disputes including wars and embargos, internal events such as accidents, fires, and labor disputes, and natural events such as hurricanes, floods, earthquakes, and tsunamis. The challenge is to reduce the risk of disruption and plan for an orderly recovery. Disruptions may be local, such as waterway closures resulting from a barge hitting a bridge, or may be regional, such as the shut-down of Gulf Coast ports from hurricanes. Impacts from these disruptions can have national ramifications because the MTS is a critical component in the national supply chain.

Because of globalization, increasing quantities of containerized manufactured goods and other commodities upon which our economy relies are moving through our ports. In addition, the military's need to deliver troops, equipment, and supplies from or through U.S. ports to defense forces deployed around the world further emphasizes the importance of the MTS. The MTS must have the capability to respond quickly to disruptions and return to normal operations. To build resilience and reliability into the supply network, risks must be identified and managed, and emergency and contingency plans must be developed.

Consistent with the National Response Framework, to increase the resilience and reliability of the MTS, the CMTS recommends the following six actions:

- Provide coordination, expertise, and resources to ensure continuity of operations, essential public services, and the resumption of commercial marine activities following a disruption;

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- Develop reserve and surge capacity in the MTS and coordinate with industry on response and recovery operations;

- Develop a coordinated approach to emergency permitting for channel restoration following a large-scale sediment deposit in navigation channels from natural disasters such as hurricanes, which may obstruct the channel and disrupt port activities;

- Work collaboratively to resolve cross-cutting jurisdictional issues surrounding abandoned and wrecked vessels or damaged bridges;

- Develop and promote national and international strategies for addressing potential climate change impacts on ports, waterways, and other vulnerable elements of the MTS; and

- Provide appropriate consultation and coordination with other policy facilitation structures, such as the Committee on Ocean Policy.

Finance and Economics

Collaborative action between the Federal government and State, local, and private interests is necessary for preserving and enhancing the MTS. The Federal role in managing the MTS is considerable and includes public infrastructure, mobility, channels, navigational systems, charting, weather and real-time navigational information, environmental oversight, marine safety and security, and incident response. State and local agencies address the demands of their geographic areas. The private sector invests in vessel, port, and transfer assets. The *National Strategy* envisions a coordinated and detailed exploration of specific options for increasing the efficiency of the existing MTS system, developing better methods for prioritizing investments, and developing ways of attracting more private sector investments. Increases in Federal funding should be considered only after a thorough exploration of opportunities for increasing the efficient use of existing infrastructure, prioritizing investments so that increased funds are used effectively, and after an identification of both private and public sources of funds so that any additional public funds leverage additional private investments.

The costs typically associated with Federally financed infrastructure can be divided into three types: fixed, incremental, and congestion. Fixed costs are incurred once and do not vary with the volume of use. Incremental costs are incurred each time the infrastructure is used. Congestion costs account for the delay cost that each additional user imposes on other users. Fees, taxes, or

general revenue contributions that equal the sum of the fixed and incremental costs must be collected to finance the project. The incremental costs should be allocated to the users who impose them on the system. Fixed costs should be allocated between users and general revenues in the least distorting manner. Congestion prices should be charged when appropriate. The revenues collected from congestion pricing can offset fixed costs and make for more efficient usage of commonly shared resources. Tax equity and economic efficiency should guide decisions when collecting the fixed and incremental costs for financing the Federal share of any project.

To maintain and improve the infrastructure of the MTS, the CMTS recommends the following five actions:

- Study alternative approaches to financing construction, rehabilitation, and maintenance of infrastructure projects, as well as environmental impact mitigation. This study should consider fees, taxes, and general revenue contributions for financing infrastructure projects, depending on the characteristics of the projects. The study should involve high-level discussions and collaboration with Federal, State, local, and Tribal governments, and also with private entities, as appropriate, on funding strategies;

- Study approaches to prioritizing how Federal dollars should be allocated among competing priorities;

- Ensure that cost allocation takes into consideration environmental and human health costs, promotes economic efficiency, and that the allocations do not create unfair competitive disadvantages;

- Study how best to coordinate the allocation of Federal funds for projects across Agencies; and

- Coordinate a CMTS membership policy recommendation to the President for congestion prices, which should be charged when appropriate. The revenues collected from congestion pricing can offset fixed costs and thereby reduce economic distortions.

Going Forward

The U.S. Ocean Action Plan directed the 18 Departments and Agencies that form the Committee on the Marine Transportation System to identify the most critical challenges facing the MTS, to

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take action to address these challenges, and to ensure that their policies and actions are synchronized and well coordinated to produce maximum results. Through the CMTS, these agencies will report progress on the actions described in the *National Strategy* biennially to the President, Congress, and the American public. This *National Strategy* does not address detailed performance measures because of the substantial volume of the recommendations. The CMTS Working Group does plan to prioritize these recommendations and develop performance measures as the next step.

The CMTS proposes the following supporting actions:

- Facilitate prioritization and development of strategies for the actions prescribed in the *National Strategy*;
- Facilitate high-level discussions regarding funding strategies, as appropriate, for the MTS;
- Facilitate the use of the CMTS high-level membership and "Integrated Action Team" capabilities to develop and recommend to the President policies that will improve the MTS, as directed in the U.S. Ocean Action Plan of 2004; and
- Report to the President, Congress, and the American public biennially on the progress made to fulfill the actions of the *National Strategy*.

In the years ahead, as the endorsed actions of the MTS *National Strategy* are executed by the CMTS and its member Departments and Agencies, substantive and measurable progress to improve the MTS is expected. The capacity of the MTS will expand to support and achieve significant system efficiencies. Advancements in navigation information and services will ensure a new level of system safety and security. The air, water, and land in proximity to or affected by maritime-related activities will reach new standards of quality as reductions in air pollution, including greenhouse gases, land-based sources of pollution, and marine pollution at sea and in coastal areas are realized. Additionally, contingency plans will be in place and system-wide coordination institutionalized to respond effectively to both system disruptions and climate-change impacts. Taken together, the completion of the endorsed actions will move the MTS forward, maintaining and advancing the Nation's standing as the global leader in maritime trade, as people and commerce are moved safely, securely, and reliably in a manner that is environmentally protective within this ever-advancing integrated network.

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SECTION ONE: THE MTS

Overview

The MTS extends from the outer boundaries of the Nation's Exclusive Economic Zone (EEZ) to the inland ports of our rivers and Great Lakes, including approximately 25,000 miles of commercially navigable channels[10] and 360 deep and shallow draft ports.[11] The waterways and land access connectors facilitate commerce, recreation, and national defense. The navigable channels and harbors provide safe passage for a wide range of vessels, including container ships, tankers, dry bulk carriers, barges, passenger ferries, oil and gas refined product carriers, military transport vessels, rescue boats, cruise ships, fishing boats, and pleasure craft. Increasingly, dinner and tour boats, oceanographic research interests, and local marine transportation have taken part in the MTS. Finally, the MTS is built upon shared resources—oceans, lakes, and rivers—that include marine protected areas, drinking water sources, and support many species of wildlife.

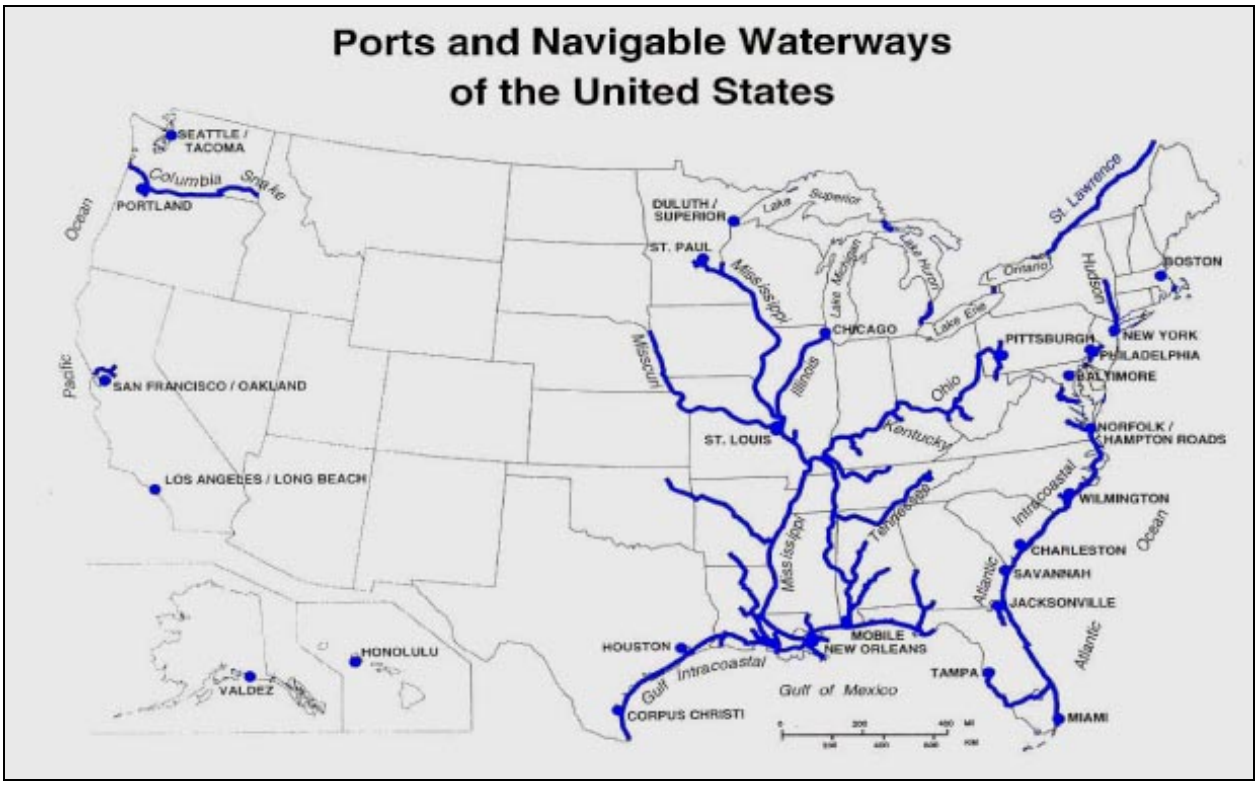
Components

The MTS has five main components:

- Navigable Waterways
- Ports
- Intermodal Connections
- Vessels
- Users

[10] U.S. Army Corps of Engineers, Headquarters Operations Division, "Fingertip Facts" (multiple years).
[11] www.globalsecurity.org/security/library/congress/2004_h/040127-bald.htm; Covering the Waterfront–A Review of Seaport Security Since September 11, 2001, United States Senate Committee on the Judiciary, 2004.

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Map depicts selected ports, rivers, and lakes that compose navigable waterways of the U.S. Marine Transportation System.

Navigable Waterways

The Nation's navigable waterways are extensive and include coastal and ocean areas; the Great Lakes St. Lawrence Seaway System; the Mississippi, Ohio, and Columbia River systems; canals; the Atlantic and Gulf Intracoastal Waterways; and Arctic waterways. They serve as waterways to transport manufactured, mineral, agricultural, and bulk products, other trade goods, and passengers to and within America, and are used for commercial, recreational, scientific, and military purposes. Navigation on the MTS is supported and facilitated by a system of canals, locks, dams, and aids to navigation.

Ports

The manner in which the MTS operates is complex. Coastal and river ports are both publicly and privately owned and operated. Terminal operators, warehouse operators, longshore labor, intermodal connectors, and overall port management are important components of port operations that directly impact a port's ability to move people and goods efficiently. Terminal

operators include stevedoring companies or shipping companies that load and unload their own ships or those of others that contract for their services. Stevedores also employ longshoremen to perform cargo loading and discharging operations.

Intermodal Connections

The railroad, shipping, trucking, and air freight companies that transport goods to and from ports with prior or subsequent water movement are considered marine transportation providers.[12] Intermodal connections are linkages at the land-water boundary that allow the transfer of passengers and cargo between transportation modes. These intermodal connections include road, rail, and airport access routes for transporting passengers and cargo, and pipelines for transporting petroleum products.



Cargo is moved rapidly from ship to truck or rail.
Photo courtesy Port of Seattle.

To move waterborne cargo quickly to or from inland locations, clear access and connections to ports must be provided to trucks, railroads, and pipelines. For some ports, the weakest link in the logistics chain is the intermodal connection, where congested roadways or inadequate rail connections to marine terminals cause delays and raise transportation costs. Efficient transportation depends upon seamless connections among road, rail, pipeline, and water facilities. However, choke points and interruptions in the flow of commerce are common. The Maritime Administration (MARAD) states in its 2005 *Report to Congress on the Performance of Ports and the Intermodal System* that robust intermodal connectivity is necessary to support the flow of global commerce and the deployment of military forces. The report further indicates that the MTS' greatest challenge is the projected growth in our international trade, and the ability of the marine, highway, and rail systems to accommodate the

[12] "The Marine Transportation System and the Global Supply Chain," Marine Transportation System Advisory Council (MTSNAC), July 2006.

increased volumes of freight shipments so vital to our Nation's continued economic growth.

Vessels

The vessels that move people and goods within the MTS include commercial oceangoing, coastal, and inland vessels, as well as military and recreational vessels. The vessels that carry our international commerce, as well as cruise ships, have grown much larger. Since the advent of containerization in the 1960s, vessel capacities have grown from 500+ TEU ships to the 12,000+ TEU container ships that are expected to become common on Trans-Pacific routes.[13] To carry the large number of containers, the length of the largest ships has increased to 1,300 feet, with widths of 184 feet and drafts of over 50 feet at full capacity.

Domestically, modern ferryboats transport thousands of commuters and tourists every day. The New York Waterway passenger ferry operation in and around Manhattan, for example, carries an average of over three million passengers per year.[14] U.S. passenger ferry usage has grown to more than 64 million riders annually.[15] There are 18 million motorized and non-motorized recreational boats in the Nation,[16] often sharing the same coastal navigation channels with commercial vessel operators.

Users

Users are a critical component of the MTS and the very reason it exists. Users can be categorized as direct and indirect. Direct users are easily recognizable groups such as vessel operators, port operators, commercial fishermen, marine service industries, recreational boaters, passengers, cargo owners, and government. Indirect users are the U.S consumers who buy finished manufactured goods that were transported on the MTS, and businesses and industries that either use or sell raw materials, intermediate goods, or finished products that traversed the MTS. The importance of the MTS is readily evident to direct users by their daily and frequent usage of the system, and yet transparent to most indirect users.

[13] Source: John Vickerman, Transystems, 2007.
[14] NYWaterway.com
[15] American Public Transportation Association, 2004.
[16] National Marine Manufacturers Assoc.: www.nmma.org/facts/boatingstats/2006/files/populationstats

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A Gallup Organization report of January 2005 stated that although citizens recognized the importance of transportation at the State and local levels, they do not include it when asked about the "most important problems of the Nation." Further, the U.S. Chamber of Commerce's "Trade and Transportation" report of 2003 states that "…while the importance of freight transportation to the national economy has never been in doubt, the true magnitude of the Nation's dependence on a reliable, cost-effective system for the distribution of goods is not well understood by the majority of people." Although most Americans live on or near a navigable waterway, port authorities routinely must implement programs to educate their neighbors about the value of port operations to the community. The American Association of Port Authorities holds marketing seminars to suggest how a port operator can educate the public on the nature and value of port operations to a community and region.

Functions

The MTS has three functions: commerce, recreation, and national defense.

Commerce

The MTS is a critical component in the trade of goods to and from the United States. In 2005 there were 61,047 vessel calls from abroad at U.S. ports carrying food, petroleum, and manufactured goods.[17] Over 66 percent of crude oil consumed in the United States is delivered by tankers from overseas sources.[18] Products such as petroleum, coal, and liquid natural gas, food products, and manufactured goods move on and through navigable waterways and ports every day. The U.S. cruise ship industry generated almost $37.5 billion in annual spending in 2006.[19]



Photo courtesy Port of Tacoma.

[17] Vessel Calls at U.S. and World Ports, 2005. Maritime Administration, Department of Transportation.
[18] Energy Information Administration, U.S. Department of Energy.
[19] Business Research and Economic Advisors. *The Contribution of the North American Cruise Industry to the U.S. Economy in 2006,* Arlington, VA: International Council of Cruise Lines, August 2007.

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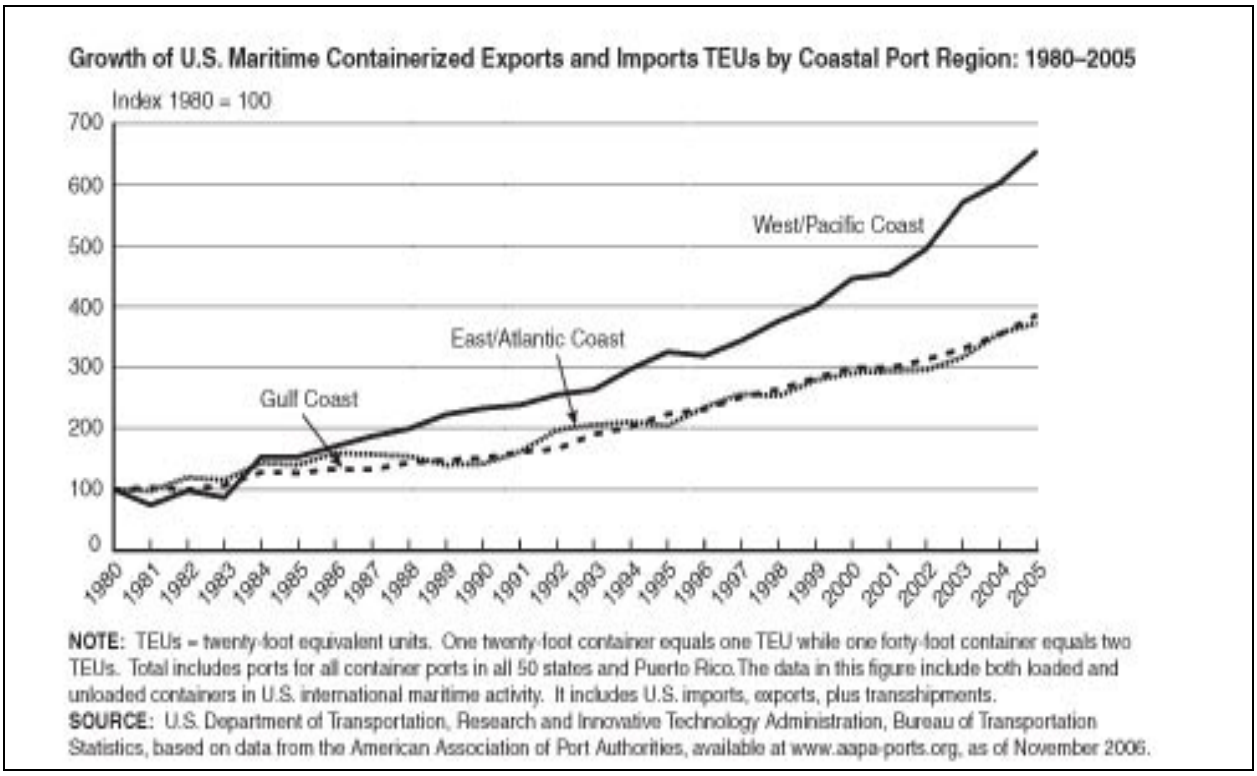


Chart depicts upward trend in containerized exports and imports.

The MTS spurs local economic development and employment. As noted in the chart above, over half—nearly 55 percent—of U.S. containerized merchandise trade in terms of TEUs passed through West Coast ports in 2005, up from 42 percent in 1980. Regionally, West Coast ports grew the fastest during this 25-year period. In 2006 the MTS was responsible for the employment of more than eight million Americans working in port and port-related industries. In addition to the direct economic benefits created by marine terminal employment ashore and afloat, the MTS also contributes to local and regional economies by supporting jobs and other activities that relate to the port industry.

The *National Defense Strategy of the United States* (March 2005) reinforces the economy as an instrument of national power. It remains among the important strategic advantages of the United States. As identified in the *National Security Strategy of the United States* (March 2006), opportunities and challenges that come from new and increased trade and investment are growing in significance with the increase in globalization. The 2005 and 2006 National Defense Strategies underscore the key contributions that the MTS makes to the U.S. economy, and the need to

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expand and improve the MTS to meet future trade growth. To support a vibrant economy and the free-flowing commerce of the modern era, the MTS must have the integrated capabilities to meet future growth in trade.



The Deep Draft Caisson Vessel built by Exxon Mobile Corporation is one of the newest offshore drilling and production platforms that are a piece of the critical part of the U.S. oil supply from the Gulf of Mexico. Photo courtesy USCG.

Our ocean, coastal, and inland waters provide opportunities for the harvesting of living resources such as commercial fishing, and the extraction of non-living resources such as offshore production of petroleum and natural gas. Another major growth industry is the building of undersea communications infrastructure. These industries are supported by the service industries of the MTS to transport people and supplies, and move the products as required. Industrial production on our Continental Shelf and within our EEZ, an area that starts at the coastal baseline and extends 200 nautical miles[20] out from our shores, is important to national interests. U.S. ratification of the International Convention on the Law of the Sea could potentially result in the acquisition of rights to additional seabed resources of great value and importance. Globally, the production and transportation of energy products and other natural resources are vital to our way of life.

The MTS supports the commercial fishing industry and its 110,000 fishing vessels, which contributed approximately $35 billion to the U.S. economy in 2006.[21] In 2006 domestic energy production from the U.S. Outer Continental Shelf (OCS), which consists of the submerged lands, subsoil, and seabed in a specified zone up to 200 nautical miles or more offshore from U.S. coasts, provided the Nation with about 507 million barrels of oil and three trillion cubic feet of natural gas with a market value of more than $47 billion, as well as tens of thousands of U.S.

[20] Or more, in some cases of an extended continental shelf.
[21] National Marine Fisheries Service, Fisheries of the United States-2006.

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jobs.[22] Currently, about 27 percent of the Nation's oil and 15 percent of its natural gas production come from the OCS. Primarily as a result of new deepwater development in the Gulf of Mexico, oil and gas production from the OCS is expected to account for 40 percent of domestic oil and nearly 20 percent of domestic gas production within the next five years.[23] With the passage of the Energy Policy Act of 2005, the OCS will also witness the development of alternative energy projects to convert wind, ocean wave, and current power into useable energy to offset the growing imbalance between U.S. consumption and production.

Arctic Commerce

Scientific evidence indicates that the Summer Arctic ice cap has shrunk by nearly half since the early 1950s, suggesting that commercial shipping into, out of, and through the Arctic could increase, perhaps significantly, in the coming years. Some anticipate that an oceanic trade route across the Arctic from the North Atlantic to the North Pacific will eventually become a reality, at least seasonally, if not year-round. Such a trade route would represent a transformational shift in maritime trade, akin to the opening of the Panama Canal in the early 20th century. A commercially viable Arctic marine highway could cut existing oceanic transport by an estimated 5,000 nautical miles or up to one week of sailing time. Further, studies indicate that significant potential oil and natural gas resources may lie in the Arctic.[24]

While transportation and energy developments in the Arctic could be critical to future national interests, the Arctic represents an especially complex and ecologically sensitive oceanic area. Navigation practices and traffic schemes, vessel standards, maritime security, environmental protection, and enforcement and response capability unique to the environment are just a short list of pressing maritime governance issues to be addressed.[25]

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[22] Minerals Management Service, Minerals Revenue Management.
[23] Minerals Management Service, Offshore Energy and Minerals Management.
[24] U.S. Geological Survey, The Arctic Energy Assessment (U.S. Department of the Interior; U.S. Geological Survey: 2007).
[25] The National Research Council has noted, "The potential for increased human activity in the northern latitudes will likely increase the need for the United States to assert a more active and influential presence in the Arctic to protect not only its territorial interests but also to project its presence as a world power concerned with security, economic, scientific, and international policy issues of the region." National Research Council, *Polar Icebreakers in a Changing World: An Assessment of the U.S. Needs* (Washington, DC: 2006), S-2.

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As an Arctic nation, the United States has varied and compelling interests in that region. The U.S. government is operating under a 1994 Presidential Decision Directive/NSC 26 (PDD-26), which articulated six principal objectives in the Arctic region:

- Meeting post-Cold War national security and defense needs;
- Protecting the Arctic environment and conserving its biological resources;
- Assuring that natural resource management and economic development in the region are environmentally sustainable;
- Strengthening institutions for cooperation among the eight Arctic nations;
- Involving the Arctic's indigenous communities in decisions that affect them; and
- Enhancing scientific monitoring and research into local, regional, and global environmental issues.

While these basic objectives endure, the U.S. government is developing a new Arctic policy that will take into account a number of significant developments that have taken place in, or relate to, the Arctic region since 1994. These developments include, among other things, the significant effects of climate change and increasing human activity in the Arctic, the advent of other relevant rules and mechanisms, and a growing awareness that the region is both fragile and rich in resources.

In relation to the Marine Transportation System, the United States is preparing to address both on its own and in cooperation with other nations a host of issues that are likely to arise from any increases in shipping into, out of, and through the Arctic. A top priority will be to facilitate shipping that is safe, secure, and environmentally sound. Safe maritime commerce in the Arctic will depend on the enhancement of infrastructure to support search and rescue capabilities, short- and long-range aids to navigation, high-risk area vessel traffic management, iceberg warnings, other sea ice information, and effective shipping standards. Even if Arctic vessel traffic does not increase as much as predicted, prospective commercial activities in the region will provide unique challenges for the MTS. For example, the Department of the Interior's Minerals Management Service (MMS) has recently completed successful lease sales in the U.S. Beaufort

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and Chukchi Seas. Additional lease sales are planned in both areas under the currently approved 5-year oil and gas leasing program, but are not scheduled until 2009 through 2012. The CMTS is poised to facilitate and coordinate the development of national policies to ensure that if commerce and navigation expand in the Arctic region, they are conducted in a manner that is safe, secure, and environmentally protective.

Recreation

BoatUS, an association representing boat owners, reports that 18 million Americans are recreational boat owners. They contribute to the economy with nationwide retail expenditures on recreational boating exceeding $39.5 billion in 2006.[26] Moreover, hundreds of millions of visitors spend billions of dollars every year to enjoy our Nation's ocean, lake, and river beaches.[27] The burgeoning cruise line industry embarked nine million passengers in 2006.[28]

National Defense

The U.S. military relies on commercial port infrastructure to enable the rapid deployment of forces during a national emergency, as most American military power moves around the world by ship. For planning purposes, facilities are designated at 15 commercial strategic seaports having sufficient capability to support major military deployments. In addition, there are several Department of Defense-owned terminals, supporting specific military outload requirements, such as ammunition. Access to these designated ports and other key components of the MTS, such as the intermodal connections between the ports and military bases, are vital to the transformed military envisioned in the Quadrennial Defense Review (QDR) (February 2006). The QDR calls for rapid global mobility to support a full range of operations. Whether deploying a large force with combat equipment, shipping humanitarian supplies for a disaster relief mission, or deploying and sustaining a peacekeeping force, the MTS provides a critical capability. A robust and resilient MTS is essential so that it can continue to perform its commercial function while responding to a national defense event or other disruption.

[26] National Marine Manufacturers Association. 2006 Statistical Abstract.
[27] www.nmma.org/lib/docs/bs/global/2005/press/NMMA_06_Abstract_Release_FINAL.pdf; National Marine Manufacturers Association: Recreational Boating Statistical Abstract, 2006.
[28] Business Research and Economic Advisors. *supra pg 16*.

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SECTION TWO: MTS CHALLENGES

System Capacity

There are many factors that contribute to providing sufficient and reliable capacity for the MTS. They range from maintaining navigational channels, maintaining and rehabilitating locks and the associated dams, making infrastructure improvements, encouraging growth in trade and travel, and accommodating changes in distribution operations, to providing accurate and timely maritime data. Each of these factors can impact both existing and future capacities.

Coastal Channel Dimensions

The Army Corps of Engineers (USACE) serves the major coastal harbors in this country by maintaining their Federal channels. It also deepens, widens, and extends these harbors and channels. Through an economic assessment of proposals by individual ports, it makes recommendations regarding authorization and funding of improvements to the channels to accommodate the new generation of container vessels and larger bulk vessels calling on the ports. In 2000, more than one-quarter of the vessel calls in the U.S. were depth-constrained by current channel and port depths. More recent constraints in the Great Lakes are due in part to low lake levels.[29]

Concerns have been raised in the Great Lakes and elsewhere about allocation of funding for maintenance dredging among coastal harbors and channels and the total spent for maintenance dredging. Revenues in the Harbor Maintenance Trust Fund are generated by the Harbor Maintenance Tax, which is an ad valorem tax based on cargo value, and fund 100% of USACE coastal navigation operation and maintenance expenses. Annual revenues to the Harbor Maintenance Trust Fund are sufficient to finance whatever level of investment in maintenance dredging is deemed to be justified. USACE gives priority to the principal channels in the 59 harbors that handle approximately 90 percent of all cargo tonnage moving through U.S. coastal ports, including the Great Lakes, while also providing some level of service to channels and

[29] USACE, National Dredging Needs Study of U.S. Ports and Harbors: 2002. Institute for Water Resources Report 00-R-04.

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harbors handling significant but lesser quantities of commercial cargo. An assessment of the impacts of channel maintenance is underway, which will provide better economic information on the level to which navigable channels and gateway ports should be maintained and the degree to which container ships, tankers, bulkers, and other larger, wider, and deeper vessels are affected.

Inland Waterways

The USACE operates a network of about 12,000 miles of rivers, canals, and other inland and intracoastal waterways serving 27 states. The program provides a low-cost transportation alternative mostly to shippers of bulk goods in areas located near these developed inland and intracoastal waterways. The inland and intracoastal waterway systems are generally considered reliable, but face increasing operational and maintenance challenges as locks age, repairs become more extensive and expensive, and dredging becomes more expensive.

Since the 1960s the Federal government has invested heavily in the maintenance and rehabilitation of the three busiest inland waterways (the Ohio River, the Mississippi River, and the Illinois Waterway), which handle the vast majority of all inland waterways traffic. USACE periodically evaluates the condition of all locks and dams on these waterways to identify and prioritize repair and replacement investments within each waterway system.



De-watering and repairs of the Inner Harbor Navigation Canal Lock, New Orleans.
Photo courtesy USACE Digital Visual Library.

Congress finances one-half of the cost of the Federal capital investment in inland and intracoastal waterways from the Inland Waterways Trust Fund. The source of funding for this Trust Fund is an excise tax on diesel fuel used on certain inland and intracoastal waterways. The tax is not raising enough revenue to keep pace with the cost of current or projected Federal capital investments. When taking into account

not only capital investments, but also the costs of operation and maintenance financed by general revenues to the Treasury, the annual Trust Fund receipts cover less than 10 percent of the total costs that USACE incurs each year to support inland waterway navigation. In 2008 the Administration proposed legislation to phase out the fuel tax and replace it with a lock usage fee, which would preserve current cost-sharing and lead over time to a more productive use of our national transportation system.

Great Lakes St. Lawrence Seaway System

The Great Lakes St. Lawrence Seaway System (Seaway System), also known as "America's Fourth Seacoast," is a vital waterborne transportation link for moving goods from the heartland of North America to international markets. The Seaway System, a bi-national waterway operated jointly by the U.S. and Canada, encompasses the St. Lawrence River and the five Great Lakes, and extends 2,300 miles from the Gulf of the St. Lawrence at the Atlantic Ocean to the western end of Lake Superior at the twin ports of Duluth, Minnesota, and Superior, Wisconsin.

For nearly 50 years, the bi-national St. Lawrence Seaway has served as a vital transportation corridor for the international movement of bulk and general cargoes such as steel, iron ore, grain, and coal, serving a North American region that makes up one-quarter of the U.S. population and nearly half of the Canadian population. Maritime commerce on the Seaway System annually sustains more than 150,000 U.S. jobs, $4.3 billion in personal income, $3.4 billion in transportation-related business revenue, and $1.3 billion in Federal, State, and local taxes.

The bi-national waterway is expected to become an even more important commercial transportation route over the next decade as the U.S. and Canadian governments seek ways to ease highway and rail congestion, especially along North America's East and West Coasts and Midwest region. In the past few years the St. Lawrence Seaway has enjoyed significant growth in new business as the waterway has become a viable alternative for shippers looking to avoid port, highway, and rail congestion. Each Seaway maximum-size vessel carries roughly 25,000 metric tons, the equivalent of 870 tractor-trailers. As congestion-related initiatives such as encouraging shipping on the Marine Highways continue to develop, the St. Lawrence Seaway will further improve its position as a competitive alternative for shipments to and from the

Midwest. Recent forecasts show a doubling of containerized traffic carried by all modes in the U.S./Canadian Great Lakes St. Lawrence Seaway region from 70 million TEUs to 140 million TEUs by 2050.

In November 2007 the U.S. Department of Transportation, Transport Canada, and the U.S. Army Corps of Engineers released the "Great Lakes St. Lawrence Seaway Study," which assessed the future U.S. and Canadian infrastructure needs of the Great Lakes St. Lawrence Seaway System, specifically the engineering, economic, and environmental implications of those needs as they relate to the marine transportation infrastructure on which commercial navigation depends. The study provides U.S. and Canadian policymakers with a "blueprint" for what would be required to maintain the commercial navigation infrastructure at its current level of reliability over the next 50 years. The study identified more than $630 million in U.S. and Canadian infrastructure renewal investments through 2050 as part of a proactive program of upgrading and repairing the Great Lakes Seaway System's most critical infrastructure.

Growth in Trade and Travel

The Government Accountability Office report entitled "Transforming Transportation Policy for the 21st Century" (September 2007) states: "projected population growth, technological changes, and increased globalization are expected to increase the strain on the Nation's transportation system." As a critical component of the global and domestic transportation system, the MTS is experiencing the same challenges that the aviation, highway, and rail systems are experiencing, such as increasing congestion and stressed infrastructure. As the U.S. economy continues to expand and greater international trade liberalization is realized, the importance of well-maintained marine transportation infrastructure will increase. The projected future growth in commercial and recreational vessel traffic brings with it the challenge to ensure that vessels on our oceans, coasts, Great Lakes, and inland waterways are operating in an environment that is available, reliable, and environmentally responsible. Transportation freight and logistics planners must be certain that reliable MTS infrastructure can meet today's demands and tomorrow's projected growth.

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In 2005 U.S. waterborne commerce amounted to 2.3 billion metric tons. International commerce accounted for 59 percent of the total tonnage, up from 55 percent five years earlier.[30] DOT predicts that between 2010 and 2020 the value of freight carried by water will increase by 43 percent domestically and 67 percent internationally.[31] Approximately 50 percent of international commerce arrives at U.S. ports in containers.[32] The U.S. Chamber of Commerce noted that ports and their associated intermodal systems may no longer be able to build their way out of their capacity problems.[33] Seventy-five percent of the 16 ports surveyed for the study could encounter significant capacity problems if nothing is done, and the study predicted that all reserve port capacity could be exhausted in the near future. As trade volumes increase, the need for an intermodal plan that efficiently links waterborne traffic with all components of the land transportation system is critical. The challenge is to find ways that ports can expand their operations within available land and financing constraints to better handle increased volume and accommodate growth. This involves the coordination of the necessary Federal, State, and local expertise and resources needed to improve intermodal connections and port efficiency, and to synchronize ship and inland intermodal freight information across the modes.

A broad challenge facing the MTS is how to use existing port system capacity in the most efficient manner to accommodate growth. There is substantial public and private infrastructure already in place throughout the Nation's ports; however, capacity issues at some ports and bottle-necks at various intermodal connectors reduce efficiency. The challenge is to streamline connections between water and land transportation modes, and identify where it is feasible to shift cargo and passenger transport from over-utilized modes to under-utilized modes or off-peak periods. Flow-through models could be developed and implemented to facilitate better cargo movement efficiencies. The MTS can no longer be regarded and addressed as a distinct mode, separate from the land transportation system. Efforts to improve the MTS should be part of a systematic approach to national transportation policy that better coordinates expenditures for highways, public mass transit, rail, airports, seaports, and waterways.

[30] Report to Congress, Maritime Administration, Fiscal Year 2006.
[31] Federal Highway Administration Freight Analysis Framework, 2002.
[32] www.whitehouse.gov/homeland/book/sect3-1.pdf; White House National Strategy for Homeland Security: Border and Transportation Security (no date on this document). "Each year, nearly 50% of the value of all U.S. imports arrives via 16 million containers."
[33] Trade and Transportation–A Study of North American Ports and Intermodal Systems. U.S. Chamber of Commerce, 2003.

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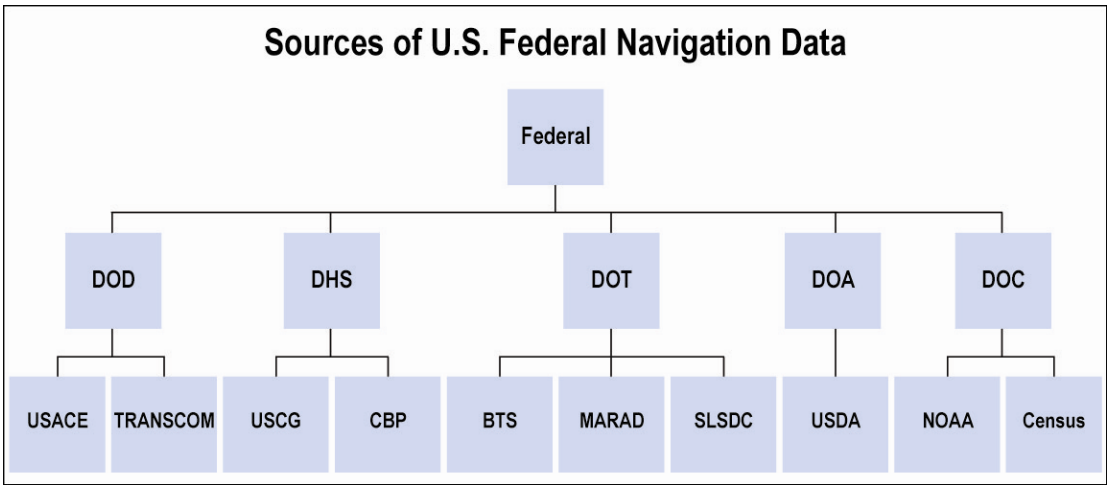
Maritime Data

The ability to provide the safest, most efficient, and environmentally responsible MTS is certainly dependent upon a reliable physical infrastructure such as fully maintained channels, locks, dams, and berths. However, there are additional MTS services that directly support navigation along the waterways and the ability of vessels to serve U.S. ports. Vessel Traffic Services (VTS) provide real-time vessel monitoring and navigational warnings for mariners in certain confined and busy waterways. By expediting ship movements, VTS increases transportation system efficiency and improves all-weather operating capability.

Real-time environmental observations for weather, tides, and currents enhance mariner situational awareness, but are not currently available in all critical areas of the MTS. Additionally, navigation charts with the most recent, full-coverage bathymetric soundings and advanced electronic presentations alert mariners to shoals, rocks, wrecks, and other obstructions they must avoid to reduce the risk of accidents that could result in loss of life and damage to property and the environment. NOAA's Federal advisory committee identified the need to aggressively survey and map the Nation's shorelines and navigationally significant areas, integrate coastal mapping efforts, modernize tidal gauging to implement real-time water levels and current observing and reporting systems in all major commercial ports, and disseminate hydrographic services data and products for the greatest public benefit.[34] NOAA's Office of Coast Survey reports that of the 43,000 square nautical miles of critical navigation areas, approximately 21,660 square nautical miles are yet to be surveyed.[35]

[34] NOAA's Hydrographic Services Review Panel, Most Wanted Hydrographic Services Improvements, March 2007.
[35] NOAA Hydrographic Survey Priorities, 2007 Edition.

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Maritime data can be presented in real-time or as static data. Real-time information, such as in a Physical Oceanographic Real Time Systems (PORTS) tide gauge, supports immediate navigation needs. Static data are commonly used to provide historic and economic information that enable projections and planning. Five Departments and numerous Agencies currently collect maritime data. The data are presented in varying ways, may have different interpretations, and applications are derived from Federal statutes with differing goals and objectives. For Federal maritime data, there is currently no central source, and no ability to prevent duplications. However, there are currently a number of efforts to coordinate and collaborate, such as the Customs and Border Protection's Automated Commercial Environment (ACE) supported by the International Trade Data System (ITDS), and NOAA's and the U.S. Army Corps of Engineers' collaboration on surveying and survey data.

Container Transportation

Increasing economies of scale in the movement of containers from foreign ports to U.S. ports may create capacity and reliability challenges for the MTS. This trend is driven by larger vessels and more complex, leaner supply chains, which require warehousing located closer to intermodal nodes.[36] Commercial pressures to reduce costs and increase speed and reliability have led to the use of longer truck trailers for over-the-road transport, double-stack container trains, and "super-sized" container vessels, all of which pose their own unique challenges to their various

[36] *Principles for a U.S. Public Freight Agenda in a Global Economy*, by Martin E. Robins and Anne Strauss-Wieder from January 2006—The Brookings Institution Series on Transportation Reform.

transportation modes. Some shippers are now unloading the 40- to 48-foot standard ocean containers and reloading the cargo into 53-foot over-the-road trailers, a practice that increases handling costs, but reduces overall transportation costs. The increasing use of just-in-time delivery and value-added warehousing are two examples of supply chain practices that have made transportation reliability more important.

Value-added warehouses, where final assembly occurs, are being built at ports (for distribution in the regional area of the port) and intermodal nodes (for distribution at inland regional intermodal connections) that are close to the customer. However beneficial for the cargo distributors, expanded warehousing adjacent to ports increases regional highway and terminal congestion. Also, the increase in long-distance shipping and the potential use of multiple freight conveyances during the journey makes supply chains more vulnerable to disruptions caused by weather, congestion, and other factors.



Containers stacked at the Port of New York to conserve space.
Photo courtesy U.S. Department of Transportation, Federal Highway Administration.

Safety and Security

Federal Agencies provide critical services to ensure the safe and secure movement of people and goods through the MTS in a way that is economically sound and environmentally protective. The growth of inbound passengers and goods arriving by sea continues to place burdens on government oversight services such as those provided by the Department of Homeland Security's U.S. Customs and Border Protection and the USCG to approve vessel, cargo, crew, and passenger arrivals and entries, inspect for U.S. maritime safety requirements under Port State Control, and screen for illegal drugs, illegal immigrants, bombs, implements of terrorism, and invasive species. The Federal government, in conjunction with international, State, local, industry, and public partners, is responsible for ensuring the safety and security of the MTS. In 2006 the USCG responded to 28,316 cases of mariners in distress, and 1,765 collisions, allisions,

and groundings occurred on our congested waterways. Some accident rates are trending downward, but despite strong prevention efforts, 59 professional mariners, 15 passengers, and 703 recreational boaters died, and many more were injured.[37]

Commendable efforts have been made to combine legacy Customs, Immigration, and USDA inspection services into a single, cross-trained officer corps, but meeting the increasing demands and the sheer volume of cargo entering the United States is a challenge. The Maritime Transportation Security Act of 2002 (MTSA) and the Safe Port Act of 2006 added security mandates that are currently being addressed via a number of existing Federal strategies and plans that are outside the scope of this document. Overarching directives guiding this effort are contained in the National Strategy for Homeland Security, Presidential Directive NSPD-41/HSPD-13, the National Strategy for Maritime Security, and HSPD-7. The priority of the *MTS National Strategy* is to be aligned with the Nation's security strategies. Continuous consultation with industry is essential to meet the ongoing needs of waterborne commerce and the protection of U.S. resources from a range of dangerous and unwanted materials.

MTSA requires vessels and port facilities to conduct vulnerability assessments and develop security plans that may include passenger, vehicle, and baggage screening procedures, security patrols, establishment of restricted areas, personnel identification procedures, access control measures, and installation of surveillance equipment. The volume, cost, and technical complexity of these new requirements have been a challenge to both business and the government, as they cope with financing infrastructure needs and increased operating costs. Developing and implementing regulations such as the requirements for vessel and facility security plans, and personnel identification procedures such as the Transportation Worker Identification Credential (TWIC), requires complex policy and sophisticated equipment. The Safe Port Act of 2006 added requirements to MTSA to improve security of U.S. ports. The Federal oversight authorities must balance the interest for a high level of protection needed for the MTS while supporting and facilitating the flow of commerce.

[37] USCG FY 2008 Budget-in Brief and Performance Report dated Feb 2007. Available at www.uscg.mil/top/about/doc/FY08_Budget.pdf

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Environmental Impacts

As waterborne trade increases, stresses to sensitive marine and freshwater environments, as well as to port communities, likely will increase. Emissions from vessels, port equipment, trucks, and locomotives have emerged as a significant concern in many port communities at the national and international level, in part due to serious human health effects associated with diesel particulate matter and other air pollutants. Regulation of carbon emissions will increase the need for accurate air quality monitoring and modeling at sea and in port; energy alternatives and technologies such as green vessel design that reduce and mitigate emissions; and research to measure and quantify effects of pollutants on human health and the environment. Discharge of oil and other pollutants, contaminated sediments, and the spread of non-indigenous invasive aquatic species through releases of ballast water or other means can affect water quality and ecosystem stability. CMTS Agency partners must look systemically at the hydrology, hydrodynamics, sediment, and water and air quality of the marine environment, and their focus on issues such as regionalization and integrated water resources will help support a more sustainable transportation system. CMTS Agencies will also focus on climate change and its implications for the MTS.

Growth in trade and travel, and associated use and activities in the MTS, as well as maintenance, improvements, and expansion of the MTS infrastructure, present challenges for protecting the environment. Accidents, disruptions, and safety and security issues also present environmental challenges and potential impacts to human health and the environment. Measures to avoid and mitigate impacts will be needed to sustain the projected growth in waterborne trade and the increase in other ocean-related activities in a manner that protects and sustains the environment and human health.

The Federal government and its MTS partners advocate the practice of environmental stewardship while operating within the MTS. Like most MTS-related laws and regulations, the authorities governing environmental protection are distributed among many Federal, State, and local agencies. Management of complex ocean, river, and lake resource linkages requires agencies and MTS partners to work together to support environmental, economic, and human health interests.

For example, the Federal government is responsible for setting national standards for the protection of air, land, and water, while States and localities frequently implement these standards and in some instances have authority to make these standards more stringent. Further, the global nature of maritime commerce means that international standards and practices also affect the MTS. For example, the International Maritime Organization is responsible for setting international maritime environmental standards, including those for maritime transportation impacts to the environment. A systems approach to Federal MTS environmental protection is needed to assist a broad array of maritime industries in complying with Federal and international guidelines and regulations. Local and regional initiatives remain vital parts of the planning process, and should be part of the national effort to achieve system-wide cohesion.

The value of waterfront access and property is evolving, and the importance of the waterfront for recreational and residential interests is increasing. Ports often must compete with other development interests for land and access. The economic standard has become more stringent to justify infrastructure investment for ports. Lightly contaminated industrial areas near ports offer potential for port development, but must compete with other land uses.

Disruptions

Minor MTS disruptions due to congestion, bottlenecks at intermodal connectors, infrastructure failures, collisions, allisions, and unavailable services or other events are experienced every day. The long-standing professional nature of MTS users and regular contingency planning provide sufficient flexibility to respond to short-term disruptions without seriously impeding the flow of passengers and goods through the waterways. Natural disasters, labor management disputes, terrorist threats, and even outbreaks of a pandemic influenza can pose severe threats to the MTS and our national economy by shutting down a significant port or an entire region and disrupting a critical supply chain. The shutdowns following Hurricanes Katrina and Rita in 2005 and labor-management disputes at West Coast ports in the Fall of 2002 highlighted the importance of the MTS to the U.S. supply chain. For example, the estimates of economic damage from the 2002 West Coast shutdown were between $140 million and $2 billion per day. The Congressional Budget Office (CBO) estimated in 2006 that the economic impact of a one-week shutdown just

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of the container traffic going through the Ports of Los Angeles and Long Beach would average $9.3 to $21 million per day.[38] However, accidents and failing infrastructure pose the most immediate threat to the MTS. The MTS, as a critical component in the global and domestic transportation system, must have the infrastructure, service capabilities, and effective intermodal connections to support our Nation's economic needs and expectations, and a growing international trade sector.

The MTS will also need to plan and build in flexibility to deal with uncertainties in the future. While trends in containerized traffic may be predicted, there are unforeseen situations such as natural disasters and political instabilities around the globe that may place unexpected demands on the MTS. This may include humanitarian or military responses to assist with stabilization reconstruction, or possible military conflict. The operational efficiency of the MTS must be balanced with the capability to support these contingencies, maintaining sufficiently robust infrastructure to enable continued commercial traffic while simultaneously supporting the movement of necessary equipment and supplies.

The Federal role in responding to natural and human-caused disasters is governed by the National Response Framework, which replaced the National Response Plan effective March 22, 2008. National efforts to reopen the Gulf Coast ports following Hurricanes Katrina and Rita are examples of Federal actions taken after disasters. Procedures may include securing the port(s), removing obstructions to navigation, and rebuilding Federal infrastructure. After containment of the risk, the first step in restoring operation of the MTS is to facilitate the movement of passengers and goods either by opening the impacted waterway or by rerouting traffic. The private sector interests in vessels, ports, and transfer assets, as well as local and State government interests in opening the ports following a disruption, form the *National Strategy's* policy framework for continuity of operations. Participants at the "Maritime

[38] The $140 million estimate is from Patrick L. Anderson and Ilhan K. Geckil, "Flash Estimate: Impact of West Coast Slowdown," (Anderson Economic Group, LLC, October 15, 2002), while the $2 billion estimate is from Martin Associates, "An Assessment of the Impact of West Coast Container Operations and the Potential Impacts of an Interruption of Port Operations, 2000" (October 23, 2001). The CBO estimate is from "The Economic Costs of Disruptions in Container Shipments" (March 29, 2006).

Recovery Workshop" held in August 2006 by the USCG made statements such as the following:

- Industry does not want the Federal government to automatically close all ports in response to a local event without a full risk analysis;
- Shippers would like to be in charge of their own logistics contingencies in case their usual port of call is closed, but estimated that as many as 50 percent of shippers do not have contingency plans in place and might welcome guidance from the Federal and State governments to develop them;
- Industry respects that some critical cargo ships may have priority (such as petroleum supplies) to enter a port over other less critical cargo (such as luxury items) after a shut-down; and
- MTS operational interests in the private sector need to be a part of the Federal interagency stakeholder discussions to maximize services and minimize conflicts and confusion.

MTS resilience and recovery can only be accomplished by the cooperation of many Federal stakeholders. The USCG has general oversight responsibilities, the USACE surveys, dredges, and removes obstructions from Federal channels and waterways, NOAA's Navigation Response Teams assist with surveys and depth soundings to chart the channel bottom, the U.S. Environmental Protection Agency (EPA) provides environment response, and the U.S. Maritime Administration (MARAD) can provide support resources such as the Ready Reserve Force.

Finance and Economics

Collaborative action among the Federal government, State, local, and private interests is necessary for preserving and enhancing the MTS. The Federal role is considerable and includes nationally significant public infrastructure, mobility, channels, navigational systems, charting, weather and real-time navigational information, environmental oversight, marine safety and security, and accident response. Local and State entities address the demands of their geographic areas. The private sector invests in vessel, port, and transfer assets. The costs typically associated with constructing and maintaining Federal

infrastructure include fixed and variable costs. Fixed costs are incurred once and do not vary with the volume of use. Variable costs are incurred each time the infrastructure is used. In addition, congestion costs account for the delay expenses that each additional user imposes on other users.

Federal expenditures for MTS infrastructure maintenance and improvements have been relatively flat for years, in real terms and as a share of Agency budgets, with the exception of funding for Hurricane Katrina-related projects. The challenge is to use existing infrastructure efficiently, quantify the need for new infrastructure, and determine how these needs can be financed and how these financing costs might be distributed across users. A comprehensive look at innovative approaches will be necessary because of the complexity and diversity of structure and ownership, both public and private, and an uneven distribution of the costs and benefits of public infrastructure. This comprehensive look must include the existing MTS Trust Funds[39] as well as existing fees and taxes, private sector finance, and innovative new user fees, including increasing the use of congestion pricing.

[39] The Harbor Maintenance Trust Fund and the Inland Waterways Trust Fund.

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SECTION THREE: MTS PRIORITIES

The *National Strategy* explores the five most pressing and current challenges to marine transportation, and calls for Federal action in these priority areas: capacity, safety and security, environmental stewardship, resilience and reliability, and finance.

Capacity

The capacity of the MTS must be adequate, reliable, accessible, and economical. Impacts to any one of these attributes can result in diminished capacity of the system, a decline in usage, or can cause significant cost increases, any of which could seriously impact the Nation's economy and security. Maintaining and sustaining existing capacity must be a priority to ensure that the MTS remains a thriving and viable entity. Enhancements to the MTS that would increase its capacity should be pursued whenever the need is clearly identified and justified.

Currently, 59 authorized Federal channels handle approximately 90 percent of all cargo tonnage through U.S. ports.[40] As a leader in world trade, the U.S. relies on its coastal and inland ports and waterway infrastructure to support the smooth flow of an enormous volume of goods shipped through the MTS.

At the USCG MTS National Strategy Workshop in July 2006, industry reported that capacity issues in some of the Nation's major ports require attention. For example, the Ports of Los Angeles and Long Beach (LA/LB) when combined rank ninth in metric ton throughput in the world, and face port congestion and capacity challenges. The ports of LA/LB handled approximately 15.5 million TEUs of containerized cargo in 2006, a 12 percent increase over the previous year.[41] These two ports forecast handling 42.5 million TEUs by 2030,[42] an average

[40] U.S. Army Corps of Engineers, 2007.
[41] www.wtcanet.org/press_05-03-06.htm See first paragraph (numbers slightly off); WTCA-LAECD Study, 2006. ALSO http://laedc.org/reports/Trade-2007.pdf; World Trade Center Organization LA-LB International Trade Trends and Impacts: The Southern California Region, 2006 Results and 2007 Outlook.
[42] http://freight.transportation.org/doc/water/RichardNordahl_Caltrans.pdf. See slide #6; California Department of Transportation: California Ports Development Update, 2006.

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annual increase of more than four percent. The Southern California port authorities recently declared there has been no available land for expansion since 2006,[43] and what land is available has gotten progressively more expensive due to other commercial or residential uses. The Ports of Los Angeles and Long Beach are planning to use new technology to increase cargo capacity on the same waterfront acreage without the necessity of new construction, new equipment, or changes in labor. One example is making the ports more "agile" by using "sprint trains" to take intermodal cargo directly from dockside and move it to a remote inland location for storage and sorting prior to distribution. However, the need to improve, enhance, and otherwise modify the existing infrastructure in LA/LB remains a critical element in MTS planning. Any plans to develop additional areas of the ports will be evaluated under the appropriate Federal and State environmental review requirements.

Port capacity issues require coordinated action by public and private entities and may entail improving the Federal navigation channels, the intermodal connectors to railways and highways, and communication with industry on port conditions to enable vessel operators and owners to better time their vessel movements. Facilitating the use of adjacent properties that are currently under restricted use due to contamination—commonly referred to as "brownfields"—may provide land development opportunities for certain ports. Again, interagency and inter-governmental cooperation will be essential. An optimized intermodal freight system would allow rapid movement of cargo to and from inland points and the ports.

In response to natural disasters, terminal and rail congestion, and labor-management disputes, many companies have reoriented their supply chains to minimize the potential impacts of disruptions.[44] Some companies have begun to use alternative West Coast ports as well as alternative gateways on the Gulf and East Coasts via the Panama and Suez Canals. A central issue for increasing operational efficiencies and productivity is related to how best to improve throughput capacity.

[43] www.portstrategy.com/archive/2007/december/regional_feature_us_west_coast/us_west_coast_feature; Port Strategy Online Edition, article "A Balancing Act," 2007. (Mr. Steven Lautsch, Executive Vice President, Marine Terminals Corp. says, "The traditional response has been to expand the ports' footprint but there is little or no land available for expansion.").

[44] Principles for a U.S. Public Freight Agenda in a Global Economy, by Martin E. Robins and Anne Straus Wieder from January 2006-The Brookings Institution Series on Transportation Reform.

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Private industry is examining ways to increase throughput capacity by using a number of measures that address total system synchronization. In general, these measures focus on intermodal networks that increase the flow of cargo through marine ports and terminals, and how best to increase transport service for passenger movement.

The Heartland Corridor project is a creative streamlining effort developed by State transportation agencies to improve efficiency of the rail connections between Virginia ports and distribution markets in the Midwest. The project, which will cut the present route to the Midwest by 250 miles, allows double-stacked containers to be transported by rail between the Hampton Roads region of Virginia to locations in West Virginia and Ohio. This will be accomplished by linking existing rail systems, building new rail lines where needed, and raising tunnel and bridge heights to allow for passage of double-stack trains.

On the West Coast, the Pier Pass Program—a private sector initiative to address traffic congestion and air pollution concerns at the ports of LA/LB—is helping to even out the flow of truck traffic in and around the area by expanding and modifying port operations to facilitate container drop-off and pick up. The greater use of port and regional chassis pools at Norfolk, VA and other U.S. ports is creating operational efficiencies for the ports, truckers, and ship operators. The Federal government can offer economic incentives to encourage private sector investment in MTS infrastructure and achieve operational efficiency to reduce congestion. CMTS Agencies can share best practices to encourage private sector interests and local governments to pursue innovative initiatives.

Landside freight congestion has caused some shippers to consider marine transportation as an alternative. Shipping along our Marine Highways has the potential in some cases to facilitate enhanced freight flow, expand freight capacity, reduce congestion, or improve air quality. A minimal reduction in the anticipated growth of trucks on highways can make a significant difference. For example, one 80,000-pound tractor-trailer truck does a great deal more damage to pavement than a car and imposes greater costs per mile for road wear—cars cost an average of .05 cents per mile, single unit trucks cost .31 cents per mile, and multi-unit trucks cost .66 cents

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The Kirby Inland Marine Vessel, M/V *Bill Watson*, with a 15-barge tow. Photo courtesy Kirby Marine.

per mile.[45] Thus, the use of marine transportation for cargo could reduce the costs of road maintenance.

America's Marine Highways can be viable alternative transportation modes. America's Marine Highways serve as an extension of the surface transportation system and consist of the navigable coastal, inland, and intracoastal waters of the United States and nearby Canada and Mexico. These corridors support the movement of passengers and cargo between U.S. ports, or between U.S. and Canadian or Mexican ports, relieving landside congestion. Transporting freight by water has traditionally been used for the movement of bulk commodities such as coal, petroleum, grain, and lumber, yet growing freight traffic congestion on the highways, combined with innovative approaches, could encourage shippers to consider marine transportation for other cargo. To promote optimal use of Marine Highways and decrease congestion, Marine Highway Corridors will be designated. The Federal government could encourage greater use of the MTS for shipping freight, as well as passengers, by supporting the collaborative partnerships to develop specific congestion mitigation projects, promoting public/private partnerships to develop marine highway services, and developing performance measures for assessing the benefits of marine transportation.

The *National Strategy* envisions a coordinated and detailed exploration of specific options for increasing the efficiency of the existing MTS system. Near-term actions should focus on working collaboratively to ensure Federal statutory, regulatory, and institutional requirements concerning the MTS are consistent and coordinated across the system. Regulatory and tax

[45] 1997 Federal Highway Cost Allocation Study, table V.5, Federal Highway Administration, U.S. Department of Transportation.

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policies should be as efficient and equitable as possible and Federal funding should maximize the efficient use of existing infrastructure and leverage the benefits of public/private partnerships.

To address capacity issues, improve the efficiency of the Marine Transportation System, and reduce transportation congestion, the CMTS recommends the following eight actions:

- Work collaboratively to address Federal statutory, regulatory, and institutional requirements in order to improve MTS performance;
- Encourage the expansion of shipping on the Marine Highways including the establishment of a pilot program to designate Marine Highway Corridors to use the waterways to relieve congestion on roadways;
- Propose economic incentives for private sector investment in MTS infrastructure and operational technologies to make the MTS more efficient for existing and future needs;
- Collaborate with State, local, and private entities to ensure environmental and National Environmental Policy Act (NEPA) compliance, and to plan for land use in and near ports;
- Share best practices and create incentives to encourage private sector interests and local governments to pursue initiatives for increased efficiency and environmental sustainability;
- Publish valid, reliable, and timely data on the MTS including cargo movements, capacity, and productivity;
- Facilitate standardized terminologies, interpretations, and flow-through models to foster increased productivity; and
- Develop performance measures to assess the productivity of the MTS and the risk of potential infrastructure failures to the MTS.

Safety and Security

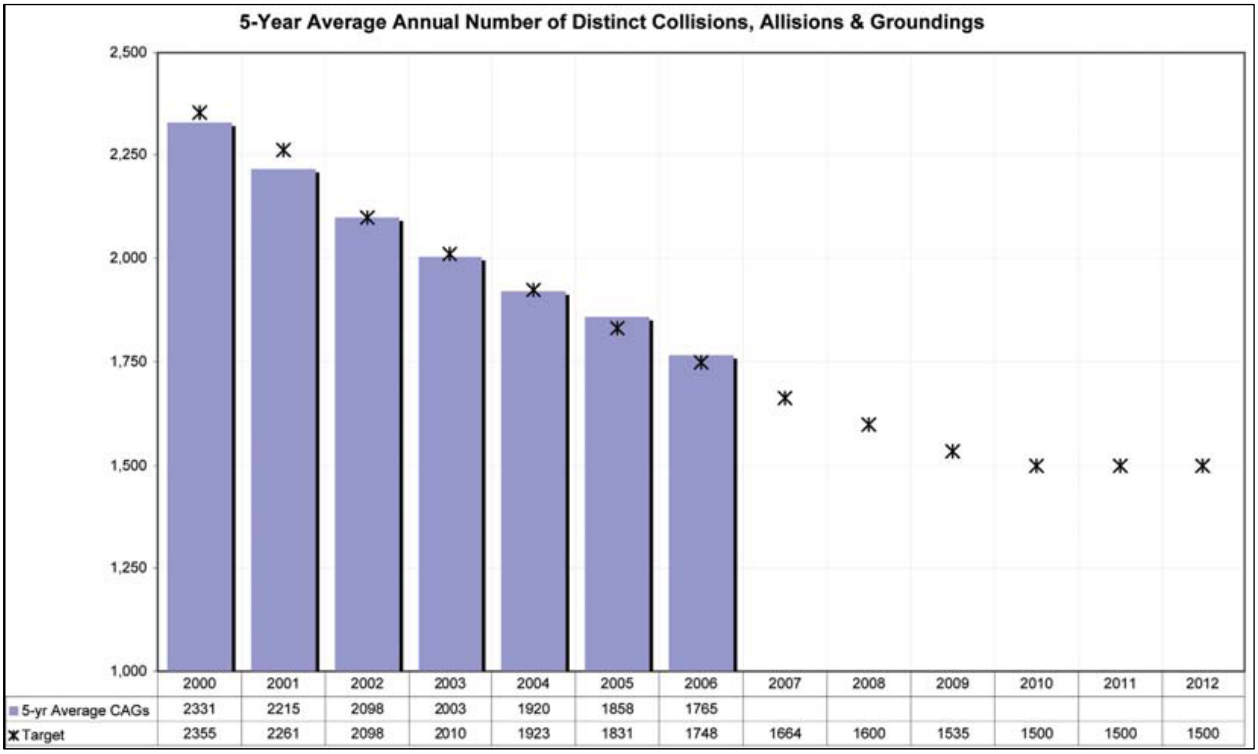
The complex nature of the MTS presents a number of significant safety challenges. Large, sophisticated vessels travel at high speeds in close proximity to each other, often in poor weather conditions. The cargoes they carry can be dangerous and require specialized handling both on the vessel and in the ports. Keeping these vessel and port operations safe requires systems, technology, and trained people to work seamlessly together. When prevention efforts fall short, response systems must be in place to protect lives, the environment, and property.

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A number of Federal Agencies administer programs that improve marine safety throughout the various components of the MTS. The USACE operates and maintains locks and dams on our inland and coastal waters, and dredges and maintains channels for vessels of all sizes. The USCG places aids to navigation, operates and maintains electronic navigation and vessel traffic management systems, certifies mariners to ensure their competency, and prevents and responds to oil spills and other accidents with assistance from NOAA and the EPA. It also develops safety standards and enforces compliance on commercial vessels, and examines recreational vessels for safety deficiencies. NOAA surveys and charts our oceans and waterways, and monitors and predicts weather. It also collects and disseminates real-time navigational information on tides, currents, and air drafts. MARAD works with private industry and transportation entities to promote safe, efficient ports. It operates the U.S. Merchant Marine Academy and helps to support the six State maritime academies. The MMS collects and provides mariners with access to location data of both visible and submerged offshore energy infrastructure. Collectively, these programs provide layers of safety to users of the MTS to prevent the loss of life and property, and harm to human health and environmental resources. The CMTS Agencies can work together to develop a unified approach to planning for energy infrastructures and energy import terminals to mitigate risk to vessels and the environment.

The development of new technologies supporting oil and gas exploration in offshore waters is making possible the discovery and production of new energy reserves critical to our Nation's economy. While many reserves continue to be found in shallow-water, near-shore locations, the most significant reserves are being found farther offshore, at water depths exceeding 1,000 feet and approaching 8,000 feet. Most of these new discoveries could result in the construction of either fixed or floating structures that would remain on location until the reserves have been depleted, a period of up to 50 years. Additionally, alternative energy offshore structures supporting wind, ocean wave, and tidal current power are expected to be constructed in Federal offshore waters. Offshore supply vessels have become an important part of U.S. domestic maritime operations. A safe and secure MTS must account for all of these energy structures in order to allow for the safe passage of vessels, both to prevent risks of injury to people and the environment and to prevent loss of energy production.

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Coast Guard FY 2008 Budget in Brief and Performance Summary, p 31

While the number of collisions, allisions, and groundings has steadily declined over the years, safety concerns continue to be high due to the increasing number of recreational and commercial boaters that share the waterways.

It is anticipated that use of the ocean will increase. These uses include marine transportation, production of energy, protection and management of living marine resources, tourism and recreation, fishing, and scientific research. The interaction of these uses is also expected to increase. As a result, to promote safety and reduce risks to life, property, and marine life, intergovernmental collaboration and action to address these interactions will be required. As technologies improve, the CMTS Agencies can collaborate to improve marine safety. For example, data integration of Vessel Traffic Services, Automatic Identification Systems (AIS), electronic charts, and real-time navigational and weather information can create a comprehensive navigational safety system that significantly improves the quality and timeliness of safety information.



Ship crews are required to have the training needed to respond to emergencies. Loss of ships and cargoes still cause supply chain disruptions.
Photo courtesy USCG.

Adverse winds, waves, and currents may slow a ship's progress and lengthen a single ocean crossing by days. Ship time has high economic value to marine operations in terms of charter rates and operating costs. Ship routing services based on real-time weather forecasts provide information to mariners to make decisions for safe and economically beneficial ocean crossings. As of 2000 an estimated 50 percent of ocean transits used some form of weather-based ship routing services for safety and savings in fuel and transit time.

Severe weather is cited as a contributing cause of many maritime accidents. A 1992 study estimated the world fleet's annual "hull and machinery" loss to be about $2 billion.[46] In addition, ocean storms with winds sometimes exceeding hurricane force are linked to damage and loss of cargo, environmental damages due to spills of hazardous materials, and human injuries and deaths.

The Federal government, in conjunction with international, State, local, industry, and public partners, is also responsible for ensuring the security of the MTS. Our maritime border is extensive, and security of the MTS is critical to our national security and prosperity. Maritime security issues are currently being addressed via a number of existing Federal strategies and plans that are outside the scope of this document. The two overarching directives guiding this effort are contained in Homeland Security Presidential Directive NSPD-41/HSPD-13 and HSPD-7. The key elements of NSPD-41/HSPD-13 are an interagency Maritime Security Policy Coordinating Committee established to serve as the primary forum for coordinating U.S. government maritime security policies, the *National Strategy for Maritime Security*, and eight

[46] Kite-Powell, H.L. 1992: Economics of Standards. Ph. D. Dissertation, Ocean Engineering Department, MIT, Cambridge.

supporting plans created by working groups composed of a cross-section of Federal Agencies. HSPD-7 deals with critical infrastructure identification, prioritization, and protection, by establishing a national policy for Federal Departments and Agencies to identify and prioritize United States' critical infrastructure and key resources, and to protect them from terrorist attacks. The priority of the *National Strategy* is to be aligned with the Nation's security strategies. Many safety, resilience, and efficiency improvements will have synergies with security and the *National Strategy* will leverage these whenever possible.

International security standards are a proven methodology that drives business to improve security beyond minimum mandatory requirements. Ports are striving to gain international security certification to demonstrate a level of excellence to their current and potential customers. The process of international standards allows flexibility in addressing security and provides for a holistic approach in the international supply chain.

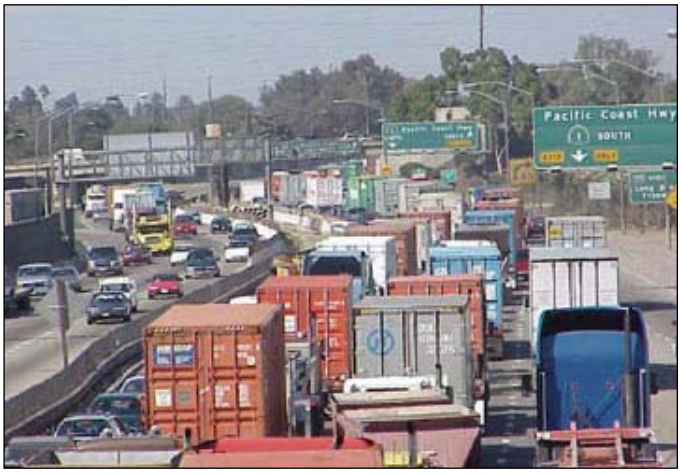
To ensure and strengthen the marine safety of the MTS, and to coordinate maritime security, the CMTS recommends the following seven actions:

- Coordinate existing Federal navigation programs to ensure collaboration, reduce duplication, and standardize terminology and presentation;
- Deliver timely, relevant, accurate navigation safety information to mariners, including real-time information systems such as the Physical Oceanographic Real Time Systems (PORTS), e-navigation, under-keel clearance, High Frequency Radar (HFR) air gap technology, and Real Time Current Velocity systems at locks and those systems associated with development of the Integrated Ocean Observing System to improve navigation safety and efficiency, and reduce the risk of accidents;
- Encourage, coordinate, and support navigation technology research and development to enhance navigation safety;
- Enhance and improve existing frameworks that plan for, operate, maintain, and mitigate risks to vessels and the environment, and respond to accidents and natural disasters;
- Ensure coordination among maritime transportation and maritime security policy-making bodies and programs;
- Consider ways in which security measures impacting the movement of trade by water can be streamlined, and where economies and coordination can be realized between safety and security imperatives; and

- Work closely with State and local boating authorities and entities, recreational boating organizations, commercial shipping interests, and ports to reduce accidents resulting from competing uses of navigation channels, and increase and manage safety of the MTS.

Environmental Stewardship

The economic health of the MTS and the natural health of the Nation's ocean, coastal, and freshwater ecosystems must co-exist in a way that supports transportation while protecting and sustaining human health and the environment. The MTS, including its ports and inland waterways, crosses, intersects with, and is in close proximity to sensitive and valuable natural resources, including wetlands, coral reefs, estuaries, drinking water resources, recreational waters, watersheds, critical habitats, fisheries, and marine mammals. Environmental stewardship of the MTS should be directed broadly to protect the environment from MTS-related impacts and to enhance the environment. Green port and waterway design can protect human health and enhance the environment, as can beneficial use of dredged material projects for beach restoration, wetland development, and habitat creation.



The MTS has the potential of becoming the most environmentally advantageous means of commercial transportation. Photo courtesy California Marine and Intermodal Transportation System Advisory Committee.

When compared with other transportation modes, marine transportation is a safe, competitive, and efficient means of moving people and cargo. It also has the potential of becoming the most environmentally advantageous means of commercial transportation. Due to technology advancements, including enhanced hull and propulsion efficiency and advancements in electronic navigation and cargo transfer systems, shipping accidents have

been reduced by 80 percent over the last 30 years, including oil spills from tankers.[47] As a result, there has been a substantial reduction in marine pollution from vessels over the last 15 years, especially with regard to the amount of oil spilled into the sea, which has fallen more than 60 percent since the 1980s.[48] This has been accomplished despite a significant increase in worldwide waterborne trade.

However, ecosystems found near MTS infrastructure are impacted by air emissions and other pollution from land-based sources and vessels, such as diesel exhaust, point source discharges, non-point source runoff, vessel discharges, marine debris from ships and from fishing, research, and recreational vessels, oil spills, and invasive species from ship hulls and ballast water. Dredging and dredged material management is a priority issue, especially where sediment may be contaminated by pollutants, and where dredging, disposal, or placement occurs near sensitive habitats, such as wetlands, coastal marine ecosystems, or fisheries areas.

Petroleum products spilled into waterways can have both short-term and long-term negative effects on water quality and living resources. These can be from both chronic, low-level releases as well as from large oil spills. The volume and type of petroleum product, as well as the proximity and sensitivity of the living resources to its release, may also affect the degree of impact. Air pollution from marine vessels and port operations can adversely affect human health and environmental quality in ports and coastal areas, as well as regions far removed from the ports and their intermodal connections. Ocean-going vessels produce sulfur oxides, nitrogen oxides, particulate matter, greenhouse gases, and other air pollutants. Diesel-powered vehicles and engines at the ports emit soot, or diesel particulate matter, and other air pollutants that increase public health risks. Cruise ships generate large amounts of solid and liquid waste that must be disposed of properly, whether in port or at sea. The discharge of petroleum products and oil, hazardous substances, introduction of non-indigenous invasive species, marine debris, garbage, and human waste are matters of concern for the health of citizens and the environment.

[47] Marine Board Meeting, February 6, 2006.
[48] 2006 UNEP Environmental Report.

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An integrated and coordinated approach to environmental pollution reduction and mitigation is essential in the MTS. Coordinated action to improve the natural environment can result in changes in marine transportation operations and infrastructure, including dredged material placement, ship air emissions, and ballast water treatment, to minimize and mitigate impacts on natural resources and the surrounding communities.

To protect the environmental health of communities and ecosystems that may be affected by the MTS, the CMTS recommends the following eight actions:

- Advocate transportation projects, technologies, and mitigation activities that improve air quality, reduce greenhouse gas emissions, and reduce congestion in port areas and other MTS components;
- Work collaboratively to foster the collection of data and information that will underpin environmental impact assessments and decision-making in MTS planning and development;
- Support research and develop and implement practical strategies to control and mitigate effects on the marine environment from pollutants, invasive species, and anthropogenic sound, and to reduce negative interactions between ships and marine mammals;
- Ensure environmentally appropriate dredged material management;
- Promote coordinated regional and watershed efforts of States, Federal Agencies, and other partners to manage sediment, dredging and dredged material, point source discharges and storm water runoff, oil or hazardous material spills, harmful anti-fouling systems, and sources of marine debris to restore habitat, reduce pollution, and plan for conservation and mitigation;
- Support harmonization of State, Federal, and international environmental standards, policy, laws, and regulations through work with Federal interagency bodies, in the International Maritime Organization and other organizations, and implement international treaties such as those regarding prevention of maritime pollution at sea;
- Support national and international solutions to environmental problems related to ship decommissioning and dismantling; and
- Encourage use of industrial land banks and formerly polluted industrial areas for MTS and intermodal transportation system facilities, and promote MTS development that avoids disproportionate impacts on minority and low-income communities.

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Resilience and Reliability

There will always be some operational delays within the MTS: a vessel may have to wait for an available berth; a vessel operator may be subject to an unexpected safety or security boarding; and ship traffic volume can delay the availability of a pilot to move the vessel through a navigation channel. While all delays should be minimized or eliminated, an experienced operations manager or shipper will build typical delays into the costs and consideration of operating. However, because of modern supply chains in the movement of goods and the volume of vital commodities that flow through the MTS, we are more aware of the impact that certain disruptions can have on the economics and quality of life of our Nation. Protecting MTS efficiency and resilience requires providing ports and infrastructure with layers of operational capability, increasing target hardness, and improving the quality and capacity of the intermodal connectors that complete internal movement of the passengers and goods. By decreasing the physical vulnerability of these assets through new design criteria or improvements in order to mitigate the consequences of an attack or event affecting communications and critical systems, it may be possible to achieve an overall reduction in risk to the MTS. Also, as infrastructure is added to meet capacity challenges, intermodal connections are improved, and cargo is shifted from congested modes to modes with excess capacity, increased system-wide capacity and efficiency will result. By enabling the MTS to achieve larger conduits to re-route cargo around disruptions and congestion, the system's resilience can be enhanced. Continuity of operations and the resumption of shipping following a disruption are essential for business and the economy, as the impact of delayed restoration may be more damaging than the incident itself.



Violent storms threaten ships, cargo, and port infrastructure.
Photo courtesy USCG.

Each MTS entity can play a role in ensuring the resilience and reliability of the MTS. Operations will be able to resume as soon as possible following a disruption by the coordination of contingency plans for the repositioning of resources needed to address expected increases in

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cargo movements at non-affected ports following a disruption, and providing timely and accurate information to industry, commercial, and passenger transportation. The National Response Framework addresses hazards and responses.

Consistent with the National Response Framework, to increase the resilience and reliability of the MTS, the CMTS recommends the following six actions:

- Provide coordination, expertise, and resources to ensure continuity of operations, essential public services, and the resumption of commercial marine activities following a disruption;
- Develop reserve and surge capacity in the MTS and coordinate with industry on response and recovery operations;
- Develop a coordinated approach to emergency permitting for channel restoration following a large-scale sediment deposit in navigation channels from natural disasters such as hurricanes that obstruct the channel and disrupt port activities;
- Work collaboratively to resolve cross-cutting jurisdictional issues surrounding abandoned and wrecked vessels or damaged bridges;
- Develop and promote national and international strategies for addressing potential climate change impacts on ports, waterways, and other vulnerable elements of the MTS; and
- Provide appropriate consultation and coordination with other policy facilitation structures, such as the Committee on Ocean Policy.

Finance and Economics

The *National Strategy* envisions a coordinated and detailed exploration of specific options for increasing the efficiency of the existing MTS system, developing better methods for prioritizing investments, and developing ways of attracting more private sector investments. Increases in funding should be considered only after a thorough exploration of opportunities for increasing the efficient use of existing infrastructure, prioritizing investments so that all funds are used effectively, and an identification of both private and public sources of funds.

The costs typically associated with Federally financed infrastructure can be divided into three types: fixed, incremental, and congestion. Fixed costs are incurred once and do not vary with the volume of use. Incremental costs are incurred each time the infrastructure is used. Congestion

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costs account for the delay cost that each additional user imposes on other users. To finance an infrastructure project over the usable life of the infrastructure, fees, taxes, or general revenue contributions must be collected that equal the sum of the fixed and incremental costs. Each of these costs must be broadly allocated between users and general revenue financing.

- Incremental costs should generally be allocated directly to users who impose these costs.
- Fixed costs should be allocated between user-derived fees, taxes, and general revenue contributions. The allocation between these sources should generally reflect the benefits that accrue to the users.
- Congestion prices should be charged when appropriate. The revenues collected from congestion pricing can offset fixed costs and thereby reduce distortions.

As part of this long-term planning, the CMTS will study and consider three interrelated topics in more detail. The CMTS member Agencies will collaborate to study approaches to prioritizing how Federal dollars should be allocated among competing priorities when Federal finance is needed for maintenance and infrastructure projects. In general, projects should be prioritized according to the difference between the public benefits, and the public costs they will incur (including funding); that is, those projects producing the greatest benefits at the lowest cost should be given highest funding priority by the Federal government. It will be important for the CMTS to solicit input on how best to measure prospective costs and benefits, some of which are easier to quantify in economic terms than others. Currently, each Federal Agency has its own list of criteria governing funding decisions for agency projects. The CMTS will address how best to coordinate the allocation of Federal funds for projects across Agencies. Finally, the CMTS will study alternative approaches to financing maintenance and infrastructure projects. This study will consider the appropriate tools (including fees, taxes, and general revenue contributions) for financing infrastructure projects depending on the characteristics of the projects and involve high-level discussions to promote those funding strategies.

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To maintain and improve the infrastructure of the MTS, the CMTS recommends the following five actions:

- Study alternative approaches to financing construction, rehabilitation, and maintenance of infrastructure projects, as well as environmental impact mitigation. This study will consider fees, taxes, and general revenue contributions for financing infrastructure projects, depending on the characteristics of the projects, and involve high-level discussions and collaboration with State, local, and Tribal governments, and also with private entities as appropriate on funding strategies;
- Study approaches to prioritizing how Federal dollars should be allocated among competing priorities;
- Ensure that cost allocation takes into consideration environmental and human health costs, promotes economic efficiency, and that the allocations do not create unfair competitive disadvantages;
- Study how best to coordinate the allocation of Federal funds for projects across Agencies; and
- Coordinate a CMTS membership policy recommendation to the President for congestion prices, which should be charged when appropriate. The revenues collected from congestion pricing can offset fixed costs and thereby reduce economic distortions.

SECTION FOUR: GOING FORWARD

The *National Strategy* presents a framework for a way forward for addressing Marine Transportation System needs for the next five years, with a view to emerging issues 20 or more years in the future. It is a short-term action plan with a long-term view. The *National Strategy* provides guidance for policy formulation and planning to ensure the MTS is properly maintained, fully efficient, safe, secure, and environmentally sustainable. The U.S. must protect its maritime interests across a vast domain with a limited number of assets that are spread out across multiple organizations. Enhancing our MTS demands a unity of effort from all stakeholders. The effort is not solely domestic; it spans the globe to include the global supply chain and improving the efficient flow of goods between nations. A systems approach to maritime planning, management, operations, and information sharing will serve as both a force multiplier and a means for coordinating maritime activities.



An aerial view of the Portsmouth, VA APM Terminals' new $450 million dollar facility with intermodal highway and rail connections.
Photo courtesy APM Terminals.

Visibility of the MTS is critical for public and private awareness of the system's value to the Nation. The role of the CMTS is to foster a partnership of Federal Agencies with responsibility for the MTS and to provide a forum through which national MTS policies, consistent with national needs, are developed and implemented. The CMTS member Agencies will provide leadership through their policies, activities, and outreach to the many and diverse stakeholder groups in the public and private sectors that will ultimately be needed to accomplish the vision for the MTS into the future. Through its Federal Departmental and Agency members, and building on the relationships forged in producing this document, the CMTS will prioritize the actions within the *National Strategy* and develop a work plan of strategies and steps to fulfill

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them. The CMTS will coordinate with other policy facilitation structures, such as the Committee on Ocean Policy, and provide a biennial report to the President on the progress made to complete the actions.

The MTS is a strategic, integrated, and globally competitive transportation system, and, if it is going to effectively serve the U.S. now and in the future, attention must be focused on the priorities identified in the *National Strategy*. The CMTS members have developed a framework for action, and will improve the MTS through the creation of efficiencies that can be realized by enhancing the coordination and integration of Federal government policies and actions, implementing technological advances that can be put in place by combining expertise, and developing financing options that promote sound investments and infrastructure improvements.

In the years ahead, as the recommended actions of the MTS *National Strategy* are executed by the CMTS and its member Departments and Agencies, substantive and measurable progress to improve the MTS is expected. The capacity of the MTS will expand to support and achieve significant system efficiencies. Advancements in navigation information and services will ensure a new level of system safety and security. The air, water, and land in proximity to, or affected by maritime-related activities will reach new standards of quality, as reductions in air pollution, including greenhouse gases, and marine pollution at sea and in coastal areas are realized. Additionally, contingency plans will be in place and system-wide coordination institutionalized to respond effectively to both system disruptions and climate-change impacts. Taken together, the completion of the recommended actions will move the MTS forward, maintaining and advancing the Nation's standing as the global leader in maritime trade, as people and commerce are moved safely, securely, and reliably in a manner that is environmentally protective within this ever-advancing integrated network.

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ANNEX I: THE CMTS

The U.S. Congress, in the Coast Guard Authorization Act of 1998, directed the Secretary of Transportation to form a task force to assess the adequacy of the Nation's Marine Transportation System to operate in a safe, efficient, secure, and environmentally sound manner. The MTS Task Force was made up of industry associations, shipper groups, and other stakeholders. Through cooperative efforts between government and private sector partners, the MTS assessment was completed and transmitted to Congress in September 1999. That report, *An Assessment of the U.S. Marine Transportation System*, called for the creation of a coordinating body, and the new Inter-agency Committee on the Marine Transportation System (ICMTS) was established.

The President's U.S. Ocean Action Plan of 2004 called for the elevation of the ICMTS to a cabinet-level committee, and the Committee on the Marine Transportation System (CMTS) was formally established in August 2005 by the Administration. The CMTS members are the Cabinet secretaries and administrators, including DOT, whose Secretary serves as CMTS Chair, the Department of Homeland Security, the Department of Defense, the Department of Commerce, the Environmental Protection Agency, the Department of the Interior, and the Chairman of the Federal Maritime Commission, among others. The CMTS reports directly to the President and is supported by the three sub-organizations:

- A coordinating board of many Federal Agency stakeholders with direct and indirect MTS interests, including the U.S. Coast Guard, the Maritime Administration (MARAD), the National Oceanic and Atmospheric Administration (NOAA), and the United States Army Corps of Engineers (USACE);

- An executive secretariat who are permanent CMTS staff based at DOT and charged with CMTS coordination; and

- Integrated action teams (IATs) that are established as required. The IATs are composed of various Agencies tasked with cooperatively addressing key MTS issues.

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ANNEX II: GLOSSARY

AMSC…….. Area Maritime Security Committee

CBP…….…… Customs & Border Protection

CBE……... Chemical, Biological & Explosive

CCF……..... Capital Construction Fund

CMTS…..…….. Committee on the MTS (Cabinet Level)

CMAQ……. Congestion Mitigation & Air Quality Improvement Program

C-TPAT…...…. Customs Trade Partnership Against Terrorism

DHS……. U.S. Department of Homeland Security

DOC……. U.S. Department of Commerce

DOE…….. U.S. Department of Energy

DOI……U.S. Department of the Interior

DOT…….. U.S. Department of Transportation

EEZ…….. Exclusive Economic Zone

EPA....…….. U.S. Environmental Protection Agency

FMC……. U.S. Federal Maritime Commission

GPS.…….…… Global Positioning System

GDP……. Gross Domestic Product

HMTF……..…..Harbor Maintenance Trust Fund

HSC……...… Harbor Safety Committee

IAT…….....….. Integrated Action Team

IWTF……..…...Inland Waterways Trust Fund

ISO……...… International Standards Organization

ICMTS……. Inter-agency Committee on the MTS

ITS.…….....… Intelligent Transportation System

MARAD.…..…..U.S. Maritime Administration

MMS……. Minerals Management Service

MTS……. Marine Transportation System

MTSA……..…..Maritime Transportation Security Act of 2002

MTSNAC…..… MTS National Advisory Council

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NOAA……..…. National Oceanographic & Atmospheric Administration

NGO……..… Non-governmental Organization

OCS…….. Outer Continental Shelf

PAWSA…..…... Port and Waterway Safety Assessment

PORTS……..… Physical Oceanographic Real Time Systems

R&D…….…. Research and Development

TEA-21……..… Transportation Equity Act for the 21st Century

TEU……..……Twenty-foot Equivalent Unit

TSA……... Transportation Security Agency

TWIC……..... Transportation Worker Identification Credential

USACE…..…..… U.S. Army Corps of Engineers

USCG…….…... U.S. Coast Guard

USGS…… U.S. Geological Survey

VTS.…….. Vessel Traffic Service



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