

**U.S. House of Representatives  
Committee on Oversight and Government Reform**



**LEGISLATIVE AND OVERSIGHT ACCOMPLISHMENTS  
OF THE HOUSE COMMITTEE ON  
OVERSIGHT AND GOVERNMENT REFORM**

**Chairman Darrell Issa**

**STAFF REPORT  
U.S. HOUSE OF REPRESENTATIVES  
DECEMBER 31, 2014**

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# Congress of the United States

## House of Representatives

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December 31, 2014

Ensuring the efficiency and effectiveness of the Federal Government has been my primary interest, responsibility and proud duty while serving as Chairman of the Committee on Oversight and Government Reform. Together with citizen watchdogs, Inspectors General, whistleblowers and others, the Committee has worked tirelessly to demand accountability of the Federal Government and to protect the right of American Taxpayers to a government that works for them.

Time and again, whether under my leadership or the leadership of previous accountability advocates such as Henry Waxman and Tom Davis, the work of this Committee has demonstrated that transparency is the best way to ensure government accountability. During the 112th and 113th Congresses, I have driven a legislative and oversight agenda that has endeavored to protect the rights of taxpayers to information by shining the light of public scrutiny in areas where reform is needed and by calling agencies and individuals to account for bad decision-making. The Committee, like all responsible entities within the Federal Government, makes all source materials supporting its statements and activities available upon request. Americans have the right to know and decide for themselves if the money Washington takes from them is being well spent. As the current session of Congress comes to a close, the Committee's work is complete and therefore all Committee documents are hereby made fully available to the American public.

It is my sincere belief that the work of this Committee has brought genuine reform to the Federal Government. In countless ways – many of which are described in this report – the Committee has protected the right of American Taxpayers to an efficient, effective government.

Sincerely,



Darrell Issa  
Chairman

## MISSION STATEMENT

*“We exist to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.*

*Our solemn responsibility is to hold Government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly, in partnership with citizen-watchdogs, to deliver the facts to the American people and bring genuine reform to the federal bureaucracy.*

*This is the mission of the Oversight and Government Reform Committee.”<sup>1</sup>*

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<sup>1</sup> H. CMTE. ON OVERSIGHT & GOV'T REFORM, MISSION STATEMENT, 113th Cong. (2013).

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## THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Congressional oversight is an integral component of good government. It is an important corollary to the powers expressly granted to the Legislative Branch by the United States Constitution and it is the codified responsibility of Congress.<sup>2</sup> The need for oversight of the Federal Government stems from the very concept of representative democracy. As political theorist John Stuart Mill wrote, “the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable.”<sup>3</sup> Today, with the ever-increasing scope of our bureaucracy, robust congressional oversight becomes even more important to ensure that the Federal Government remains accountable, transparent and efficient. As the government’s chief watchdog, the Committee on Oversight and Government Reform is uniquely positioned to fulfill this responsibility, as it “may at any time conduct investigations of any matter.”<sup>4</sup>

However, the benefits of oversight and the promise of “a more perfect Union”<sup>5</sup> are lost where the Legislative Branch fails to exercise the powers granted exclusively to it by the Constitution. Members of Congress must thoughtfully exercise and zealously defend the grant of “[a]ll legislative Powers” delegated to the Federal Government by the People of the United States.<sup>6</sup> Where congressional oversight identifies a need for reform – whether required to redress wrongdoing or to advance the evolving needs of Americans – the Legislative Branch must act. With a mission to ensure Americans are served by an “efficient, effective government that works for them,” the Committee on Oversight and Government Reform has driven important bipartisan efforts that have brought “genuine reform to the federal bureaucracy.”<sup>7</sup>

Under the leadership of Chairman Darrell Issa and Ranking Member Elijah Cummings, the Committee worked tirelessly to expose waste, fraud, abuse and mismanagement at all levels of the Federal Government.<sup>8</sup> It has also supported legislation that has, and will, fundamentally transform the Federal bureaucracy so that it can be held accountable by the American Taxpayers it serves. This report highlights the accomplishments of the Committee on Oversight and Government Reform in the years between 2011 and 2014 – during the terms of the 112th and 113th Sessions of Congress. However, it first provides context for these accomplishments by discussing the evolution of the Committee – from its informal beginnings in the 18th Century, through its official creation in 1927 and subsequent reorganizations during the latter years of the 20th Century, to the place it occupies within the Federal Government today.

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<sup>2</sup> See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812; Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140.

<sup>3</sup> JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 81 (Oskar Piest ed, The Liberal Arts Press 1958) (1861).

<sup>4</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, cl. 4(c)(2).

<sup>5</sup> U.S. CONST. pmb1.

<sup>6</sup> U.S. CONST. art. I.

<sup>7</sup> H. CMTE. ON OVERSIGHT & GOV’T REFORM, MISSION STATEMENT, 113th Cong. (2013).

<sup>8</sup> A list of Committee Members is provided below as Appendix A.

## A NECESSARY FUNCTION: EVOLUTION OF THE COMMITTEE

The Committee on Oversight and Government Reform has existed in various forms since the earliest days of our nation. In 1792, during the Second Session of Congress, President George Washington put before the House of Representatives a resolution requesting that a select committee be formed to investigate the recent defeat of the Army at the Battle of Wabash River.<sup>9</sup> The resolution suggested the cause of the defeat may have been due to delays in the delivery of money, “military stores,” provisions and other items to the troops.<sup>10</sup> Although the Members of the new Federal Government acknowledged the potential for such an investigation to “embarrass the President,” a majority of the Representatives present, including James Madison, agreed that “inquiry into the expenditure of all public money was the indispensable duty of this House.”<sup>11</sup> Recognizing the Members of the House as “the immediate guardians of the public interest,”<sup>12</sup> the resolution adopted granted the committee the power to “call for such persons, papers, and records, as may be necessary to assist their inquiries.”<sup>13</sup> By a vote of 44 to 10, the House of Representatives created the first committee to exercise oversight over activities of the Executive Branch.<sup>14</sup>

In February, 1814, during the 13th Congress, the “Committee on Expenditures” was created “to examine into the state of the departments and of appropriation laws, to watch for violations of the law in expenditures, and to report provisions looking to economy and to accountability of public officers.”<sup>15</sup> During the 14th Congress, this responsibility for oversight and investigation of the public accounts was generally divided among six standing committees which were “appointed to serve during the present Congress, and that hereafter, at the commencement of the first session in each Congress, like committees shall be appointed, whose duties shall continue until the first session of the ensuing Congress.”<sup>16</sup> The six originally appointed committees maintained, respectively, jurisdiction over the expenditures of Departments as follows:

- 1) the Department of State;
- 2) the Treasury Department;
- 3) the Department of War;
- 4) the Department of the Navy;
- 5) the Post Office; and

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<sup>9</sup> 2 ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES, 1ST SESSION 490 (1792).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 490-91.

<sup>12</sup> *Id.* at 490.

<sup>13</sup> *Id.* at 493.

<sup>14</sup> *Id.* See also *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* 5 (1976).

<sup>15</sup> Am. Law Div., Legislative Ref. Serv., *Historical Data Regarding the Creation and Jurisdiction of the Committee on Government Operations*, House of Representatives 1 (1958).

<sup>16</sup> *Id.* at 3. See also 14 ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES, 1ST SESSION 1298 (1816)).

6) the “Public Buildings.”<sup>17</sup>

Over time, separate standing committees with jurisdiction over the expenditures of various departments were created. From 1860 until 1927, five additional standing committees with jurisdiction over expenditures of various departments were created, including:

- 7) the Committee on Expenditures in the Interior Department (1860);
- 8) the Committee on Expenditures in the Department of Justice (1874);
- 9) the Committee on Expenditures in the Department of Agriculture (1889);
- 10) the Committee on Expenditures in the Department of Commerce and Labor (1905);  
and
- 11) The Committee on Expenditures in the Department of Labor (as separate from the Department of Commerce; 1913).<sup>18</sup>

In the following years, Members of Congress questioned the need for several committees, noting that “certain committees... have no real work to do in the House.”<sup>19</sup> Finally, on December 5, 1927, the 11 separate standing committees with jurisdiction over expenditures were abolished and 70th Congress created a single “Committee on Expenditures in the Executive Departments.” The consolidated committee was granted “jurisdiction of expenditures for all executive departments,” was intended to “do all the work the whole 11 could have done,” and was “provided with a room, a clerk, and everything that is necessary to do certain work that is desired to be done in connection with the work of the Appropriations Committee, and also along other various lines.”<sup>20</sup>

In 1946, the Legislative Reorganization Act specifically defined the duties and jurisdiction of the Committee on Expenditures in the Executive Departments. The Committee was provided with legislative jurisdiction over “budget and accounting measures, other than appropriations” and “reorganizations in the executive branch of the Government.” Its duties were defined to include examining reports from the Comptroller General; studying the economy and efficiency of “the operation of Government activities at all levels;” evaluating executive and legislative reorganizations; and studying the relationships between the Federal government and the governments of the various States, municipalities, and international organizations.<sup>21</sup> Following the trend toward a more generalized emphasis on government workings and efficiency, the name of the committee was changed in 1952 to “Committee on Government Operations.”<sup>22</sup>

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<sup>17</sup> Am. Law Div., Legislative Ref. Serv., Historical Data Regarding the Creation and Jurisdiction of the Committee on Government Operations, House of Representatives 3-4 (1958). *See also* 14 ANNALS OF CONGRESS, HOUSE OF REPRESENTATIVES, 1ST SESSION 1298 (1816)).

<sup>18</sup> *Id.* at 3-8.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

<sup>21</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812.

<sup>22</sup> Am. Law Div., Legislative Ref. Serv., Historical Data Regarding the Creation and Jurisdiction of the Committee on Government Operations, House of Representatives 13 (1958).

The House realized as time progressed that the committee system created by the Legislative Reorganization Act had resulted in committees with overlapping, duplicative and competitive jurisdictional responsibilities. After study by two select committees, the jurisdiction of the Committee on Government Operations was expanded to envelop the National Archives and the Civil Service Committee in 1974.<sup>23</sup>

After the 1994 midterm elections, the new Republican majority renamed the Committee on Government Operations as the Committee on Government Reform and Oversight.<sup>24</sup> As part of a significant overhaul of the House committee roster at the beginning of the 104th Congress, both the Committee on Post Office and Civil Service and the Committee on the District of Columbia were consolidated with the then-titled Committee on Government Reform and Oversight – a move that demonstrated the Republican commitment to reforming Congress by saving millions of dollars and reducing staff by nearly 50 percent.<sup>25</sup> At the beginning of the 107th Congress in 2001, under the leadership of then-Chairman Dan Burton, the Committee shortened its name to the Committee on Government Reform.<sup>26</sup> When Representative Henry A. Waxman became chairman in 2007, the name was again changed to what it is still called today – the Committee on Oversight and Government Reform.<sup>27</sup>

Congressman Darrell Issa was tapped to serve as the top Republican on the House Committee on Oversight and Government Reform at the beginning of the 111th Congress. After serving two years as Ranking Member – a term during which Democrats controlled the Executive Branch as well as both Houses of Congress – Representative Issa was elevated to chairman of the Committee. After six years as the Committee’s top Republican, Chairman Issa will step down from this position at the end of the 113th Congress.<sup>28</sup> Current Chairman of the Subcommittee on National Security, Representative Jason Chaffetz, will take the Committee’s top position with the beginning of the 114th Congress – “an experienced leader [who will] continue the pursuit of transparency and accountability in government on behalf of the American people.”<sup>29</sup>

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<sup>23</sup> Letter from Ms. Judy Schneider, Specialist on the Cong., Gov’t Div., LTR91-2591, Analysis of Government Operations Committee’s Jurisdiction (Mar. 29, 1991) (on file with author).

<sup>24</sup> H. CMTE. ON GOV’T REFORM & OVERSIGHT, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, H.R. Doc. No. 104-874, at 12 (1997).

<sup>25</sup> H. CMTE. ON GOV’T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 108-815, at 2 (2005).

<sup>26</sup> *Id.*

<sup>27</sup> H. CMTE. ON OVERSIGHT & GOV’T REFORM, ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. Doc. No. 110-830 (2009).

<sup>28</sup> Pursuant to the Rules of the House, “a member of a standing committee may not serve as chair of the same standing committee . . . during more than three consecutive Congresses . . . .” RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, cl. 5(c)(2).

<sup>29</sup> Press Release, Rep. Darrell Issa, Chairman, House Comm. on Oversight & Gov’t Reform, Issa Congratulates Rep. Jason Chaffetz on Selection as Next Oversight Committee Chair (Nov. 18, 2014), *available at* <http://oversight.house.gov/release/issa-congratulates-rep-jason-chaffetz-selection-next-oversight-committee-chair/> (last accessed Dec. 17, 2014).

## MATTERS BEFORE THE COMMITTEE: LEGISLATIVE AND OVERSIGHT RESPONSIBILITIES

The Committee on Oversight and Government Reform – by rule and precedent – serves as the House of Representative’s government operations committee as well as its chief investigative and oversight body, reviewing complaints of waste, fraud, abuse and mismanagement across the Federal Government. Like other standing committees in the House of Representatives, the activities of the Committee are directed by the Rules of the House of Representatives (the “House Rules”).<sup>30</sup> Adopted at the beginning of each new two-year Term of Congress, the House Rules apply for the following Session and generally define, among other things, the size, jurisdiction and procedures of each House committee. Subject to the authority of these House Rules, each committee is permitted to establish its own, more specific rules of conduct – these rules govern items such as meeting schedules, voting procedures, parameters for producing and publishing committee reports and documents, subcommittee structure and jurisdiction, staffing, hearing procedures and the responsibilities and expectations of the Members.<sup>31</sup> By tradition, both the House Rules and the rules adopted by the Committee on Oversight and Government Reform (the “Committee Rules”) at the beginning of each Term largely mirror the rules in place during the prior Session – though the interpretation and relative authority afforded the rules inevitably, and necessarily, varies from year to year and even issue to issue.

### *LEGISLATIVE JURISDICTION*

In the most general terms, the Committee on Oversight and Government Reform is responsible for studying and recommending House action on bills that would impact the operations of the Federal Government. Specifically, during Representative Darrell Issa’s time serving the Committee as Ranking Member and Chairman, “[a]ll bills, resolutions and other matters” relating to the following subjects were referred to the Committee for review:

1. Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement.<sup>32</sup>
2. Municipal affairs of the District of Columbia in general (other than appropriations).
3. Federal paperwork reduction.
4. Government management and accounting measures generally.<sup>33</sup>
5. Holidays and celebrations.

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<sup>30</sup> “Each House may determine the rules of its proceedings . . . .” U.S. CONST. art. I, § 5.

<sup>31</sup> *See* RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES (113th Cong.).

<sup>32</sup> For example, see the discussion of the Smart Savings Act legislation in the Legislative Activities section later in this report. With significant bipartisan support, the Smart Savings Act would improve the automatic allocation of investments by federal employees into the Thrift Savings Plan.

<sup>33</sup> One of the greatest obstacles faced by those seeking to review the Federal Government’s excessive spending is the inconsistency in information is published. The DATA Act, discussed in the Legislative Activities section below, requires the government to produce specific information in an accessible format so government can be held accountable for how it spends the dollars of American Taxpayers.

6. Overall economy, efficiency, and management of government operations and activities, including Federal procurement.
7. National archives.
8. Population and demography generally, including the Census.
9. Postal service generally, including transportation of the mails.
10. Public information and records.<sup>34</sup>
11. Relationship of the Federal Government to the States and municipalities generally.
12. Reorganizations in the executive branch of the Government.<sup>35</sup>

In its legislative role, the Committee is responsible for scrutinizing all legislative measures that are referred to it by the Speaker of the House.<sup>36</sup> The Chairman of the Committee will then refer the legislation, as appropriate, to one or more of the Subcommittees for consideration.<sup>37</sup> In order to gain a better understanding of the legislation's likely effects, the Committee and/or Subcommittee – with the assistance of professional staff supporting Members of both the Majority and Minority – will conduct independent research and may solicit information from relevant departments, agencies and interested parties from outside the government. The Committee or Subcommittee can gather this information in a number of ways, discussed in more detail later in this chapter.<sup>38</sup>

The information gathered by the Committee or Subcommittee will be discussed at committee meetings, especially during “markup” – when, according to the House Rules, the Committee Rules

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<sup>34</sup> The Freedom of Information Act (“FOIA”) is an essential piece of legislation that helps to ensure that the Federal Government can be held accountable by American Taxpayers by compelling agencies to respond to requests for information according to certain procedures favoring transparency. Originally enacted in 1966, the legislation's effectiveness depends upon a nonpartisan dedication to transparency and consistent execution of its principles across Administrations. The Committee's recent oversight of the politicization of the FOIA process and the procedural hurdles that threaten the transparency guaranteed by the law are discussed later in this report, in Chapter One. The FOIA Oversight and Implementation Act, discussed in the Legislative Activities section below, seeks to improve the procedures by which requests for information are fulfilled thereby reinforcing government accountability. As the 113th Congress comes to a close, it does not appear that the legislation will be enacted before the end of the Term.

<sup>35</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, 1(n). *See also id.* (112th Cong.) Rule X, 1(n); *Id.* (111th Cong.) Rule X, 1(n).

<sup>36</sup> *See* RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XII, cl.2. Where legislation includes issues relevant to multiple committees, the Speaker may refer the legislation to one or more as appropriate. *Id.* cl.2(c). Alternatively, a committee with jurisdiction covering issues included in a legislative matter may agree to waive its jurisdiction by agreement. *See* JUDY SCHNEIDER & MICHAEL L. KOEMPEL WITH CONTRIBUTING AUTHOR ROBERT KEITH, CONGRESSIONAL DESKBOOK: THE PRACTICAL AND COMPREHENSIVE GUIDE TO CONGRESS 235-36 (6th ed. 2012). For example, under Chairman Edolphus Towns, the Committee on Oversight and Government Reform waived its jurisdiction over the Patient Protection and Affordable Care Act, and therefore did not review the legislation nor report the bill to the House. *See* Minority Staff of H. Cmte. on Oversight & Gov't Reform, *A Constitutional Obligation: Congressional Oversight of the Executive Branch*, 111th Cong. 9 (2010).

<sup>37</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES (113th Cong.) Rule 6, cl. b.

<sup>38</sup> The methods by which Congress may obtain such information is discussed in more detail in the *Tools of the Trade* section of this report, below.

and traditional practice, the text of the bill is examined in detail by the Members, and any suggested amendments are considered and voted upon.<sup>39</sup> Following markup, the Members of the Committee will vote on whether or not the legislation – whether in its original form or as amended – should be reported for consideration by the full House.<sup>40</sup>

When the Committee votes to report the legislation to the House, the measure is scheduled on the appropriate House calendar<sup>41</sup> and a legislative report, drafted by the Committee, must be filed with the Clerk of the House<sup>42</sup> so that it is available for review by all of the Members. The report will include substantive information based on the Committee’s research that will be needed by the Members when deciding how to vote. For example, the report will usually summarize the information received by the Committee from research, interviews, witness testimony, and government reports; it will relate actions taken during markup, including votes by Members; and it will provide an estimate of the costs associated with enacting and implementing the measure.<sup>43</sup> The report should also contain all supplemental, minority or additional views that differ from those of the majority of Committee Members voting to approve reporting of the legislation to the House.<sup>44</sup>

During the four years Representative Darrell Issa has served as Chairman, over 110 legislative measures were referred to and passed by the Committee; 74 of the bills reported by the Committee were passed the House; and of those, 23 pieces of legislation were signed into law either as stand-alone measures or as incorporated into other bills. As the House Committee responsible for the U.S. Postal Service, the Committee also facilitated the naming of at least 70 post offices throughout the country.

### *OVERSIGHT JURISDICTION*

The House Rules also define the oversight jurisdiction of each committee. All standing committees are responsible for conducting oversight of matters within and related to their legislative jurisdiction.<sup>45</sup> This affirmative duty ensures not only that the laws passed by Congress are implemented by the Executive Branch and responsible agencies, but that they are implemented properly, continuously and consistent with the intent of Congress.<sup>46</sup> As described by Chief Justice Earl Warren in *Watkins v. United States*:

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<sup>39</sup> See RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI; RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES (113th Cong.) Rule 7, cl. a. For a more detailed discussion of the markup process, see JUDY SCHNEIDER & MICHAEL L. KOEMPEL WITH CONTRIBUTING AUTHOR ROBERT KEITH, CONGRESSIONAL DESKBOOK 245-49 (6th ed. 2012).

<sup>40</sup> See RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI.

<sup>41</sup> There three different scheduling calendars used by the House; placement on the appropriate calendar depends on the nature of the legislation. See RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XIII, cl. 1(a).

<sup>42</sup> *Id.*

<sup>43</sup> For certain types of legislation being considered, additional, specific sections must be included in the report. See *id.* Rule XIII, cl. 3.

<sup>44</sup> *Id.* Rule XIII, cl. 2(c).

<sup>45</sup> See *id.* Rule X, cl. 2.

<sup>46</sup> Section 3 of Article II of the U.S. Constitution requires the President to “take care that the laws be faithfully executed.” U.S. CONST. art. II, § 3. For a discussion of the President’s duty to execute the laws, see Rep. Bob Goodlatte, *The President’s Duty to Faithfully Execute the Laws*, Lecture No. 1254 in *Legal Issues*, HERITAGE FOUND., (Nov. 6, 2014), available at <http://www.heritage.org/research/lecture/2014/the-presidents-duty-to->

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.<sup>47</sup>

As the House committee with legislative jurisdiction over issues related to “government management and accounting measures generally,” the Committee on Oversight and Government Reform is responsible for overseeing the proper implementation of the DATA Act, for example, which was signed into law by President Obama on May 9, 2014.<sup>48</sup> In the most general terms, the DATA Act directs the U.S. Department of Treasury (“Treasury”) and the White House Office of Management and Budget (“OMB”) to ensure the public reporting of federal spending information in a consistent, reliable and searchable format. The law establishes milestones for Treasury and OMB to meet in furtherance of this objective at various intervals over the next several years.<sup>49</sup> The Committee held a hearing in December 2014 to examine the Administration’s initial efforts to comply with the timeline, inviting witnesses from the Senate, Treasury, OMB and the Government Accountability Office to testify.<sup>50</sup> This type of oversight enables the Committee and the Congress to effectively monitor the steps taken by the Administration to execute the law – providing the opportunity for problems to be identified before they stall implementation.

While all standing committees maintain oversight responsibilities related to their legislative jurisdiction, the Committee on Oversight and Government Reform is unique because it possesses a special mandate to conduct comprehensive oversight at all levels of government, notwithstanding the jurisdiction of other committees. As the chief investigative body of the House, the Committee may investigate “any matter” at “any time.”<sup>51</sup> It exists to be an honest broker in Congress, to conduct independent oversight free from any preexisting relationships or preconceived conclusions. The House Rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”<sup>52</sup> In order to perform its duties, the Committee is specifically authorized to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the

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[faithfully-execute-the-law](#) (explaining, “[t]his clause, known as the Take Care Clause, requires the President to enforce all constitutionally valid Acts of Congress, regardless of his own Administration’s view of their wisdom or policy.”).

<sup>47</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>48</sup> Pub. L. No. 113-101 (2014).

<sup>49</sup> *See id.* By May 2015, Treasury and OMB are expected to issue data standards and initiate a pilot program; by May 2017, agencies of the Federal Government will be required to report federal spending information using new standards developed by Treasury and OMB; and by May 2018, OMB will issue guidance to agencies on the application of data standards to be used by reporting agencies. *Id.*

<sup>50</sup> *Transforming Federal Spending: Implementing the Digital Accountability and Transparency Act: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Government Spending of the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (2014).

<sup>51</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, cl. 4(c)(2).

<sup>52</sup> *Id.*

production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>53</sup>

During Representative Issa’s time as Chairman, the Committee on Oversight and Government Reform has held over 350 full and subcommittee hearings, sent over 2,000 letters requesting information from government agencies, officials and interested parties, issued over 100 subpoenas compelling the production of documents, and published nearly 60 oversight and investigative staff reports.

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<sup>53</sup> *Id.* Rule XI, cl. 2(m)(1)(B).

### *ORGANIZING RESPONSIBILITIES: THE ROLE OF SUBCOMMITTEES*

As discussed above, the Committee on Oversight and Government Reform divides its responsibilities among various subcommittees without ceding the jurisdiction of the entire Committee over any individual issue. This arrangement gives the Committee the flexibility required to effectively and efficiently review bills and other legislative measures referred to it by the Speaker and to more expertly evaluate the performance of the Federal Government according to its broad oversight jurisdiction. At the beginning of each Session of Congress, after the Rules of the House have been adopted, each standing committee adopts its own rules of procedure.<sup>54</sup> Although most committees are limited by the Rules to creating only five or six subcommittees, the Committee on Oversight and Government Reform is permitted to have seven.<sup>55</sup>

The use of subcommittees provides a dynamic structure that can facilitate performance of the Committee's duties. For example, to more effectively oversee the multiagency implementation of the Troubled Asset Relief Program,<sup>56</sup> the Committee's structure provided for a subcommittee with specific jurisdiction over "financial and monetary policy, banking, housing, and insurance regulation, financial crisis and rescues, and tax policy."<sup>57</sup> In the 113th Congress, the following subcommittees were established to address the needs of the Committee:

1. The Subcommittee on Federal Workforce, U.S. Postal Service and the Census – Legislative jurisdiction over the federal civil service, the U.S. Postal Service, and the Census Bureau;
2. The Subcommittee on Government Operations – Legislative jurisdiction over government management and accounting measures, the economy, efficiency, and management of government operations and activities, procurement, federal property, public information, including the Freedom of Information Act and Federal Advisory Committee Act, federal records (including the National Archives and Records Administration and the Presidential Records Act) federal information technology and data standards, grant reform, the relationship between the Federal Government and states and municipalities, including unfunded mandates;
3. The Subcommittee on National Security – Oversight jurisdiction over national security, homeland security, foreign operations, immigration, emergency management, and criminal justice. The Subcommittee also has legislative jurisdiction over drug policy;
4. The Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs – Oversight jurisdiction over regulatory affairs, impediments to economic growth and job creation, monetary policy, banking, infrastructure, and tax policy. The Subcommittee also has legislative jurisdiction over federal paperwork reduction, data quality, and the Office of Information and Regulatory Affairs; and

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<sup>54</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI, cl. 2(a).

<sup>55</sup> *Id.* Rule X, cl. 5(d)(2).

<sup>56</sup> The Committee's activities related to the Troubled Asset Relief Program are highlighted in Chapter 2.

<sup>57</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES (112th Cong.) Rule 6.

5. The Subcommittee on Energy Policy, Health Care, and Entitlements – Oversight jurisdiction over federal health care policy, food and drug safety, energy policy, solvency of federal entitlement programs.<sup>58</sup>

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<sup>58</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES (113th Cong.) Rule 6. For a list of the subcommittees during the 113th and previous Sessions, please see Appendix B.

**THE TOOLS OF THE TRADE: DOING THE WORK OF OVERSIGHT AND GOVERNMENT REFORM**  
Essential to the performance of the monumental task assigned to the Committee on Oversight and Government Reform is the ability of its Members to obtain credible, responsive information on a timely basis. In order to perform their duties, committees of the House of Representatives are permitted to conduct “such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X.”<sup>59</sup> As explained by the Supreme Court:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.<sup>60</sup>

### *LETTERS*

A written request for information to the agency, corporation or individual is an important first step. Letters from the Chairman typically announce the initiation of an inquiry pursuant to the committee’s authority, describe its purpose and scope, and request documents in categories that are relevant to the inquiry. Document request letters also provide notice that relevant records should be preserved, and that destruction of relevant records may invoke the federal criminal law prohibition of obstruction of a congressional proceeding.<sup>61</sup>

Letters from the Chairman usually include questions for agency officials (i.e. interrogatories) and document requests. Document requests and interrogatories often follow up on media accounts or on information obtained from a whistleblower. If the request is not answered and there is no legitimate explanation, the Committee may follow up with more formal—and in some cases, more public—processes.

### *DEPOSITIONS AND TRANSCRIBED INTERVIEWS*

After some information has been gathered, it may be necessary to conduct interviews or depositions of individuals. In some cases, the Committee can rely on informal staff interviews to gather information to advance an investigation. It is often useful, however, for Committee staff and Members to question witnesses in a more formal transcribed setting.

Depositions are conducted under subpoena and pursuant to the Committee Rules, which specify the way questioning proceeds. Transcribed interviews are slightly less formal—the witness is not under subpoena and the Committee Rules do not apply.

Individuals called to appear before the Committee for questioning may be “fact” witnesses who can provide more background information, as well as individuals who may have been involved in the conduct under investigation. Not all Committees have deposition authority. Regardless of the

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<sup>59</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI, 1(b).

<sup>60</sup> *McGrain v. Daugherty*, 23 U.S. 135, 174-75 (1927).

<sup>61</sup> Morton Rosenberg, *When Congress Comes Calling*, CONSTITUTION PROJECT 4 (2009).

format, depositions and interviews are routinely transcribed. The transcript provides protection for both the witness and the Committee.

### *SUBPOENAS*

As one of the permanent, standing committees of the House of Representatives, the Committee on Oversight and Government Reform is authorized “to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>62</sup>

While Congress possesses broad powers to engage in oversight and conduct investigations to aid in its legislative functions, and to seek information from executive agencies, private persons, or organizations, there may be obstacles in gathering the needed information. Committees have many tools available to ensure access to executive branch information. The power to issue subpoenas is one of the Committee’s most important tools. Subpoenas can be drafted broadly so long as the documents and records covered in the schedule are “pertinent to the subject under inquiry.”<sup>63</sup> The standard is very broad and permits a wide range of questions relevant to an investigation.<sup>64</sup> In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.<sup>65</sup>

The Chairman typically issues a subpoena after the Committee and the custodian of records that will advance the Committee’s investigation are at impasse with respect to negotiating terms for a voluntary production of documents or records. In some cases, records custodians request a subpoena before providing documents to the Committee so they are legally protected.

Committees do not have to recognize attorney-client, work-product, or deliberative process privileges, where agencies argue release of information regarding an agency’s policy development process would interfere with internal communications necessary for policymaking. If a Committee compels the production of privileged communication through a subpoena, the private party or agency will still be able to assert the privilege elsewhere, as long as it is shown the compulsion was resisted.<sup>66</sup>

### *HEARINGS*

In order to obtain information from witnesses with information related to an issue relevant to a committee’s jurisdiction, the House Rules permit the committee to “hold such hearings as it considers necessary . . . .”<sup>67</sup>

Committee hearings are usually open to the public. The purpose of the hearing is to obtain information and opinions on proposed legislation, conduct an investigation, or evaluate/oversee

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<sup>62</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI, 1(b)(1).

<sup>63</sup> *Unites States v. Rumely*, 345 U.S. 41, 43, 45 (1953); *Watkins v. United States*, 354 U.S. at 200 n. 3.

<sup>64</sup> Morton Rosenberg, *When Congress Comes Calling*, CONSTITUTION PROJECT 9 (2009).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule XI, 1(b)(1).

the activities of a government department or the implementation of a Federal law. Hearings may also be purely exploratory in nature, providing testimony and data about topics of current interest.

Hearings are scheduled and noticed in compliance with the House and Committee Rules. Witnesses are typically invited to testify voluntarily; in some cases, witnesses are compelled to appear by a subpoena. At the hearing, the Chairman usually makes an opening statement to define the subject matter of the hearing and establish the pertinence of questions asked to the witnesses. The Committee on Oversight and Government Reform swears in hearing witnesses. The Chairman administers the oath.

In conjunction with the hearing, the Committee may also release a Committee report or a staff report containing investigative findings; introduce legislation to reform the identified problem; refer the matter to an agency or its inspector general; or determine that no further action is required.

## A PLACE WITHIN GOVERNMENT: THE ROLE OF OVERSIGHT AND GOVERNMENT REFORM IN RECENT YEARS

### *A FOCUS ON "REFORM": THE 108TH AND 109TH CONGRESSES*

While under the leadership of Chairman Tom Davis and Ranking Member Henry Waxman, the then-titled "Committee on Government Reform" conducted oversight over a diverse portfolio of issues while pursuing a legislative agenda seeking necessary improvements to government operation and efficiencies. Through its oversight activities related to the effective administration of government programs, the Committee "ensured the accountability of public officials, and contributed to efforts to address serious problems facing America today."<sup>68</sup> These activities helped to lay the groundwork for the Committee to hold more than 250 hearings in the 109th Congress, focusing the Committee's attention on issues ranging from organizational reform at the General Services Administration to government contracting in Iraq.<sup>69</sup>

For example, as part of an effort to modernize the Department of Defense, the Committee worked with the Armed Services Committee to improve accountability in federal employment within the Department's Civil Service System, impacting more than 700,000 employees. It facilitated additional employment reforms within other specific agencies as well, including the National Aeronautics and Space Administration ("NASA"), the Federal Bureau of Investigation ("FBI"), the Securities and Exchange Commission ("SEC"), and transformed the government-wide Senior Executive Service into a "pay-for-performance" organization.<sup>70</sup> The Committee also played an integral role in efforts to establish a new, stronger Federal Emergency Management Agency ("FEMA") within the Department of Homeland Security ("DHS") in the aftermath of Hurricane Katrina. Following an investigation by the Select Bipartisan Committee on Katrina, the legislation was designed to provide FEMA with a direct line of communication to the President in cases of emergency in order to prevent communication breakdowns within the Federal Government, and included provisions to help address the waste, fraud and mismanagement troubles faced by DHS in its response and recovery efforts.<sup>71</sup> The Committee also defended the rights of whistleblowers – essential partners in the Committee's efforts to uncover waste, fraud and abuse – by implementing reforms to the complaint system within agencies, giving these important witnesses a voice in Federal district court.<sup>72</sup>

Chairman Davis also oversaw the first postal reform legislation enacted by the Federal Government since the 1970s. The Postal Accountability and Enhancement Act of 2006, signed into law by President George W. Bush on December 20, 2006, reformed the organization, leadership and financing of the U.S. Postal Service's operations and employee liabilities in the face of declining mail

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<sup>68</sup> H. CMTE. ON GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 108-815, at 65 (2005).

<sup>69</sup> H. CMTE. ON GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 109-739, at 13 (2006).

<sup>70</sup> See H. CMTE. ON GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 108-815, at 13 (2005).

<sup>71</sup> *Id.* at 14.

<sup>72</sup> *Id.*

volume and significant losses.<sup>73</sup> The legislation mandated transparency in the Postal Service's finances and operations; created a powerful new regulator in the Postal Regulatory Commission; and instituted improvements to the collective bargaining process.<sup>74</sup> In the years since the passage of this legislation, the Postal Service has continued to see declining revenue and growing costs – an issue the Committee will continue to face in the 114th Congress.

Garnering national attention, the use of steroids and performance-enhancing drugs in professional sports became an issue of significant focus during Chairman Davis' tenure. The Committee on Government Reform helped to expose the pervasive use of these drugs among professional athletes; it held at least three congressional hearings and reported to the House tough legislation targeting professional sports leagues that would have strengthened testing procedures and toughened the penalties that would be required for violations. As a result of this intense pressure and calls for institutional reform from congressional leaders, professional sports leagues strengthened their internal drug testing programs and discipline policies – and therefore the Committee decided not to pursue enactment of legislation.<sup>75</sup>

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<sup>73</sup> See Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).

<sup>74</sup> H. CMTE. ON GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 109-739, at 13 (2006).

<sup>75</sup> See H. CMTE. ON GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON GOVERNMENT REFORM, H.R. Doc. No. 109-739 (2006); see United States Postal Service, Annual Report (Form 10-K) 12 (Nov. 16, 2009), available at <http://about.usps.com/who-we-are/financials/10k-reports/fy2009.pdf> (last accessed Dec. 15, 2014).

### *INCONSISTENCIES IN OVERSIGHT: THE 110TH AND 111TH CONGRESSES*

A landslide election placed Democrats in the House Majority for the first time in over ten years in 2007, and, under then-Chairman Henry Waxman, the Committee forcefully exercised its constitutional duty of oversight of the Federal Government under the Administration of President George W. Bush. Called the “Eliot Ness of the Democrats” by the *The Nation* while serving as the Committee’s Ranking Member in 2005,<sup>76</sup> Chairman Waxman led the renamed Committee on Oversight and Government Reform to relentlessly investigate a wide array of issues, from the State Department’s role in the Iraq War to the presence of formaldehyde in Federal Emergency Management Agency trailers.<sup>77</sup> In the two years between 2008 and 2009, the Committee held 203 hearings<sup>78</sup> and issued over 45 subpoenas;<sup>79</sup> during Chairman Waxman’s first year, the Committee sent over 450 letters seeking information or requesting a witness’s presence.<sup>80</sup> Throughout the 110th Congress, House Democrats zealously used the constitutional authority of the Committee to thoroughly investigate the activities of the Bush Administration. Although Chairman Waxman faced significant criticism that his work was partisan and biased, he remained steadfast in his commitment to robust congressional oversight, saying that “[o]versight is just as important, if not more important, than legislation.”<sup>81</sup>

However, when President Barack Obama was elected in November 2008, the Majority’s emphasis on robust congressional oversight waned. Representative Waxman moved on to chair the House Energy and Commerce Committee, and Representative Edolphus Towns took on the position of Chairman in January 2009. Within months of the new Democrat Administration taking office, *Mother Jones* magazine observed that “[u]nder Towns – and with a Democrat in 1600 Pennsylvania Ave - the oversight committee seems to be willing to give the White House more leeway.”<sup>82</sup> In fact, during his two years as chairman during the 111th Congress, the Committee only sent approximately 420 letters (as compared with 450 letters by Chairman Waxman in a single year),<sup>83</sup> served only seven subpoenas,<sup>84</sup> and conducted only 164 hearings.<sup>85</sup>

Despite multiple requests from the Republican Minority for hearings and joint investigations, the Committee’s Majority essentially gave the Obama Administration a free hand to implement its agenda with little pressure to increase transparency and virtually no accountability. For example, when the Patient Protection and Affordable Care Act was being considered by the House, Chairman

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<sup>76</sup> David Corn, *Waxman: Democrats’ Eliot Ness*, NATION, Feb. 14, 2005, available at <http://www.thenation.com/article/waxman-democrats-eliot-ness#>.

<sup>77</sup> See Jonathan Weisman, *White House Feels Waxman’s Oversight Gaze*, WASH. POST, Oct. 25, 2007.

<sup>78</sup> H. CMTE. ON OVERSIGHT & GOV’T REFORM, ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. Doc. No. 110-930, at 1 (2008).

<sup>79</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *Restoring Government Oversight and Accountability in the 112th Congress*, 112th Cong. 3 (2012).

<sup>80</sup> See Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *A Constitutional Obligation: Congressional Oversight of the Executive Branch*, 111th Cong. 8 (2010).

<sup>81</sup> Elizabeth Williamson, *Revival of Oversight Role Sought*, WASH. POST, Apr. 25, 2007.

<sup>82</sup> Nick Baumann, *Dems Tread Lightly on Obama Oversight*, MOTHER JONES, Mar. 19, 2009.

<sup>83</sup> See Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *A Constitutional Obligation: Congressional Oversight of the Executive Branch* 111th Cong. 8 (2010).

<sup>84</sup> H. CMTE. ON OVERSIGHT & GOV’T REFORM, ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. Doc. No. 110-930, at 13 (2008).

<sup>85</sup> *Id.* at 1.

Towns refused to hold even a single hearing or markup on the legislation, deciding instead to waive the Committee's jurisdiction over the new law completely.<sup>86</sup> Chairman Towns ignored Republican encouragement for investigations into rampant waste, fraud and abuse in government healthcare programs, notwithstanding Attorney General Eric Holder's own admission that "every year we lose tens of billions of dollars in Medicare and Medicaid funds to fraud."<sup>87</sup> The Committee's Majority also ignored requests for a public hearing on the significant role played by Fannie Mae and Freddie Mac in the financial crisis, even though Treasury Secretary Timothy Geithner had announced that no reform plans for the two entities would be formulated until 2011. Other issues ignored by the Majority despite the Minority's urgings included hearings on food safety after repeated salmonella outbreaks, homeland security after the shooting at Fort Hood and the attempted bombing of Times Square, wasteful stimulus spending by the National Endowment for the Arts, cozy relationships between the Minerals Management Service ("MMS") and the oil companies it regulated and the politicization of science during "Climategate" at the Environmental Protection Agency ("EPA").<sup>88</sup>

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<sup>86</sup> The Minority asked Chairman Towns to join several letters to the Administration requesting further information on various aspects of the health care reform debate, including information technology provisions and civil tort liability reform; Chairman Towns declined. See Minority Staff of H. Cmte. on Oversight & Gov't Reform, *Oversight Status Report: Midway through the 111th Congress, Creating Accountability and Transparency under One-Party Rule*, 111th Cong. (2010).

<sup>87</sup> Eric Holder, Attorney General of the United States, Attorney General Holder on New Medicare Fraud Initiative at a Press Conference with HHS Secretary Sebelius (May 20, 2009) (remarks as prepared for delivery), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090520.html>.

<sup>88</sup> See Minority Staff of H. Comm. On Oversight and Gov't Reform, *A Constitutional Obligation: Congressional Oversight of the Executive Branch*, 111th Cong. 8-10 (2010).

## *A RENEWED COMMITMENT TO ACCOUNTABILITY AND TRANSPARENCY: THE 112TH AND 113TH CONGRESSES*

When the 112th Congress convened in January 2011, the new Republican Majority in the House of Representatives rededicated the focus of the Committee on comprehensive and robust congressional oversight. In accepting the gavel as Speaker, Representative John Boehner pledged to promote a “government that is honest, accountable and responsive . . . . A government that respects individual liberty, honors our heritage, and bows before the public it serves.”<sup>89</sup> After serving as Ranking Member during the 111th Congress, Representative Darrell Issa assumed the position of Chairman with a plan for the Committee to target government inefficiency, reduce Washington spending and reform the federal bureaucracy.<sup>90</sup> It would serve as “the committee of stopping government from taking away your liberties, government from exceeding its authority, government from keeping your business from expanding and growing, government from spending your money less efficiently than you would spend it yourself.”<sup>91</sup>

Together, Chairman Issa and Ranking Member Cummings worked to advance several pieces of bipartisan government reform legislation. For example, the Inspector General Empowerment Act of 2014, introduced by Chairman Issa with Ranking Member Cummings and Representative Mark Meadows as co-sponsors, was reported favorably by the Committee in September 2014. This legislation would strengthen independence of Inspectors General by allowing them to issue testimonial subpoenas during the conduct of audits and investigations within their departments and agencies.<sup>92</sup> Although the need for this legislation is supported by Members on both sides of the aisle, it will not be enacted before the end of the 113th Congress. The FOIA Oversight and Implementation Act (the “FOIA Act”) was another bill introduced by Chairman Issa with Ranking Member Cummings as co-sponsor – this Act would update provisions of the original FOIA legislation that protect the right of Americans to request information from the Federal Government.<sup>93</sup> The legislation was approved by a unanimous vote in the House of Representatives on February 25, 2014.<sup>94</sup> Although the Senate voted to pass similar legislation on December 8, 2014,<sup>95</sup> the House was unable to take up the measure before the end of the current Term.<sup>96</sup>

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<sup>89</sup> Richard E. Cohen & Jake Sherman, *John Boehner: ‘This is the people’s House,’* POLITICO BLOG (Jan. 6, 2011 6:41 AM), <http://www.politico.com/news/stories/0111/47078.html> (last accessed Dec. 15, 2014) (quoting Speaker John Boehner, Opening Remarks as Speaker of the House on Jan. 4, 2011).

<sup>90</sup> Ken Dilanian, *Issa Vows to Hunt Down Waste in Government*, CHICAGO TRIB., Jan. 3, 2011; *Interview with Darrell Issa*, CNN, Jan. 2, 2011.

<sup>91</sup> Philip Rucker, *In Power Seat, Issa Recasts Self as Washington’s Whistleblower*, WASH. POST, Dec. 19, 2010.

<sup>92</sup> Inspector General Empowerment Act of 2014, H.R. 5492 113th Cong. (as amended and reported to the House Sept. 17, 2014).

<sup>93</sup> FOIA Oversight and Implementation Act of 2013, H.R. 1211, 113th Cong. (as introduced Mar. 15, 2013).

<sup>94</sup> FOIA Oversight and Implementation Act of 2013, H.R. 1211, 113th Cong. (as amended, approved by the House and referred to the Senate Feb. 26, 2014).

<sup>95</sup> FOIA Improvement Act of 2014, S.2520, 113th Cong. (as amended, approved by the Senate Dec. 8, 2014).

<sup>96</sup> A variety of reasons have been suggested for the failure of the legislation to come before the House for a vote, including opposition by the Department of Justice and the priority of passing a spending package. See Josh Hicks, *How a popular government-transparency bill suddenly died in Congress*, WASH. POST, (Dec. 16, 2014), available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/12/16/how-a-popular-government-transparency-bill-suddenly-died-in-congress/>.

However, as with other bills reported, the Committee has laid the foundation for the legislations' passage in a future Session.

Passage of the DATA Act was a significant bipartisan success for the Committee. The Digital Accountability and Transparency Act ("DATA Act"), signed into law by President Barack Obama on May 9, 2014, seeks to transform government data reporting.<sup>97</sup> By mandating the creation and implementation of a government-wide financial reporting standard, the DATA Act "expand[s] transparency standards so that taxpayers can see how federal funds are spent."<sup>98</sup> In December 2014, the Committee held a hearing to evaluate the efforts of the Department of Treasury and the White House Office of Management and Budget to begin complying with legislative directives.<sup>99</sup> In his opening statement, Ranking Member Cummings referred to the "landmark" legislation as "a bipartisan bill that would provide the American people with information about how their money is being spent." Ranking Member Cummings noted that "[f]rom the very beginning, [Chairman Issa] worked closely with me and my staff, as well as with the Administration and the Senate . . ." and should be "commended for [his] leadership."<sup>100</sup>

Although the DATA Act and many of the Committee's legislative activities have received the support of Members of both the Majority and Minority, the Committee's oversight activities often met resistance when members of the Administration faced questions. Throughout history, Members of Congress have defended the legitimacy of the separation of powers doctrine and the need for Congress to exercise oversight of the Executive Branch.<sup>101</sup> During the Administration of President George W. Bush, Senator Robert Byrd called Members of Congress to maintain those ideals, warning of the harm that comes to American when Members become too deferential to the President:

Under the Constitution, we have three separate but equal branches of Government. How many of us know that? How many of us know that the executive branch is but the equal of the legislative branch – not above it, not below it, but equal? Why do we treat Presidents as though they were kings, clothed in royal purple? The real losers in this scenario are the American people. They are not well served by a Congress that fritters away opportunity after opportunity to probe, to analyze, to exercise its independent judgment on the urgent issues of the day in favor of rushing to do the bidding of the executive branch. Shame on us. Fie on us.<sup>102</sup>

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<sup>97</sup> Digital Transparency and Accountability Act of 2014, Pub. L. No. 113-101, 128 Stat. 1146.

<sup>98</sup> Cristina Marcos, *Federal transparency bill headed to White House*, HILL, FLOOR ACTION BLOG (Apr. 28, 2014 5:01 PM), <http://thehill.com/blogs/floor-action/204586-federal-transparency-bill-headed-to-white-house>.

<sup>99</sup> *Transforming Federal Spending: Implementing the Digital Accountability and Transparency Act: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014).

<sup>100</sup> *Transforming Federal Spending: Implementing the Digital Accountability and Transparency Act: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014) (opening statement of Ranking Member Elijah Cummings).

<sup>101</sup> As early as the Second Term of Congress, the Congress has fulfilled the necessary role of investigator and auditor of the government accounts on behalf of taxpayers. A brief discussion of the history of the Committee is included earlier in this report in the section, *A Necessary Function: Evolution of the Committee*.

<sup>102</sup> 150 CONG. REC. S79 (daily ed. Jan. 21, 2004) (statement of Sen. Robert Byrd).

Charged with overseeing the operations of the Federal Government<sup>103</sup> and provided the authority to investigate “any matter” at “any time,”<sup>104</sup> the Committee on Oversight and Government Reform has a unique responsibility to the American Taxpayer; as Members of the House of Representatives, the Committee’s Members have a mandate to “press for the interests of their constituents.”<sup>105</sup>

However, time and again, Minority Members of the Committee wrongly attempted to compromise or prematurely end investigation into allegations of government abuse. Case in point, the Committee’s investigation into disparate treatment of applicants for tax exempt status by the IRS. Near the outset of the IRS targeting investigation, before many key facts had been brought forward, Ranking Member Cummings publicly declared, “[b]ased upon everything I’ve seen the case is solved.”<sup>106</sup> Later, after public statements from Members of both the Majority and Minority, Ranking Member Cummings walked back this statement, explaining that he was “open to interviewing additional Cincinnati-based IRS employees and holding more hearings on the scandal.”<sup>107</sup>

Yet, only six days after that clarification, the Ranking Member released a transcribed copy of the Committee’s interview with an IRS employee<sup>108</sup> – providing every subsequent witness with a roadmap to the Committee’s questions.<sup>109</sup> The relationship between the Minority and the Obama Administration came under scrutiny again more recently, when the Brian Fallon from the Department of Justice – apparently believing he was calling the office of Ranking Member Cummings – called Chairman Issa’s staff instead to discuss leaking documents related to the IRS investigation. According to Mr. Fallon, the Director of the DOJ’s Office of Public Affairs, this planned leak would allow Administration officials to comment on the documents “before the majority” did.<sup>110</sup>

Efforts to protect actors within the Obama Administration and to disrupt the conduct of vigorous oversight extended beyond the IRS targeting scandal. For over three years, the Committee’s Minority publicly berated Chairman Issa and the Committee’s investigations; the lengths to which

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<sup>103</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, cl. 4(c)(2).

<sup>104</sup> *Id.*

<sup>105</sup> Eugene W. Hickock, *Congress, the Court, and the Constitution: Has Congress Abdicated its Constitutional Responsibilities?*, Heritage Foundation, Nov. 29, 1990, available at <http://www.heritage.org/research/lecture/hl299nbsp-congress-the-court-and-the-constitution>.

<sup>106</sup> Interview by Candy Crowley, *State of the Union*, CNN with Representative Elijah Cummings, Ranking Member, House Comm. on Oversight & Gov’t Reform (June 9, 2013).

<sup>107</sup> Rachael Bade, *Rep. Elijah Cummings clarifies: IRS case is not ‘solved,’* POLITICO, June 12, 2013, available at <http://www.politico.com/story/2013/06/elijah-cummings-clarifies-irs-case-not-solved-92689.html>.

<sup>108</sup> Press Release, Ranking Member Elijah Cummings, FIRST-HAND ACCOUNT: Cummings Releases Full Transcript of “Conservative Republican” IRS Manager Explaining Genesis of Tea Party Screening (June 18, 2013), available at <http://democrats.oversight.house.gov/news/press-releases/first-hand-account-cummings-releases-full-transcript-of-conservative-republican>.

<sup>109</sup> In a transcribed interview with Committee staff, an attorney in the Exempt Organizations branch of the IRS’s Chief Counsel explained that he had been provided with the testimony released by Ranking Member Cummings in preparation for the interview. Transcribed interview of David Marshall, Internal Revenue Serv., in Wash., D.C. (July 26, 2013).

<sup>110</sup> Bernie Becker, *Issa: Holder aide caught red-handed*, HILL, Sept. 9, 2014, available at <http://thehill.com/policy/finance/217129-issa-accuses-doj-of-under-the-table-coordination-with-house-democrats>.

the Minority sought to undermine the Committee's efforts even included an amicus brief opposing the lawsuit authorized by a vote of the House of Representatives to compel the production of document from the U.S. Department of Justice.

Despite this, an order of U.S. District Court for the District of Columbia explained why Congress is entitled to nearly two-thirds of the subpoenaed information:

This is a lawsuit to enforce a subpoena for documents under the Attorney General of the United States. From the start, the Attorney General has sought to withhold the records in question on one ground only: he asserted they were covered by the deliberative process component of the Executive Privilege. . . . On August 20, 2014, the Court ordered defendant to review the records at issue, determine which of them meet the legal test for applicability of the deliberative process privilege, and produce to plaintiff by October 1, 2014 those documents that do not satisfy the test. . . . The fact that the Attorney General now seeks to assert some sort of general work file privilege along the lines of the attorney work product doctrine does not alter the analysis set forth in the order of August 20. . . . The "possibility" of an appeal and piecemeal litigation does not satisfy defendant's burden to demonstrat[e] a "clear case of hardship or inequity" without a stay. Given this, and that the Attorney General has no valid legal basis to withhold non-deliberative documents under the deliberative process privilege, the Court denies defendant's motion to stay the production of these documents until the end of this litigation. The Court orders defendant to produce these documents to the Committee by November 3, 2014.<sup>111</sup>

On that evening, in an "Election Eve Dump," the Department of Justice turned over 64,280 pages of documents previously withheld from the Committee under President Obama's claim of executive privilege.<sup>112</sup> The documents produced demonstrate attempts to overextend the use of executive privilege to avoid disclosing documents that would potentially embarrass or otherwise implicate Administration officials – documents the Ranking Member claimed consisted of "highly sensitive law enforcement and national security materials that have never been requested before and are completely unrelated to Operation Fast and Furious."<sup>113</sup>

As Chairman of the Committee, Representative Darrell Issa has fought these efforts to obstruct oversight; as under the leadership of Chairman Henry Waxman before, the Committee during the 112th and 113th Congresses has sought to exercise oversight of the

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<sup>111</sup> Order of the Court, Comm. on Oversight & Gov't Reform, U.S. House of Representatives, v. Holder, No. 121-1332 (D.D.Ct.) (Oct. 6, 2014).

<sup>112</sup> Press Release, Cmte. on Oversight & Gov't Reform, *Election Eve Dump: Justice Department Turns Over 64,280 pages of Claimed 'Executive Privilege' Operation Fast and Furious Documents* (Nov. 4, 2014), available at <http://oversight.house.gov/release/election-eve-dump-justice-department-turns-64280-pages-claimed-executive-privilege-operation-fast-furious-documents/>.

<sup>113</sup> Press Release, Ranking Member Elijah Cummings, *Cumming Statement on Subpoena to Department of Justice*, Oct. 12, 2012, available at <http://democrats.oversight.house.gov/news/press-releases/cummings-statement-on-subpoena-to-department-of-justice-0>.

executive branch in order to “help all levels of government function better.”<sup>114</sup> Americans have a right to know that the money Washington takes from them is well spent. Americans deserve an efficient, effective government that works for them. The Committee on Oversight and Government Reform has worked tirelessly – overcoming unprecedented obstruction, public disparagement and legal challenge – to deliver the facts to the American people and bring genuine reform to the federal bureaucracy.

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<sup>114</sup> Rep. Henry Waxman, *Effective Oversight is Essential*, Politico Opinion (as updated Jan. 25, 2011, 3:13 P.M.), available at <http://www.politico.com/news/stories/0111/48018.html>.

# OVERSIGHT AND GOVERNMENT REFORM: LEGISLATIVE ACTIVITIES

## INTRODUCTION

During the 112th and 113th Congresses, the Committee on Oversight and Government Reform facilitated the passage of legislation that will significantly reform the function of Federal Government – legislation such as the DATA Act and the Federal Information Technology Acquisition Reform Act<sup>115</sup> will make the government more efficient, more transparent and more accountable to American Taxpayers. Other legislation passed by the Committee, such as the Unfunded Mandates Reform Act and the Federal Records Accountability Act, has laid the foundation for additional reforms to be made in the future.

According to its legislative jurisdiction, the Committee on Oversight and Government Reform is responsible for considering all measures referred to it by the Speaker of the House as related to the operation of government generally. As described earlier, the subject matter of the Committee is divided into 12 areas:

1. Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement.
2. Municipal affairs of the District of Columbia in general (other than appropriations).
3. Federal paperwork reduction.
4. Government management and accounting measures generally.
5. Holidays and celebrations.
6. Overall economy, efficiency, and management of government operations and activities, including Federal procurement.
7. National archives.
8. Population and demography generally, including the Census.
9. Postal service generally, including transportation of the mails.
10. Public information and records.
11. Relationship of the Federal Government to the States and municipalities generally.
12. Reorganizations in the executive branch of the Government.

In the following sections, highlights of the legislative activities of the Committee are discussed.

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<sup>115</sup> As included in the Fiscal Year 2015 National Defense Authorization Act, discussed below.

## DATA ACT

Americans have the right to hold their government accountable for how taxpayer dollars are spent. To effectively exercise that right, Americans need free access to accurate, comprehensive and useful information describing how the Federal Government uses their money. Transparency in federal financial information provides a check on waste, fraud and abuse in government<sup>116</sup>--but only if Federal data is reliably published in formats that make it easy to analyze. Federal decision makers, including executive branch managers and members of Congress, also need comprehensive and accurate financial information to make informed choices.

Over the past six years, the Committee on Oversight and Government Reform (the "Committee") conducted a thorough study of transparency of Federal information, particularly spending data. The Committee held seven hearings examining transparency of federal information.<sup>117</sup> Together, Republican and Democrat Committee staff conducted extensive outreach and research to better understand the complexities of federal financial data and best practices for data transparency. The result of these oversight efforts was clear: despite previous efforts to make Federal spending transparent to Americans, the information currently made available by the government often lacks accuracy, comprehensiveness and usefulness.

The Digital Accountability and Transparency Act ("DATA Act")<sup>118</sup> applies the lessons learned from the Committee's activities to Federal spending data, opening it to closer scrutiny by the public, watchdog groups, media, executive-branch management and Congress. Signed into law by President Obama on May 9, 2014, the DATA Act requires Federal agencies to publicly report all of their obligations and expenditures--encompassing both external spending, such as grants, loans, and contracts, and internal spending on salaries, supplies, and facilities. Federal spending information will be disclosed publicly on a single online platform. To ensure that these two categories of information may be checked against one another and easily searched and analyzed, the DATA Act imposes common data identifiers and electronic reporting standards on agencies.

The DATA Act builds on the Federal Funding Accountability and Transparency Act of 2006 ("FFATA").<sup>119</sup> FFATA required the Office of Management and Budget ("OMB") to establish a website, USASpending.gov, which publishes selected information, gleaned from government-wide databases, for each Federal grant, loan and contract. However, the Sunlight Foundation reported that \$1.55 trillion of federal grant spending reported on USASpending.gov in fiscal year 2011 was

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<sup>116</sup> See, e.g., Testimony of Earl Devaney before the Committee on Oversight and Government Reform, June 14, 2011, available at [http://oversight.house.gov/images/stories/Testimony/Devaney\\_Testimony\\_2.pdf](http://oversight.house.gov/images/stories/Testimony/Devaney_Testimony_2.pdf), at 4 ("Devaney Testimony") ("Transparency can cause embarrassment, which, in turn, causes self-correcting behavior").

<sup>117</sup> "Preventing Stimulus Waste and Fraud: Who are the Watchdogs?" March 19, 2009; "Tracking the Money: Preventing Waste, Fraud and Abuse of Recovery Act Funding," July 8, 2009; "Tracking the Money: How Recovery Act Recipients Account for their Use of Stimulus Dollars," Nov. 19, 2009; "The Freedom of Information Act: Crowd-Sourcing Government Oversight," March 17, 2011; "Achieving Transparency and Accountability in Federal Spending," June 14, 2011; "Transparency Through Technology: Evaluating Federal Open-Government Initiatives," March 11, 2011 (Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform); "Improving Oversight and Accountability in Federal Grant Programs," June 23, 2011 (Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform).

<sup>118</sup> Digital Transparency and Accountability Act of 2014, Pub. L. No. 113-101, 128 Stat. 1146.

<sup>119</sup> Pub. L. No. 109-292.

misreported,<sup>120</sup> and 64.2 percent of the data reported was inconsistent.<sup>121</sup> Moreover, USASpending.gov covers Federal grants, contracts, or loans, but not internal agency spending, which means that it cannot provide taxpayers or decision-makers with a complete picture of the cost of a given program, office or department.

The DATA Act requires the same information to be published online as required under FFATA, but greatly expands the scope of spending transparency by adding agencies' internal spending data to FFATA's mandate. It also strengthens reporting requirements. For all federal funds, agencies will report the amount of budget authority available, the amount obligated, the amount of outlays, and the amount of expired or unobligated balances.

The DATA Act also incorporates lessons learned from the American Recovery and Reinvestment Act of 2009 ("ARRA"), which required the recipients of Federal stimulus funds to report on the receipt and use of those funds to a single central publicly available database on Recovery.gov. Recovery.gov has demonstrated better accuracy<sup>122</sup> and relevance<sup>123</sup> than USASpending.gov. First, Recovery.gov's recipient-supplied reports are received quarterly, permitting activity to be tracked across time; whereas USASpending.gov only publishes data once for each transaction. Second, the award recipients report accurately under ARRA, or run the risk of losing their stimulus funding if they do not. Meanwhile, FFATA's mandate only applies to OMB and Federal agencies do not face any penalties for noncompliance, creating little incentive to provide accurate data to the government-wide databases that feed USASpending.gov.

Significantly, the usefulness of both USASpending.gov and Recovery.gov is hampered by the Federal Government's long-term failure to adopt common data elements and reporting standards for electronic financial information. For example, there is no system of identifier codes for all Federal awards; instead, every agency separately tracks grants, contracts, and loans using its own distinct system.<sup>124</sup> Similarly, there is no system of identifier codes for all recipients of Federal grants, contracts, and loans; no master list of all Federal programs; and, in fact, no agreed system of agency codes. Without government-wide identifiers for awards, recipients, programs, agencies, and other

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<sup>120</sup> See Press Release, Sunlight Foundation, U.S. Government Misreported \$1.55 Trillion in Grants in 2011 (Feb. 4, 2013), available at <http://sunlightfoundation.com/press/releases/2013/02/04/us-government-misreported-155-trillion-grants-2011/> (last accessed Dec. 16, 2014).

<sup>121</sup> See *Clearspending: Making Sense of the Federal Checkbook, Consistency Results for Fiscal Year 2011*, SUNLIGHT FOUNDATION <http://sunlightfoundation.com/clearspending/> (last accessed Dec. 16, 2014). The Sunlight Foundation study covered only grant programs, because grant information on USASpending.gov may be compared to corresponding information in the Catalog of Federal Domestic Assistance, but there is no independent compilation of contract information to which contract data on USASpending.gov may be compared.

<sup>122</sup> By the end of the first quarter of calendar 2011, only 17 recipients had failed to file recipient reports under ARRA twice, and the number of three-time non-reporters was seven. See, e.g., Testimony of Earl Devaney before the Committee on Oversight and Government Reform, June 14, 2011, available at [http://oversight.house.gov/images/stories/Testimony/Devaney\\_Testimony\\_2.pdf](http://oversight.house.gov/images/stories/Testimony/Devaney_Testimony_2.pdf), at 5.

<sup>123</sup> In contrast with the extensive use of the Recovery Operations Center by the Recovery Board and inspectors general throughout the executive branch to detect irregularities and fraud, Federal authorities do not use USASpending.gov for any oversight-related purpose.

<sup>124</sup> See RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD, SOLUTIONS FOR ACCOUNTABILITY AND TRANSPARENCY: UNIFORM GOVERNMENTWIDE AWARD ID NUMBER (undated) available at <http://www.recovery.gov/arra/About/Documents/WhitePaperonStandardizedGovernmentwideAwardID.pdf> (last accessed Dec. 16, 2014).

data elements, sophisticated electronic searches and comparisons will be impossible, even under a comprehensive spending transparency mandate.

The DATA Act tasks the Department of the Treasury and the White House Office of Management and Budget with establishing government-wide data standards for federal spending. The Department of the Treasury will collect Federal spending information and publish that information in formats that make it easy to search, sort, and download. Treasury is further directed to designate common electronic data elements and reporting standards for the spending information it collects, in conjunction with OMB.

The DATA Act also shifts from OMB to Treasury the statutory responsibility for administering USASpending.gov. Treasury can comply with this provision by assuming control over the administration of the USASpending.gov site. The data posted on USASpending.gov will contain information from more sources than it currently does, increasing the availability and accuracy of data. All data on USASpending.gov will be available in a machine-readable, searchable format and down loadable in bulk.

The DATA Act also seeks to reduce the burden of reporting. The Office of Management and Budget is tasked with reviewing current financial reporting requirements and making recommendations instructing agencies on how to simplify reporting to reduce duplication and compliance costs. OMB or a designate shall also conduct a three year pilot program to evaluate consolidated financial reporting for recipients of federal funds and its ability to increase financial transparency and reduce compliance costs and burdens. The pilot program will review \$1 billion in Federal funds in the form of grants, contracts and sub-awards. Participants will include a diverse group that collectively receives funds under multiple programs across multiple agencies.

The DATA Act was introduced by Committee Chairman Darrell Issa and Ranking Member Elijah Cummings in 2011. It passed the House but stalled in the Senate. Chairman Issa and Ranking Member Cummings reintroduced the DATA Act, H.R. 2061, in 2013. Senator Mark Warner of Virginia and Senator Rob Portman of Ohio introduced an identical bill in the Senate, S. 994. The DATA Act was passed by both houses and it was signed into law by President Obama on May 9, 2014.

### **DISTRICT OF COLUMBIA HEIGHT ACT**

In an effort to help the city beautify and update its architecture, Chairman Issa began exploring options to update the 100 year old law that capped building heights in the City. After several years of review, the City and the National Capital Planning Commission generally agreed on some modest changes to the law. While this agreement fell short of the Chairman's expectations, he listened to the will of the elected representatives of the City and pushed the legislation. H.R. 4192, unofficially referred to as the "D.C. Height Act," simply allows for human occupancy on an area that used to be reserved for mechanical structures. This legislation is discussed in more detail in Chapter 7.

## EXCESS FEDERAL BUILDING AND PROPERTY DISPOSAL ACT

The U.S. Government Accountability Office (“GAO”) has repeatedly reported, most recently in the 2013 High Risk Report, that the Federal Government continues to hold more real property than it actually needs.<sup>125</sup> The annual costs of operating and maintaining these underutilized and excess properties reach into the billions of dollars.<sup>126</sup> Moreover, when agencies do move to dispose of an unneeded property, they face legal and environmental screening requirements that often slow down the disposal process.<sup>127</sup>

Subcommittee Chairman Jason Chaffetz introduced the Excess Federal Building and Property Disposal Act of 2013 (“H.R. 328”) on January 22, 2013.<sup>128</sup> The Act makes permanent changes to the federal property disposal process in order to make disposition more efficient. The legislation also incentivizes agencies to appropriately manage and efficiently dispose of their real property assets. H.R. 328 directs the Administrator of the General Services Administration (“GSA”) to conduct a pilot program, in consultation with the Director of the Office of Management and Budget (“OMB”), for the expedited disposal of real property that is no longer meeting the needs of the Federal Government. Consistent with the one of the requirements in the existing disposal process, Subcommittee Chairman Chaffetz’s legislation also establishes a grant program under which a portion of the proceeds from sale of the property may be used by organizations serving the homeless to provide permanent housing.

## FEDERAL EMPLOYEE PHASED RETIREMENT ACT

In 2010, the U.S. Office of Personnel Management (“OPM”) requested phased retirement authority to improve the Federal Government’s ability to retain and share institutional knowledge. Chairman Issa responded to OPM’s request in 2012 with legislation authorizing agencies to use phased retirement as a workforce planning and employee retention tool.<sup>129</sup> Enacted as part of the Moving Ahead for Progress in the 21st Century Act (“MAP-21”),<sup>130</sup> the Federal Employee Phased Retirement Act gives agency managers an additional tool for retaining valuable knowledge and expertise, while, at the same time, providing federal workers greater flexibility in planning their careers. Phased retirement allows federal workers to retire from a portion their full time employment and receive a prorated pension for that service. With permission from their agency, phased retirees work 20 to 80 percent of their full-time schedule and receive a pro-rated salary as well as pension credit commensurate with the time worked. When the phased retiree fully retires, their pension annuity is adjusted.

Federal workers waited more than two years for OPM to issue the implementing regulation, resulting in bipartisan communication to OPM regarding the delay. The regulation was issued August 7, 2014.<sup>131</sup>

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<sup>125</sup> Government Accountability Office (GAO), GAO High Risk Report 2013, GAO-13-283, Feb. 2013 at 106.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> H.R. 328, 113th Cong. (as introduced Jan. 22, 2013).

<sup>129</sup> Federal Employee Phased Retirement Act, H.R. 4363, 113th Cong. (as introduced, Apr. 17, 2012).

<sup>130</sup> Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012).

<sup>131</sup> Phased Retirement, 79 Fed. Reg. 46607 (2014).

## FEDERAL INFORMATION SECURITY MODERNIZATION ACT

In response to a sharp spike in recent years of cyber-intrusions into federal computer systems – a trend that shows no signs of reversing – Members of Congress have demonstrated a heightened concern about our government’s ability to protect against, and respond to, such threats.

Recognizing the need for legislation that would reform current systems, Chairman Issa, introduced the Federal Information Security Amendments Act of 2013 (“H.R. 1163”).<sup>132</sup> Drafted on a bipartisan basis with Ranking Member Cummings among its cosponsors, H.R. 1163 would reauthorize and update the Federal Information Security Management Act of 2002 (“FISMA”),<sup>133</sup> creating a framework for the protection of federal information systems. The legislation puts a new emphasis on automated and continuous monitoring of information security breaches in federal systems, turning focus away from the “check the box” mentality that comes with simply ensuring certain security protocols are in place. H.R. 1163 supports the use of commercial security solutions for Government systems, providing flexibility without dictating specific solutions to federal agencies.

The Federal Information Security Amendments Act was introduced on March 14, 2013 by Chairman Issa and was approved by voice vote the same day in Committee. On April 16, 2013, the bill was approved on the House floor in a unanimous 416-0 recorded vote. A separate but similar bill, the Federal Information Security Modernization Act (“S. 2521”) was introduced in the Senate on June 24, 2014 by Homeland Security and Government Affairs Chairman Tom Carper.<sup>134</sup> Chairman Carper’s bill passed the Senate on December 8, 2014, and was passed by the House two days later. Signed into law on December 18, 2014, the Federal Information Security Modernization Act of 2014 became Public Law 113-283.<sup>135</sup>

## FEDERAL INFORMATION TECHNOLOGY ACQUISITION REFORM ACT

Information technology (“IT”) plays a pivotal role in the efficient operation of government. Without modern IT systems, government is incapable of providing basic services, curtailing waste, fraud and abuse or managing internal operations. As the Government Accountability Office (“GAO”)<sup>136</sup> has repeatedly pointed out in recent years, the Federal Government spends approximately \$79 billion annually on IT,<sup>137</sup> yet those investments continue to underperform, often incurring considerable cost overruns and delays, while contributing little to mission-related outcomes. These failures directly impact progress towards improving citizen services and conducting effective oversight. As such, they impact the entire \$3.5 trillion of annual federal outlays. For example, without state-of-the-art IT and the oversight capability it brings, the government cannot tackle the \$108 billion lost to improper payments in fiscal year 2012 alone.<sup>138</sup> Furthermore, in terms of potential cost savings, some in the industry have estimated that more than one trillion dollars could be saved over the

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<sup>132</sup> Federal Information Security Amendments Act of 2013, H.R. 1163, 113th Cong. (2013).

<sup>133</sup> Federal Information Security Management Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. § 3541, et seq.).

<sup>134</sup> Federal Information Security Modernization Act of 2014, S. 2521, 113th Cong. (2014).

<sup>135</sup> Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283.

<sup>136</sup> The General Accountability Office is the “watchdog” agency used by Congress to oversee executive branch agencies.

<sup>137</sup> GAO testimony, “*Investment Oversight and Management have improved but continued attention is needed*”; Statement of David Powner; (March 17, 2011) GAO-11-454T, at 3.

<sup>138</sup> For the Committee’s work related to Federal Financial Un-accountability, see Chapter 5.

next ten years if the government adopted the “proven” IT best practices currently in use by the private sector.

The Federal Information Technology Acquisition Reform Act (“FITARA”), introduced by Chairman Issa with Representative Gerald Connolly as co-sponsor, squarely addressed this dismal record with strong bipartisan, bicameral support. It provided common-sense good governance reforms to assist the government in its adoption and employment of critical IT resources. It gave agency Chief Information Officers more authority over the budget, governance, and personnel processes for agency information technology investments. It also sought to make agency IT investments more transparent to the public and require agencies to pay attention to troubled investments. To eliminate duplication and waste, the bill required agencies to annually review their IT investments, with particular emphasis on consolidating and optimizing data centers--the facilities in which federal agencies house computer systems and related components.

After a similar bill was considered and reported in the Senate,<sup>139</sup> the Committee worked with the Senate Homeland Security and Government Affairs Committee as well as the intelligence and armed services committees to draft compromise language. Ultimately the compromise language was included in the Fiscal Year 2015 National Defense Authorization Act, signed into law by President Obama on December 19, 2014. As enacted, the legislation enhances the authority of CIOs, improves transparency and risk management, requires annual IT reviews by agencies, requires consolidation of over 9,000 Federal data centers, further develops a skilled IT acquisition workforce and leverages the scale of the Federal Government to improve purchasing power.

## FEDERAL RECORDS ACCOUNTABILITY ACT

Improving internal recordkeeping standards has been a priority for the Federal Government since the 1930’s. These standards were greatly strengthened in 1950 with the passage of the landmark Federal Records Act (“FRA”) and further expanded in 1978 with the enactment of the Presidential Records Act. While these reforms have been largely effective over the last several decades, the advent of new unforeseen technologies and the continued growth of government have exposed cracks in current recordkeeping practices. As a result increasing numbers of federal employees are using unofficial technologies to conduct government business dramatically diminishing government transparency and accountability.

Over the last several years, the Committee has encountered a number of incidents where federal records were jeopardized or lost due to ignorance or deliberate effort. In one example, the Committee learned that then-Assistant Attorney General Thomas Perez used his personal e-mail 1,200 times over a four-year period to conduct official business at the Department of Justice. More recently, new allegations related to FRA compliance have been raised at EPA and IRS, causing even further concerns about deliberate recordkeeping subversion.

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<sup>139</sup> Federal Information Technology Savings, Accountability and Transparency Act of 2013, S.1843 113th Cong (as introduced by Sen. Tom Udall).

As a result of these incidents, Representative Mark Meadows introduced H.R. 5170, the Federal Records Accountability Act (“FRAA”).<sup>140</sup> The legislation was a direct effort to update the FRAA to account for modern technology and the larger bureaucracy. Specifically, the FRAA would bar federal employees from using personal e-mail or twitter accounts for official business and provide for clear penalties for employees who destroy federal records. Additionally, during Committee consideration of the FRAA, amendments were incorporated that will ensure the electronic capture of key digital communication within agencies automatically, instead of the current outdated process that requires paper versions of electronic documents be preserved.

Ultimately, the amended version of H.R. 5170 was reported by voice vote on a bipartisan basis on July 24, 2014.<sup>141</sup> Subsequently, H.R. 5170 was passed by the full House of Representatives by a voice vote with the vocal support of both Chairman Issa and Ranking Member Cummings.<sup>142</sup>

### FOIA OVERSIGHT AND IMPLEMENTATION ACT

Since its enactment in 1966, the Freedom of Information Act<sup>143</sup> has been amended multiple times in efforts to increase agency compliance with the requirements of the Act and to improve the process. Despite these amendments, significant problems persist. The FOIA Oversight and Implementation Act of 2014 (the “FOIA Act”) was introduced by Chairman Darrell Issa and Ranking Member Elijah Cummings as co-sponsor in an effort to address some of these lingering problems on March 15, 2013.<sup>144</sup> With the overwhelming support of both Republicans and Democrats, the FOIA Act passed the House of Representatives by a vote of 410-0 on February 25, 2014. It was received in the Senate and referred to the Senate Committee on the Judiciary on February 26, 2014.<sup>145</sup>

The United States Supreme Court explained the purpose of the Freedom of Information Act early after its original enactment as being “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language,”<sup>146</sup> and later explained that “[a]s the Act is structured, virtually every document generated by agency is available to public in one form or another, unless it falls within one of the Act’s nine exemptions.”<sup>147</sup> On his first day in office President Barack Obama directed all agencies to “adopt a presumption in favor of disclosure” and “take affirmative steps to make information public.”<sup>148</sup> However, when the Committee on Oversight and Government Reform conducted oversight of the Federal Government’s response to properly made FOIA requests numerous issues with procedure were identified.<sup>149</sup>

The FOIA Act helps to address many of these issues, including overuse of FOIA’s statutory exemptions, inappropriate charging of fees for FOIA requesters, agency failure to post frequently

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<sup>140</sup> H.R. 5170, 113th Cong. (as introduced, July 23, 2014).

<sup>141</sup> H.R. 5170, 113th Cong. (as reported by H. Cmte. on Oversight & Gov’t Reform, July 24, 2014).

<sup>142</sup> H.R. 5170, 113th Cong. (as passed by the House, Sept. 16, 2014).

<sup>143</sup> Pub. L. No. 89-487, 80 Stat. 250 (codified as amendment at 5 U.S.C. § 552).

<sup>144</sup> H.R. 1211, 113th Cong. (as received in the Senate, Feb. 26, 2014).

<sup>145</sup> Roll Call Vote No. 63., available at <http://clerk.house.gov/evs/2014/roll063.xml>.

<sup>146</sup> EPA v. Mink, 410 U.S. 73, 80 (1973).

<sup>147</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

<sup>148</sup> Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

<sup>149</sup> Highlights of the Committees activities related to FOIA are discussed in Chapter 1.

requested records online and the continued rise of FOIA lawsuits. The legislation establishes a statutory presumption of openness, strengthens requirements for agencies to post frequently requested information, requires the Federal Government to establish a single portal for FOIA requests, strengthens the ombudsman and mediator role of the Office of Government Information Services and mandates agencies to update FOIA regulations. Although Senate Judiciary Committee Chairman Patrick Leahy, with Senator John Cornyn among co-sponsors, introduced substantially similar legislation,<sup>150</sup> the legislation will not be passed before the end of the term.

## GOVERNMENT REPORTS ELIMINATION ACT

Congress regularly enacts legislation placing reporting requirements on the Executive Branch. These agency reports can be useful resources and tools for the Congress as well as the general public. But changing technology, program requirements, and economic, domestic and foreign policy eventually render many reports that agencies supply to Congress unnecessary. The preparation of these reports can be expensive, primarily in terms of the work hours involved to produce them, but also in materials used. To help address this waste, the Government Performance Results Act<sup>151</sup> was amended in 2010.<sup>152</sup> As amended, the legislation directed each agency to assist the Office of Management and Budget (“OMB”) in publishing an annual list of unnecessary agency reports. In January 2013, OMB published the first such list.

It then became the job of Congress to vet this list, and determine which reports that the Administration views as unnecessary are also unnecessary in the eyes of the Legislative Branch. Chairman Issa sent letters to the chairmen of each House Committee soliciting input on OMB’s list of proposed eliminations. The Committee relied on the feedback received to winnow down the original list of eliminations proposed by OMB. In conducting the research required under the legislation, the General Accountability Office also identified nine statutory reporting mandates it must currently comply with that are burdensome and unnecessary.

Taking the feedback received into consideration, Chairman Issa introduced Chairman Issa introduced the Government Reports Elimination Act in March 2014.<sup>153</sup> The bill, as passed by the House the following month, eliminated statutory requirements for over 100 federal agency reports and revised five of the mandates identified by GAO as unnecessary.<sup>154</sup> After passing with amendment by the Senate in September, the chambers resolved differences in the legislation and it was presented to the President on November 17, 2014. The Government Reports Elimination Act of 2014 was signed into law on November 26, 2014, becoming Public Law 113-188.

A second direct result of the Committee’s work was a proposed change to the legislative protocols for the 114th Congress made by the House leadership in October 2014.<sup>155</sup> The change would require every new agency report included in future legislation to “sunset” after a specified period of

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<sup>150</sup> FOIA Improvement Act of 2014, S. 2520, 113th Cong. (as introduced, Jan. 24, 2014).

<sup>151</sup> Government Performance and Results Act of 1993, Pub. L. No. 103-62.

<sup>152</sup> Government Performance and Results Act Modernization Act of 2010, Pub. L. No. 111-352.

<sup>153</sup> H.R. 4194, 113th Cong. (as introduced, Mar. 11, 2014).

<sup>154</sup> H.R. 4194, 113th Cong. (as introduced, Apr. 28, 2014).

<sup>155</sup> Memo from The Honorable House Majority Leader Kevin McCarthy to all House Republicans, October 22, 2014.

time, unless the report is specifically re-authorized by the Congress.<sup>156</sup> While legislative protocols do not govern the introduction of legislation, “good-faith compliance” with protocols is necessary for House floor consideration.<sup>157</sup> The House of Representatives is expected to adopt the revised protocols in the coming months.

## GOVERNMENT SPENDING AND ACCOUNTABILITY ACT

In recent years, agency conference and travel spending has become exorbitant and out of control, wasting millions of taxpayer dollars on over-the-top accommodations and gifts. Following its oversight into this behavior,<sup>158</sup> the Committee, and subsequently the full House, approved the Government Spending Accountability Act of 2013 (the “GSA Act”).<sup>159</sup> Introduced by Congresswoman Jo Ann Emerson with Representative James Lankford joining as a co-sponsor, the legislation would reduce overall conference and travel spending through the implementation of new restrictions on these expenses. This legislation was passed unanimously by the House of Representatives on July 31, 2013,<sup>160</sup> but despite significant bipartisan support, it was not taken up by the Senate before the end of the Term.<sup>161</sup>

## INSPECTOR GENERAL EMPOWERMENT ACT OF 2014

The Inspector General Empowerment Act of 2014 was approved by the Committee and reported to the House of Representatives on September 16, 2014.<sup>162</sup> Introduced by Chairman Darrell Issa with co-sponsors Ranking Member Elijah Cummings and Representative Mark Meadows, the legislation would strengthen the independence of the Inspectors General and provide them with additional tools by which to conduct investigations.

The Inspector General Act of 1978 (the “IG Act”) established the inspectors general (“IGs”) to promote economy, efficiency and effectiveness within Executive Branch departments and agencies.<sup>163</sup> The IG Act broadly empowers IGs to undertake whatever investigations or reports they consider “necessary or desirable.”<sup>164</sup> In support of this function, Section 6(a)(1) of the Act clearly states that IGs shall “have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which related to programs and operations with respect to which that Inspector General has responsibilities under this Act.”<sup>165</sup> However, on August 5, 2014, many Members of Congress received a letter signed by 47 Inspectors General describing “serious limitations on access to records that have recently impeded the work of Inspectors General” and identified three IGs specifically whose work has been obstructed.

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<sup>156</sup> *Id.*

<sup>157</sup> 113th Congress Legislative Protocols, <http://www.majorityleader.gov/protocols/>.

<sup>158</sup> The Committee’s oversight efforts related to this alleged mismanagement of taxpayer dollars is discussed later in Chapter 5.

<sup>159</sup> H.R. 313, 113th Cong. (as introduced, Jan. 18, 2013).

<sup>160</sup> H.R. 313, 113th Cong. (as passed by the House, July 31, 2013).

<sup>161</sup> H.R. 313, 113th Cong. (as referred to Senate Cmte. on Homeland Security and Gov’t Affairs, Aug. 1, 2013).

<sup>162</sup> H.R. 5492, 113th Cong. (as reported to the House, Sept. 16, 2014).

<sup>163</sup> Inspector General Act of 1978, P. L. 95-452, §1, Oct. 12, 1978, 92 Stat. 1101 (codified as amended at 5 U.S.C. §§ 1-13).

<sup>164</sup> 5 U.S.C. §6(a)(2) (2012).

<sup>165</sup> 5 U.S.C. app §6(a)(1).

The legislation proposed by Chairman Issa would authorize Inspectors General to write testimonial subpoenas for Federal Government contractors and former federal employees. This authority will enhance the ability of Inspectors General to conduct thorough audits and investigations, particularly in procurement fraud matters. The bill also adds predictability to the budget for the Council of Inspectors General for Integrity and Efficiency (“CIGIE”) by authorizing a direct appropriation to CIGIE from Congress. The bill expedites investigations performed by the CIGIE Integrity Committee, and requires progress reports concerning ongoing investigations. Finally, the bill requires that the Government Accountability Office issue a report concerning prolonged vacancies in IG offices, and that CIGIE issue a report on collaboration among Inspectors General on cross-cutting issues that pertain to waste, fraud, abuse and/or mismanagement across multiple IG jurisdictions (cybersecurity, for example). In response to a request from CIGIE, the bill makes a number of changes to facilitate the work of Inspectors General.

## POSTAL REFORM LEGISLATION

Chairman Darrell Issa and Postal Service Subcommittee Chairman Dennis Ross introduced the Postal Reform Act (“PRA”) on June 23, 2011. Since its founding by the Second Continental Congress in 1775,<sup>166</sup> the United States Postal Service has repeatedly, and dramatically, evolved to respond to the changing needs of the American people. The Postal Service’s ability to adapt has enabled it to grow and endure despite radical advancements in technology, such as the advent of the telegraph and the telephone, which have made it significantly easier for individuals to communicate over long distances. As a result of the Postal Service’s successful strategies, mail volume growth and economic growth were highly correlated for much of the nation’s history, including a nearly perfect correlation for the period from 1946 through 2000.<sup>167</sup> However, by the late 1990’s, it was clear to some observers that major changes were necessary to reorganize the Postal Service so it could survive in the burgeoning era of the Internet.

As early as 1988, it was becoming clear that booming information technologies would place unprecedented pressure on the Postal Service’s long-term financial conditions.<sup>168</sup> Representative John McHugh, one of the earliest advocates of a new round of postal reform, introduced the Postal Reform Act of 1996 on June 25, 1996,<sup>169</sup> a bill designed to allow the Postal Service to respond to quickly to changing market conditions. However, despite the growing pressure of electronic diversion, it was only in 2004, under Chairman Tom Davis, that a major postal reform bill was voted on by the full House Oversight and Government Reform Committee.<sup>170</sup> Ultimately, the decade long saga of postal reform was concluded on December 20, 2006 when a scaled back version of

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<sup>166</sup> U.S. POSTAL SERV., *THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775-2006* 3 (2007), available at <http://about.usps.com/publications/pub100.pdf>.

<sup>167</sup> Darrell E. Issa, *The Postal Reform Act: A Plan for an Affordable, Sustainable Postal Service*, 38 NOTRE DAME L. REV. 157-58 (2012).

<sup>168</sup> Dr. Malcome Harris et al., *The Household Diary Study: Mail Use & Attitudes in FY 2000*, 2001 USPS 51 (2001) (on file with author).

<sup>169</sup> Postal Reform Act, H.R. 3717, 104th Cong. (1996).

<sup>170</sup> H.R. 3717, 104th Cong.

Representative John McHugh's 1996 legislation was finally signed into law as the Postal Accountability and Enhancement Act ("PAEA").<sup>171</sup>

Only four years after its peak in 2006, mail volume had dropped to 171 billion pieces in 2010 and by 2013 mail volume was 158 billion pieces.<sup>172</sup> In just the seven years between 2006 and 2013, more than 25 percent of the Postal Service's total mail volume disappeared. As a result, during this drop off, the Postal Service saw revenues plummet, including a decrease of \$9.2 billion between 2008 and 2010 alone.<sup>173</sup>

It was in this environment that Chairman Issa and Subcommittee Chairman Ross introduced the Postal Reform Act ("PRA") in 2011. The PRA was a clear proposal to reshape the Postal Service in light of declining demand and a direct response to changing consumer demand. At its core, the PRA had the goal of granting the Postal Service the ability to make difficult changes concerning rightsizing needs independent of purely political concerns. As a result, one of the key provisions of the PRA was the inclusion of a "Base Realignment and Closure" style process that had been successfully applied to military base restructuring to preclude backroom deals over specific plant closures.<sup>174</sup> Additionally, the legislation included a number of commonsense reforms, including asking postal employees to pay the same as other federal employees for health care and the switch to modified 6-day delivery of mail.<sup>175</sup> The PRA was approved by the Committee on October 13, 2011, less than four months after it was introduced.<sup>176</sup>

While the legislation never came before the full House of Representatives, bipartisan negotiations with the Senate on a compromise bill lasted until December 2012 before falling apart due to intransigence on the part of many House Democratic members who were unwilling to support the inclusion of any cost-cutting measures in any compromise legislation. Similarly, in 2013 and 2014 House Democratic Members were also unwilling to discuss cost-cutting measures at the Postal Service, even after Chairman Issa agreed to incorporate many provisions of Ranking Member Cummings's Postal Service-related legislation, the Innovate to Deliver Act of 2013, into the Postal Reform Act of 2013.

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<sup>171</sup> See *Pieces of Mail Handled, Number of Post Offices, Income, and Expenses Since 1789*, U.S. POSTAL SERV., (2014), available at <http://about.usps.com/who-we-are/postal-history/pieces-of-mail-since-1789.pdf> (last accessed Dec. 20, 2014).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> OFFICE OF THE DEPUTY UNDER SEC'Y OF DEF., DEP'T OF DEF., REPORT ON 2005 DEFENSE BASE CLOSURE AND REALIGNMENT IMPLEMENTATION 6 (2013).

<sup>175</sup> Postal Reform Act, H.R. 2309, 112th Cong. §§ 302, 111 (2011).

<sup>176</sup> Press Release, H. Cmte. on Oversight & Gov't Reform, Oversight Comm. Approves Issa-Ross Postal Reform Bill (Oct. 13, 2011) (on file with author).

## SMART SAVINGS ACT

The Smart Savings Act enhances the retirement security of federal workers. It does so by changing the default investment fund for Thrift Savings Plan (“TSP”) participants from a low-growth fund to an asset-allocation fund. Introduced by Chairman Issa on March 11, 2014 with significant bipartisan support,<sup>177</sup> the legislation was passed by the House of Representatives on July 14, 2014.<sup>178</sup> Similar legislation, introduced by Senators Elizabeth Warren and Rob Portman, passed the Senate on September 16, 2014.<sup>179</sup> The Smart Savings Act became Public Law 113-188 when signed into law by President Obama on December 18, 2014.

The legislation responds to a recommendation from the Federal Retirement Thrift Investment Board (“FRTIB”), a nonpartisan entity whose mission is to administer the TSP solely in the interest of participants and beneficiaries.<sup>180</sup> The previous default fund, the G Fund, invested exclusively in nonmarketable, short-term U.S. Treasury securities issued to the TSP. The earnings come from interest income on the security. However, the TSP also offered age-appropriate asset allocation funds, currently known as the Lifestyle or (L) Funds, designed to automatically address an individual's changing needs as they approach retirement. The L Funds offer professionally designed portfolios of investments with earnings that are generally higher than the earnings of the G Fund.

Investment results drove interest in making the L Fund the default option. According to the FRTIB, if the L Funds had been the default investment option since the beginning of automatic enrollment in 2010, participants would have achieved greater returns than by investing solely in the G Fund. Between August 2010 and September 2013, the cumulative returns for the G Fund were 6.33 percent, compared to 47.39 percent for the L 2040 Fund.<sup>181</sup>

The Smart Savings Act will help ensure TSP participants are better prepared for retirement, by investing their contributions in a fund designed to yield higher returns over the course of their career. However, it is important to note that employees retain their ability to control their investment choices. Ranking Member Elijah E. Cummings was an original cosponsor of the legislation, along with the Chair and Ranking Member of the Federal Workforce Subcommittee, Representatives Blake Farenthold and Stephen F. Lynch. Other Committee Members, including Representatives Rob Woodall and Gerald E. Connolly as well as D.C. Delegate Eleanor Holmes Norton also supported the legislation.

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<sup>177</sup> Smart Savings Act, H.R. 4193, 113th Cong. (as introduced Mar. 11, 2014).

<sup>178</sup> H.R. 4193, 113th Cong. (as passed by the House, July 14, 2014).

<sup>179</sup> S. 2117, 113th Cong. (as passed by the Senate, Sept. 16, 2014).

<sup>180</sup> Federal Retirement Thrift Investment Board, Minutes of the Meeting of the Board Members, December 16, 2013, available at <http://www.frtib.gov/pdf/minutes/Dec2013.pdf>.

<sup>181</sup> Federal Retirement Thrift Investment Board, Memorandum for Board Members, From: Greg Long, Executive Director, Subject: “L Fund Default Investment Option” (December 16, 2013), available at <http://www.frtib.gov/pdf/minutes/MM-2013Dec-Att3.pdf>.

## STOP UNWORTHY SPENDING ACT

Given the amount of money distributed through contracts, grants and financial assistance, it is imperative that the Federal Government have a reliable method for evaluating the recipients to ensure American Taxpayers receive value for their dollar. The World Bank's Chief Suspension and Debarment Official has explained the importance of this principle:

As the world's largest single buyer of goods and services, the United States government has an interest in ensuring its funds are being used appropriately. Indeed, as a matter of policy, the Federal Government seeks to prevent the improper dissipation of public funds in its contracting activities by doing business only with responsible contractors. To this end, the United States employs a suspension and debarment system that seeks to preclude US government agencies from entering into new contractual dealings with contractors whose actions suggest they are not responsible in fulfilling their legal or contractual obligations.<sup>182</sup>

"Suspension and debarment," ("S&D") is a process within the federal acquisition and grant system that dictates actions taken by agencies to exclude firms or individuals from receiving government contracts (and subcontracts, in some cases), grants or financial assistance from the Federal Government based on various types of misconduct. A suspension is a temporary exclusion of the contractor or recipient from consideration for future awards pending the completion of an investigation or legal proceeding; a debarment is a similar exclusion but lasts for a fixed term that depends upon the seriousness of the misconduct, but generally should not exceed three years.<sup>183</sup> Once a federal agency makes the determination that a suspension or debarment is necessary, these exclusions are reported in the System for Award Management ("SAM"), a publicly available, database maintained by the General Services Administration ("GSA") that combines procurement information from agencies across the Federal Government.<sup>184</sup> Under the Federal Acquisition Regulation, a contracting officer must check the SAM database before making a new contract award or exercising an option under an existing contract.<sup>185</sup> No awards or other government benefit may be made to a suspended or debarred party unless the agency executes a special waiver based on compelling needs.<sup>186</sup>

Under then-Chairman Edolphus Towns in 2009, the Committee began conducting oversight of the government's repeated hiring of federal contractors despite a history of poor performance or malfeasance—holding a hearing to examine problematic awards in 2009. At a second hearing held by then-Chairman Towns in March, 2010, the Committee learned that, despite the previous hearing on the issue, "federal agencies, including DHS, USAID, and DOT, continue to disregard regulations

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<sup>182</sup> Pascale Helene Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. CHI. LEGAL F. 195 (2012).

<sup>183</sup> See 48 C.F.R. § 9.4 (2014).

<sup>184</sup> See *System for Award Management*, GENERAL SERVICES ADMINISTRATION, [www.sam.gov](http://www.sam.gov) (last visited Dec. 11, 2014).

<sup>185</sup> 48 C.F.R. § 4.1103 (2014).

<sup>186</sup> See *id.*

related to suspension and debarment.”<sup>187</sup> In most cases in which contracts were terminated, the government contractor was “never even reviewed for possible suspension or debarment.”<sup>188</sup> At the end of the 111th Congress, “continuing oversight” was the only method by which agencies could be held accountable for taking steps to improve their suspension and debarment deficiencies.

During the first year of the 112th Congress, the Subcommittee on Technology, Information Policy, Intergovernmental Regulations and Procurement Reform held a hearing entitled, *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?*<sup>189</sup> This hearing examined why some agencies are effective at using the S&D remedy to weed out contractors who defraud the government while others languish far behind. This hearing highlighted characteristics of agencies with effective S&D programs, such as the Department of Defense, while illustrating the substantial weaknesses of other agencies’ S&D programs, such as the Department of Health and Human Services.

Picking up on subcommittee actions in 2011, the Committee on Oversight and Government Reform held a full Committee hearing entitled, *Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?* in June, 2013.<sup>190</sup> Witnesses testified to persistent problems degrading the efficiency of the Federal Government’s S&D process – problems that have resulted in the award of federal contracts and grants to “non-responsible”<sup>191</sup> companies and individuals, including those with criminal convictions, outstanding federal tax liabilities or terrorist ties.<sup>192</sup>

Given the difficult history uncovered by the Committee related to use of the suspension and debarment procedures, Chairman Darrell Issa, along with Ranking Member Elijah Cummings, Subcommittee on National Security Chairman Jason Chaffetz, Subcommittee on Government Operations Chairman John Mica, and Representative Jackie Speier, introduced the Stop Unworthy Spending Act (the “SUSPEND Act”) on October 28, 2013.<sup>193</sup> On the following day, the full Committee voted to order the legislation, as amended by Subcommittee Chairman Chaffetz and Representative Speier, to be reported to the House for vote.<sup>194</sup> Subsequent action has not been taken.

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<sup>187</sup> H. CMTE. ON OVERSIGHT & GOV’T REFORM, ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. Doc. No. 111-705, at 30 (2011).

<sup>188</sup> *Id.*

<sup>189</sup> *Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (2011).

<sup>190</sup> *Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (2013).

<sup>191</sup> A contractor may be “non-responsible,” in contrast to irresponsible, for a number of reasons. Used as a term of art, a contract bidder may be determined to be “non-responsible” and therefore ineligible for a contract award because it is not technically capable of performing the contract, without regard to any moral or ethical characteristics. *See* PNM Construction, Inc. v. United States, 13 Cl. Ct. 745 (1987). *See also* 48 C.F.R. § 9.104-1 (2014).

<sup>192</sup> *Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 45-46 (2013); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011).

<sup>193</sup> Stop Unworthy Spending Act, H.R.3345, 113th Cong. (as introduced Oct. 28, 2013).

<sup>194</sup> Stop Unworthy Spending Act, H.R.3345, 113th Cong. (as amended and ordered to be reported, Oct. 29, 2013).

The SUSPEND Act sought to reform the S&D process in several ways. As amended by the Committee, the Act would have consolidated the suspension and debarment offices and programs of more than 40 executive agencies into a centralized board, and would have ensured more efficient management of resources and the consistent application of procedures. It would have combined the two separate S&D regulations governing contracts and grants into a single, comprehensive regulation. By requiring maintenance of a national database for tracking S&D cases, the SUSPEND Act sought to provide agencies with up-to-date information on federal fund recipients that can be used in screening candidates prior to award.

## UNFUNDED MANDATES REFORM

Traditionally, the Federal Government has relied upon voluntary grant-in-aid funding to encourage state and local governments to act to further policy in the national interest.<sup>195</sup> However, in the 1970s and 1980s, there was a shift in this relationship.<sup>196</sup> The Federal Government increasingly relied upon compulsory programs and regulations to impose duties on state and local governments in furtherance of national goals.<sup>197</sup> These intrusive initiatives, which result in unsubsidized, federally-induced costs, are unfunded mandates.<sup>198</sup>

The Unfunded Mandates Reform Act (“UMRA”) of 1995 was enacted to promote informed decision-making within the Federal Government concerning the appropriateness of federal mandates, recognizing a need to “retain competitive balance between the public and private sectors.”<sup>199</sup> However, it quickly became apparent that UMRA was an insufficient tool for the curtailing of unfunded mandates.

When drafting UMRA, legislators struggled to balance interests favoring procedural requirements restricting the availability with maintaining the Federal Government’s ability to effectively protect and promote national interests. Significant debate surrounded the statutory definition of unfunded mandates and the reach of the procedural and analytical requirements.<sup>200</sup> Ultimately, Congress chose a narrow definition and included several exemptions and exclusions, in an effort to “ensure that Congress’s and the Executive Branch’s hands are not tied.”<sup>201</sup>

As early as 1998, the Government Accountability Office (“GAO”) found that UMRA “has had little direct effect on agencies’ rulemaking actions during the first 2 years of its implementation.”<sup>202</sup> Since UMRA’s enactment, the Office of Information and Regulatory Affairs (“OIRA”) has reviewed more than 850 final rules with estimated benefits and/or costs that exceed \$100 million annually.<sup>203</sup> Only 225 of those rules, about 26 percent, included a mandate as defined in UMRA.<sup>204</sup>

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<sup>195</sup> ROBERT JAY DILGER AND RICHARD S. BETH, CRS, *UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES*, R40957 (Sept. 25, 2014).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> <http://www.library.unt.edu/gpo/acir/Reports/information/m-193.pdf>.

<sup>199</sup> Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. § 1501).

<sup>200</sup> DILGER, *supra* note 195.

<sup>201</sup> *Id.*

<sup>202</sup> GOV’T ACCOUNTABILITY OFFICE, *UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES’ RULEMAKING ACTIONS*, GAO/GGD-98-30 (Feb. 1998).

<sup>203</sup> DILGER, *supra* note 195.

In 2005, GAO reported that “[m]ost parties from the state and local governments, federal, business, and academic/think tank sectors vie[w] UMRA’s narrow coverage as a major weakness that leaves out many federal actions with potentially significant financial impacts on nonfederal parties.”<sup>205</sup> According to GAO, there are 14 different reasons why a rule might not qualify as a mandate under UMRA.<sup>206</sup>

In the 112th Congress, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, chaired by Representative James Lankford, held a series of hearings to examine the effects of UMRA. Over the course of three hearings, the subcommittee heard from a wide range of witnesses including representatives of local and tribal governments, representatives of the private sector, and several regulatory experts.

In the first hearing, Susan Dudley, former Administrator of OIRA and Director of the George Washington University Regulatory Studies Center, described the widely recognized flaws that exist with the current UMRA statute, and suggested multiple remedies.<sup>207</sup> She recommended that UMRA be aligned with Executive Order 12866 because the analytical requirements in the Executive Order are a more effective mechanism for holding agencies accountable.<sup>208</sup> Ms. Dudley also advocated for expanding judicial review to incentivize agencies to carefully consider the “least costly, most cost-effective or least burdensome alternative” when regulating.<sup>209</sup>

Representatives from state and local governments shared with the Committee that the increasing burden of federal mandates made it difficult to do their jobs and meet the needs of their citizens. Patrice Douglas, then-Mayor of Edmond, Oklahoma, explained the difficulty of effectively budgeting and meeting the needs of the city, when the Federal Government continually hands down regulatory requirements that can cost millions due to compliance.<sup>210</sup> The then-County Executive of Fairfax Virginia, Anthony Griffin, said that in 2008 “the net cost of Federal and State mandates was \$751 million out of a \$3 billion general fund,” meaning a quarter of the county’s revenue was spent complying with government mandates.<sup>211</sup> The National Conference of State Legislatures, represented by Joni Cutler, a member of the South Dakota Senate at the time, encouraged Congress to adopt a broader definition of “mandate” to better reflect the realities of regulation faced by non federal entities.<sup>212</sup>

Private sector representatives spoke about the effects of federal regulation on businesses. Raymond Keating, Chief Economist at the Small Business and Entrepreneurship Council, urged the inclusion of regulatory costs impacting prices, risk-taking, economic growth and employment in

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<sup>204</sup> *Id.*

<sup>205</sup> GAO, *supra* note 202.

<sup>206</sup> *Unfunded Mandates and Regulatory Overreach: Hearing Before the H. Subcomm. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform, 112th Congress (2011)* (testimony of Denise Fantone, Director, GAO Strategic Issues).

<sup>207</sup> *Id.* (testimony of Susan Dudley, Director, GW Regulatory Studies).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* (testimony of Patrice Douglas, Mayor, Edmond, OK).

<sup>211</sup> *Id.* (testimony of Anthony Griffin, County Executive, Fairfax, VA).

<sup>212</sup> *Id.* (testimony of Joni Cutler, Senator, SD).

agency cost estimates.<sup>213</sup> John Arensmeyer, founder and CEO of the Small Business Majority, supported retrospective regulatory review and encouraged careful scrutiny of regulations affecting small businesses.<sup>214</sup>

At the third hearing, Cass Sunstein, then-Administrator of OIRA, affirmed the Administration's commitment to regulatory analysis and evidence based decision making.<sup>215</sup> In his testimony, Mr. Sunstein highlighted Executive Order 13563, which expands existing regulatory analysis requirements and encourages independent agencies voluntarily comply with analytical requirements, and the close relationship with UMRA's goals.<sup>216</sup> When asked about how to improve UMRA, Mr. Sunstein stressed the "crucial importance of public participation to good regulatory outcomes."<sup>217</sup> In this testimony and in previous scholarship, Mr. Sunstein emphasized that "a thoroughgoing reform effort would require legislative reforms, not merely executive action."<sup>218</sup>

Following the hearings examining the deficiencies in UMRA, Chairman Lankford and the Subcommittee on held a meeting to discuss and consider amendments to H.R. 373, the Unfunded Mandates Information and Transparency Act.<sup>219</sup> Representative Virginia Foxx, a Committee member in the 109th and 110th Congresses, introduced H.R. 373 in early 2011 after having introduced similar bills in 2008 and 2009.<sup>220</sup> Representative Foxx's bill expanded the definition of unfunded mandate to include all "reasonably foreseeable indirect costs" and expanding the reach of UMRA's requirements to include all independent agencies.

Chairman Lankford offered an amendment in the nature of a substitute ("ANS"). The ANS added to Representative Foxx's UMRA reform goals by incorporating several suggestions from the Committee's hearings, including: judicial review of the agencies' adherence to UMRA, alignment with and codification of Executive Order 12866, enhanced consultation for entities directly affected, and other provisions to close loopholes to requirements for agency analysis.

H.R. 373 was passed out of the full Committee on November 17, 2011. The bill was packaged into a larger piece of legislation, the Red Tape Reduction and Small Business Job Creation Act, which passed the House on July 26, 2012.<sup>221</sup> However, the jobs bill, including the UMRA language, died in

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<sup>213</sup> *Id.* (testimony of John Arensmeyer, founder & CEO, Small Business Majority).

<sup>214</sup> *Id.* (testimony of Raymond Keating, Chief Economist, Small Business and Entrepreneurship Council), *id.* (testimony of John Arensmeyer, founder & CEO, Small Business Majority).

<sup>215</sup> *Id.* (testimony of Cass Sunstein, Administrator, OIRA).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

<sup>219</sup> Unfunded Mandates Information and Transparency Act of 2011, H.R. 373, 112th Cong. (as reported by H. Cmte. on Oversight & Gov't Reform, May 16, 2012).

<sup>220</sup> Unfunded Mandates Information and Transparency Act of 2009, H.R. 2255, 111th Cong. (as referred to H. Cmte. on Judiciary, Subcmte. on Commercial and Admin. L., June 12, 2009); Unfunded Mandates Information and Transparency Act of 2008, H.R. 6964, 110th Cong. (as referred to H. Cmte. on Oversight & Gov't Reform, Sept. 18, 2008).

<sup>221</sup> Red Tape Reduction and Small Business Job Creation Act, H.R. 4078, 112th Cong. (as passed by the House, July 26, 2012).

the Senate at the end of the 112th Congress. In the 113th Congress, Representative Foxx reintroduced the bill as H.R. 899.<sup>222</sup>

With bipartisan support, the House passed H.R. 899 on February 28, 2014. In September, having seen no action on most bills sent to the Senate, the House included H.R. 899 into a larger bill, the Jobs for America Act.<sup>223</sup> House leadership bundled 15 bills that had previously passed the House into the Jobs for America Act, to send a message to the Senate about the House's priorities for job creation. Unfortunately, the jobs bill with the unfunded mandate reform language, like many other bills passed by the House, has not moved in the Senate.

### WHISTLEBLOWER PROTECTION AND ENHANCEMENT ACT

Whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement and criminal activity across the Federal government. Their disclosures can save billions of dollars, and even human lives. It is vital that Congress encourage--not discourage--these well-intentioned individuals from coming forward. To accomplish that, prospective whistleblowers must be protected from reprisal.

The Executive and Judicial Branches have been ignoring and eroding congressional protections for whistleblowers. To address those concerns, in a significant demonstration of Republican and Democrat support for whistleblower protections, the Whistleblower Protection and Enhancement Act was signed into law on November 27, 2012.<sup>224</sup>

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<sup>222</sup> Unfunded Mandates Information and Transparency Act of 2014, H.R. 899, 113th Cong. (as introduced Feb. 28, 2013).

<sup>223</sup> Jobs for America Act, H.R. 4, 113th Cong. (as passed by the House, Sept. 18, 2014).

<sup>224</sup> Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199.

# CHAPTER 1. IMPROPER INFLUENCE AND OBSTRUCTION OF OVERSIGHT: THE POLITICIZATION OF PUBLIC SERVANTS

## INTRODUCTION

The American People deserve a government that is both transparent and accountable; the employees of the Federal Government have an obligation to serve the People, and not a partisan agenda. Issues such as those giving rise to concerns about transparency in the passage of the Affordable Care Act, the legitimacy of Operation Choke Point, the IRS targeting scandal and the politicization of scientific research at EPA demonstrate the potential for federal employees to become the subject of – or alternatively, to become active participants in the advancement of – improper influence. The promise of transparency is codified in the Freedom of Information Act, the offices of Inspectors General and whistleblower protection legislation; all are attempts to ensure that situations potentially giving rise to improper influence are exposed before harm occurs. Analogously, investigations into potential Hatch Act violations and the political activity of organizations such as ACORN ensure transparency in federal campaigns and compliance with election law – vital tools necessary for maintaining accountability. With a multifaceted approach, the Committee on Oversight and Government Reform has exposed opportunities for the harmful politicization of public servants and identified significant opportunities for reform.

## MISLEADING THE PUBLIC: TRANSPARENCY FAILURES AND THE IMPLEMENTATION OF OBAMACARE

Under Chairman Issa’s leadership, Committee staff found that the Centers for Medicare and Medicaid Services (“CMS”), the operating division within the Department of Health and Human Services (“HHS”) tasked with implementing “the insurance reforms and Affordable Insurance Exchanges included in” ObamaCare,<sup>225</sup> inflated August 2014’s enrollment numbers by adding approximately 400,000 dental plans into their calculation. This finding, coupled with Professor Jonathan Gruber’s inflammatory remarks on how the Administration’s “lack of transparency” was essential to passing ObamaCare, led the Committee to question whether the CMS’s self-described “mistake” was actually indicative of conscious and systematic transparency failures in the passing and implementation of ObamaCare.

### *DOUBLE-COUNTING DENTAL PLANS*

Obama Administration officials were careful to phrase statements regarding ObamaCare enrollment numbers in such a way as to purposefully inflate the figures without explicitly lying. At a Committee hearing on September 18, 2014, Centers for Medicare and Medicaid (“CMS”) Administrator Marilyn Tavenner testified that 7.3 million people were “enrolled in the health

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<sup>225</sup> Ctrs. for Medicare & Medicaid Servs. (CMS), [hhs.gov](http://www.hhs.gov/about/foa/opdivs/cms.html) (last updated Nov. 13, 2013), <http://www.hhs.gov/about/foa/opdivs/cms.html>.

insurance marketplace coverage.”<sup>226</sup> Enrollments in “health insurance marketplace coverage” would include all dental and health insurance plans, even though such language was widely interpreted, both by Congress and the press, to mean only enrollments in health insurance. Media outlets such as *Politico* reasonably interpreted Ms. Tavenner’s testimony to mean that “[t]here are currently 7.3 million people enrolled in health insurance plans on the ObamaCare exchanges.”<sup>227</sup> The Department of Health and Human Services (“HHS”) Secretary Sylvia Burwell subsequently updated the enrollment figures on October 15, 2014 to include 7.1 million people enrolled in “health insurance marketplace coverage.”<sup>228</sup> The updated statement again used the deceptive language to double-count dental plans with health insurance plans enrolled, without caveat.

On October 1, 2014, the Committee requested the monthly enrolment reports data underlying Ms. Tavenner’s 7.3 enrollment announcement. After weeks of negotiations, CMS finally provided only one month’s requested data on November 4, 2014. However, CMS staff had password-protected each of the 289 spreadsheets so that the Committee was unable to aggregate the data. When Committee staff requested that CMS unlock the spreadsheets, CMS accused the Committee of intending to tamper with documents. Committee staff pointed out that it was impossible to draw any meaningful conclusion about the data when forced to make manual calculations, to which CMS responded that they would “verify” any figures the Committee calculated, but still refused to unlock the spreadsheets. Only on November 6, after verbally threatening to subpoena the data in a usable format did CMS finally provide the August enrollment report. Upon a cursory review of this data, Committee staff found that approximately 400,000 dental plans were included in the total. *Bloomberg* broke the inflated enrollment story.<sup>229</sup> The Committee’s finding also made headlines in *The Atlantic*,<sup>230</sup> *The Wall Street Journal*,<sup>231</sup> *Politico*,<sup>232</sup> and *The Washington Post*.<sup>233</sup>

On November 21, 2014, CMS acknowledged that they included at least 393,000 dental plans.<sup>234</sup> CMS further stated that they would no longer include dental plans in future enrollment totals. The Committee called Ms. Tavenner to testify about the inflated numbers at a hearing entitled, *Examining ObamaCare’s Transparency Failures*. Only the night before the hearing did CMS provide

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<sup>226</sup> *Examining ObamaCare’s Failures in Security, Accountability and Transparency: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (Sept. 18, 2014). According to CMS, this number was based on CMS’s August enrollment report from providers.

<sup>227</sup> Jennifer Haberkorn, *7.3 Million in Obamacare Plans, Beats CBO Forecast*, POLITICO (Sept. 18, 2014), <http://www.politico.com/story/2014/09/obamacare-enrollment-numbers-111097.html>.

<sup>228</sup> Alex Wayne, *Obamacare Sign-ups Were Inflated with Dental Plans*, BLOOMBERG (Nov. 20, 2014), <http://www.bloomberg.com/news/2014-11-20/obamacare-s-subscriber-rolls-include-unpublicized-dental-plans.html>.

<sup>229</sup> *Id.*

<sup>230</sup> Russell Berman, *The Affordable Care Act’s Embarrassing Moment of Tooth*, The Atlantic (Nov. 20, 2014), <http://www.theatlantic.com/politics/archive/2014/11/obamacares-missed-affordable-care-act-target-dental-plans-enrollment/383007/>.

<sup>231</sup> Louise Radnofsky, *U.S. Overstates Health-care Enrollees*, Wall St. J. (Nov. 20, 2014), <http://online.wsj.com/articles/u-s-again-overstates-health-care-enrollees-1416513555>.

<sup>232</sup> Brett Norman et. al, *Administration Admits Obamacare Enrollment Numbers Error*, Politico (Nov. 21, 2014), <http://www.politico.com/story/2014/11/inflated-obamacare-enrollment-dental-113064.html>.

<sup>233</sup> Erik Wemple, *Media Should Hammer Obamacare Inc. for Bogus Enrollment Numbers*, Wash. Post (Nov. 20, 2014), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2014/11/20/media-should-hammer-obamacare-inc-for-bogus-enrollment-numbers/>.

<sup>234</sup> Letter from Marilyn Tavenner, Admin’r, Ctrs. for Medicare & Medicaid Servs., to Darrel Issa, Chairman, H. Comm. on Oversight and Gov’t Reform (Nov. 20, 2014).

the Committee with enrollment data for the other monthly reports. Ms. Tavenner, in her written testimony, maintained that the erroneously added dental plans “was a mistake.”<sup>235</sup>

#### *DR. GRUBER’S INFLAMMATORY GAFFES*

Testifying beside Ms. Tavenner at the Committee’s December 9th hearing was Dr. Jonathan Gruber, economics professor at the Massachusetts Institute of Technology (“MIT”). Dr. Gruber was awarded a sole-source contract from the Department of Health and Human Services (“HHS”) to provide economic analysis using his proprietary microsimulation model.<sup>236</sup> Dr. Gruber was paid for similar consultation services in at least eight states. Dr. Gruber received more than \$1.5 million in four of these states: \$481,050 from Michigan, \$329,000 from Minnesota, \$400,000 from Vermont, and \$400,000 from Wisconsin.<sup>237</sup> Dr. Gruber has been cited, and has represented himself, as an “architect” of ObamaCare. The *New York Times* noted that after Dr. Gruber “helped the administration put together the basic principles for the proposed legislation, the White House lent him to Capitol Hill to help congressional staff members draft the specifics of the legislation.”<sup>238</sup> *Politico* reports that Steve Rattner called Dr. Gruber “the man” who “helped... put ObamaCare together.”<sup>239</sup> Sarah Kliff of the *Washington Post* called Dr. Gruber “a key architect of both Romneycare and ObamaCare.”<sup>240</sup>

After achieving notoriety in academic and health policy circles for his work on ObamaCare, Dr. Gruber lectured at universities and conferences. In those lectures, Gruber candidly admitted that the Administration needed to deceive the American public in order to pass ObamaCare. Such tactics included mischaracterizing the certainty with which cost-control measures would work,<sup>241</sup> a purposeful “lack of transparency” as a “political advantage”<sup>242</sup> used to exploit the “basic lack of economic understanding” of the American people,<sup>243</sup> “mislabeling” the Cadillac tax,<sup>244</sup> and

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<sup>235</sup> *Examining ObamaCare’s Transparency Failures: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (Dec. 9, 2014).

<sup>236</sup> Glenn Kessler, *Did Jonathan Gruber Earn ‘Almost \$400,000’ from the Obama Administration?*, WASH. POST (Nov. 14, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/14/did-jonathan-gruber-earn-almost-400000-from-the-obama-administration/> (earning a “Geppetto checkmark” for truthfulness).

<sup>237</sup> *Id.*

<sup>238</sup> Catherine Rampell, *Academic Built Case for Mandate in Health Care*. LAW, N.Y. TIMES (Mar. 28, 2012).

<sup>239</sup> Kendall Breitman, *Steve Rattner: Jonathan Gruber Was ‘The Man’ on Obamacare*, POLITICO (Nov. 18, 2014).

<sup>240</sup> Sarah Kliff, *Jon Gruber on Obamacare, Premium support and Health Policy Dreams*, WASH. POST (May 21, 2012).

<sup>241</sup> *See, e.g.*, Dr. Jonathan Gruber, “Health Care in the U.S.,” College of the Holy Cross (Mar. 11, 2010), *available at* <http://www.c-span.org/video/?292478-1/health-care-reform>.

<sup>242</sup> Dr. Jonathan Gruber, Professor of Economics, Mass. Inst. of Tech, AHEC 2013 Conference (Oct. 2013), *available at* [https://www.youtube.com/watch?v=iHihDa\\_VPWw](https://www.youtube.com/watch?v=iHihDa_VPWw).

<sup>243</sup> Patrick Howley, *University of Rhode Island Removes Gruber Video After It Goes Viral*, DAILY CALLER (Nov. 17, 2014) (quoting Dr. Gruber), <http://dailycaller.com/2014/11/17/university-of-rhode-island-removes-gruber-video-after-it-goes-viral/>. The video of the University of Rhode Island speech is not available online.

<sup>244</sup> Dr. Jonathan Gruber, 2011 Hewitt Health Care Lecture, Pioneer Inst. (posted Mar. 6, 2011), <http://pioneerinstitute.org/hewitt-lecture/2011-hewitt-health-care-lecture/>.

discussing how political pressure on states would induce them to create their own exchanges in order for their residents to receive federal subsidies.<sup>245</sup>

At the hearing, the Committee grilled Dr. Gruber on his statements. Although Dr. Gruber tried to minimize the political ramifications of his remarks by saying that he made “a series of glib, thoughtless, and sometimes downright insulting comments,” Committee members, including Mr. Gowdy, questioned whether or not, due in part to the repetition of similar disparaging statements of the course of many lectures, Dr. Gruber actually “meant” what he had said. Dr. Gruber said that his statements “were not lies.”<sup>246</sup> In addition, Dr. Gruber refused to testify as to how much money he had received from federal and state contracts and grants relating to his work on ObamaCare.<sup>247</sup> Dr. Gruber only released to the Committee three grants he received from the Federal Government over the past two years. When Chairman Issa and other members told Dr. Gruber that his submissions were incomplete, Dr. Gruber repeatedly told the Committee to consult with his counsel.<sup>248</sup>

#### *THE ADMINISTRATION’S SYSTEMATIC OBAMACARE TRANSPARENCY FAILURES*

The Obama Administration has systematically failed to implement ObamaCare in a transparent manner. As the Committee discovered from CMS’s inflated enrollment figures, nearly 400,000 dental plans were improperly included in the enrollment data, and the announcement of the inflated figure was couched in peculiar language that misled Congress and the American people. In contrast, Dr. Gruber’s inflammatory statements about the politics surrounding the passage of ObamaCare—where “lack of transparency is a huge political advantage”—shed light into the process by which the Obama Administration passed and is now implementing ObamaCare.

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<sup>245</sup> Dr. Jonathan Gruber, Professor of Economics, Mass. Inst. of Tech., “Health Care Reform: What It Is, Why It’s Necessary, and How It Works,” NOBLIS (Jan. 18, 2012), *available at* <https://www.youtube.com/watch?v=GtnEmPXEpr0>.

<sup>246</sup> *Examining ObamaCare’s Transparency Failures: Hearing Before the H. Comm. on Oversight & Gov’t Reform: Hearing Before the H. Comm. On Oversight and Gov’t Reform*, 113th Cong. (2014) (statement of Dr. Jonathan Gruber) (forthcoming).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

## OPERATION CHOKE POINT: SHUTTING DOWN DISFAVORED BUSINESSES

Operation Choke Point was created by the Department of Justice (“DOJ”) to “choke out” businesses engaged in certain disfavored lines of business. Despite the fact that these businesses provide valued, legal services to a significant portion of the American population they have been identified by DOJ and federal banking regulators as being engaged in “high risk” industries – and, therefore, are apparently unworthy of receiving normal financial services.

In order to force these banks and payment processors to stop providing services to clients in these targeted industries, the Department of Justice leveraged the threat of federal investigation. Under a misguided interpretation of a law from the Savings and Loan Crisis from the 1980s, DOJ has issued at least 55 administrative subpoenas demanding confidential documents and information related to their alleged “high risk” clients since early 2013. Federal banking regulators – such as the Federal Deposit Insurance Corporation and the Federal Reserve Board of Governors – have begun similar operations, demonstrating a coordinated attack by President Barack Obama’s Administration on disfavored businesses that have been accused of no wrongdoing.

Faced with the likelihood of a federal investigation, many financial institutions found the risk of harm too great to challenge the regulators. Businesses began receiving letters from their banks notifying them of account terminations – many after having relationships with those banks for decades.

The Committee on Oversight and Government Reform (the “Committee”), serving as the primary watchdog for the Federal Government, began investigating claims that Operation Choke Point was improperly targeting legitimate American companies according to an undisclosed agenda to force disfavored companies out of business. The Committee’s oversight has provided valuable information to American taxpayers, bolstered calls for legislative reform, and produced tangible changes in agency management and policies.<sup>249</sup>

### *OPERATION CHOKE POINT – A TORTURED INTERPRETATION OF FIRREA*

DOJ implemented Operation Choke Point by releasing a flood of administrative subpoenas on target banks, alleging that some of their clients may be committing fraud based solely on the nature of the client’s business. These subpoenas were issued by DOJ under Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”).<sup>250</sup>

Congress enacted FIRREA – and its extraordinary grant of civil investigative authority – in response to the savings and loan crisis of the late 1980s. The intent of § 951 was to give the Department the tools to pursue civil penalties against individuals and entities that commit fraud *against* depository institutions.<sup>251</sup> Section 951 authorizes the Attorney General to seek civil money penalties against

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<sup>249</sup> Investigations into Operation Choke Point are being conducted at several levels of government, including by offices of inspectors general at the FDIC and Department of Justice.

<sup>250</sup> 12 U.S.C. § 1833a.

<sup>251</sup> Allyson B. Baker and Andrew Olmem, Venable LLP, *FIRREA: The DOJ’s Expansive (and Expensive) Tool of Choice*, 29 WESTLAW J. OF CORP. OFF. AND DIR. LIABILITY 3 (2013).

entities that commit mail or wire fraud “affecting a federally insured financial institution.”<sup>252</sup> The Attorney General is further authorized, in contemplation of such legal proceeding, to issue administrative subpoenas requiring the production of documents and the deposition of witnesses. Unlike other subpoenas issued in court proceedings, the Attorney General’s subpoenas issued under § 951 are not subject to judicial authorization and may apply to all records and witnesses the Attorney General “deems relevant or material to the inquiry.”<sup>253</sup>

Documents produced to the Committee indicate that, in furtherance of Operation Choke Point, the Department of Justice radically and inappropriately expanded its authority under FIRREA. In one memorandum, senior DOJ officials candidly discussed the legal authority for the program. The discussion begins by flatly conceding that “[Section 951] was not designed principally to address consumer fraud . . . FIRREA penalties are paid to the Treasury, and the statute does not include a provision for restitution to victims of fraud.”<sup>254</sup> The memorandum further acknowledged that § 951 requires that the alleged fraud “[affect] a federally insured financial institution.”

In an end-run around this requirement – the requirement that the alleged fraud affected a federally insured financial institution – the DOJ memorandum posits that providing normal banking services to an allegedly fraudulent merchant creates a variety of “risks,” and that these risks may “affect” the institution. The memorandum even concedes that these risks are strictly hypothetical, candidly admitting that “[t]he financial institutions we are investigating have not suffered any actual losses.”<sup>255</sup> While the memorandum does cite a single recent court case, DOJ’s analysis clearly reflects the inherent legal error of using an anti-*bank fraud* statute to combat alleged *merchant fraud*. Ultimately, the Department’s tortured legal analysis turned FIRREA on its head: Section 951 was intended to help DOJ defend banks from fraud; instead, the Department is using it to force banks to adopt the Administration’s view of disfavored businesses and to serve as the “policemen and judges” of the commercial world.<sup>256</sup>

### *DOJ TARGETS LEGAL INDUSTRIES*

By distorting its authority as granted under a statute enacted in response to the Savings and Loan Crisis of the 1980s, DOJ has bullied banks and banking regulators into pursuing the Administration’s crusade against certain disfavored industries. Standing in the place of the financial industry experts, the Department of Justice unilaterally deemed certain industries as “high risk.” Despite clear evidence to the contrary, the Department of Justice has repeatedly asserted that the target of Operation Choke Point was mass-market consumer fraud and that the Department was not singling out any particular industry.<sup>257</sup>

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<sup>252</sup> 12 U.S.C. § 1833a(c)(2).

<sup>253</sup> *Id.* § 1833a(f)(1)(C).

<sup>254</sup> Memorandum from the Director of the Consumer Protection Branch to the Assistant Attorney General for the Civil Division, U.S. Dep’t of Justice (Sept. 9, 2013) [HOCR-3PPP000336].

<sup>255</sup> *Id.*

<sup>256</sup> Frank Keating, Op-Ed., *Justice Puts Banks in a Choke Hold*, WALL ST. J., Apr 24, 2014.

<sup>257</sup> Congressional Staff Briefing with the Deputy Assistant Attorney General for Consumer Protection, Civil Div., U.S. Dep’t of Justice, on Sept. 20, 2013.

In a letter to Attorney General Holder on January 9, 2014, Committee on Oversight and Government Reform Chairman Darrell Issa and Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Chairman Jim Jordan requested all documents and communications referring or relating to Operation Choke Point. In response, DOJ provided 853 pages of internal memoranda, e-mail communications, and presentations.

### **The Mission of the Working Group**

The idea to “choke-off” access to essential banking services for certain businesses by suggesting their industries were engaging in consumer fraud originated in the Consumer Protection Working Group of the Financial Fraud Enforcement Task Force. The Working Group’s mission statement included a list of priorities:

[T]his new Working Group will examine a wide variety of areas where consumers may be vulnerable to fraud. Those may include: identity theft, third-party payment processors and other payment fraud, student-consumer fraud, cramming, business opportunity schemes, data privacy, payday lending, counterfeiting, and schemes targeting service members and their families.<sup>258</sup>

There is no explanation for why payday lending and payment processing – two legal financial practices – are included in a list of explicitly fraudulent activities.

### **Regular Status Reports for Assistant Attorney General**

Regular status reports on the progress of Operation Choke Point drafted for senior DOJ officials reflect an intense focus on short-term lending. The *Eight-Week Status Report* on Operation Choke Point, prepared for Assistant Attorney General Delery on April 17, 2013, framed payday lending as the primary target of the initiative. In fact, it is the sole type of financial service mentioned in the memorandum.<sup>259</sup> The *Four-Month Status Report* on Operation Choke Point, prepared for Assistant Attorney General Delery on July 8, 2013, expressly identifies Internet payday lending as a fraudulent “scam” being targeted by the initiative.<sup>260</sup>

### **The Consumer Protection Branch**

In a series of emails from August 6, 2013, senior officials in the Civil Division discussed the Department’s cooperation with the *Wall Street Journal* reporter. The Director of the Consumer Protection Branch summarized the initial inquiry as follows:

This is connected to our third party payment processing initiative, in which we have been starting to pay closer attention to banks and processors who deal with payday

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<sup>258</sup> Mission Statement for Consumer Protection Working Group of the Financial Fraud Enforcement Task Force [HOCR-3PPP000001].

<sup>259</sup> Memorandum from the Director of the Consumer Protection Branch to the Assistant Attorney General for the Civil Division, U.S. Dep’t of Justice (Apr. 17, 2013) [HOCR-3PPP000048-52] (The conclusion of the memorandum, entitled “Related Areas of Inquiry,” does include a brief discussion of other financial services and products: “In addition to evaluating the payday lending industry, we are attempting to develop a better understanding of consumer fraud risk posed by emerging payment systems.”).

<sup>260</sup> Memorandum from the Director of the Consumer Protection Branch to the Assistant Attorney General for the Civil Division, U.S. Dep’t of Justice (Jul. 8, 2013) [HOCR-3PPP000166].

lenders. **My view is that getting the message out that DOJ is interested in on-line payday lenders and the potential abuses is important.**<sup>261</sup>

The Deputy Assistant Attorney General for Consumer Protection further described the Department's cooperation with the *Wall Street Journal* inquiry:

We want to give you a heads up that [the Director of the Consumer Protection Branch] is doing a background interview this afternoon at 4pm **on online pay day lending. As we described for you at last week's meeting, we are engaged in a third-party payment processor initiative in which we are looking into banks that deal with processors who work for payday lenders of all types.**<sup>262</sup>

### **Negotiated Settlement Terms**

Further evidence of the unjustified targeting of the online payday lending industry was found in the contents of internal communications among Department of Justice officials regarding settlement negotiations. In an e-mail dated October 1, 2013, the Director of the Consumer Protection Branch and the Deputy Assistant Attorney General for Consumer Protection within the DOJ discussed opportunities that could be pursued with subpoenaed banks.<sup>263</sup> The e-mail notes that DOJ's settlement proposals have included requiring that banks implement "specific bans [on] doing business" with whole categories of lawful financial services.<sup>264</sup> The e-mail describes "specific language" on payday lending, debt relief companies, foreclosure rescue companies and credit repair companies. Such blanket prohibitions on entire industries are wholly inconsistent with DOJ's repeated assertion it is merely pursuing fraudsters and has "no interest" in discouraging lawful conduct.<sup>265</sup>

### *THE IMPACT OF OPERATION CHOKE POINT ON AMERICAN JOB CREATORS*

While the Department of Justice ("DOJ") recognized the risk that Operation Choke Point could result in banks ceasing to do business with completely legitimate businesses, it was a risk the DOJ was willing to take:

**Although we recognize the possibility that banks may have therefore decided to stop doing business with legitimate lenders, we do not believe that such decisions should alter our investigative plans.** Solving that problem – if it exists – should be left to legitimate lenders themselves who can, through their own

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<sup>261</sup> Email from Michael Blume, Director of the Consumer Protection Branch to Maame Frimpong, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, (Aug. 6, 2013 11:24), [HOGR-3PPP000307] (emphasis added).

<sup>262</sup> Email from Maame Frimpong, Acting Assistant Attorney General, Civil Rights Division to Tracy Toulou, Director, Office of Tribal Justice, U.S. Dep't of Justice, (Aug. 6, 2013 14:36), [HOGR-3PPP000308].

<sup>263</sup> Email from Michael Blume, Director of the Consumer Protection Branch to Maame Frimpong, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, (Oct. 1, 2013 10:55), [HOGR-3PPP000401].

<sup>264</sup> *Id.*

<sup>265</sup> Letter from Stuart F. Delery, Assistant Attorney General, Civil Div., Dep't of Justice, to Jeff L. Plagge, Chairman, American Bankers Ass'n, and Jason Oxman, Chief Executive Officer, Elec. Transaction Ass'n (Jan. 22, 2014).

dealings with banks, present sufficient information to the banks to convince them that their business model and lending operations are wholly legitimate.<sup>266</sup>

As an initial matter, such an expectation – “if they are legitimate, they can prove it” – is offensive to traditional American notions of justice. Furthermore, given that DOJ has ordered banks to cease doing business with all short-term lenders in its settlement negotiations, no amount of evidence of legitimacy will be “sufficient” to secure a banking relationship.<sup>267</sup>

## *DOJ'S PARTNERSHIP WITH THE FEDERAL DEPOSIT INSURANCE CORPORATION*

### **Creation of the “High-Risk Merchant” List**

Documents produced to the Committee reveal that DOJ actively partnered with the Federal Deposit Insurance Corporation in the prosecution of Operation Choke Point. FDIC is the primary federal regulator of state-chartered banks that are not members of the Federal Reserve System, and directly supervises and examines more than 4,500 depository institutions.<sup>268</sup> FDIC's participation in Operation Choke Point included requests for information about the investigation, discussions of legal theories and the application of banking laws, and the review of documents involving FDIC-supervised institutions obtained by DOJ in the course of its investigation.<sup>269</sup> Furthermore, FDIC originated the list of “high risk” industries included in the DOJ subpoenas.<sup>270</sup>

FDIC publishes *Supervisory Insights*, a quarterly journal intended to serve as informal and educational guidance for both FDIC examiners and private sector stakeholders.<sup>271</sup> The summer 2011 issue of *Supervisory Insights* included the article “Managing Risks in Third-Party Payment Processor Relationships.”<sup>272</sup> The ostensible purpose of the article is to advise financial institutions on how to adequately monitor and manage the risks associated with payment processors and their merchant clients. The article argues that “[a]lthough many clients of payment processors are reputable merchants, an increasing number are not and should be considered ‘high risk.’ These disreputable merchants use payment processors for questionable or fraudulent goods and services.”<sup>273</sup>

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<sup>266</sup>Memorandum from the Director of the Consumer Protection Branch to the Assistant Attorney General for the Civil Division, U.S. Dep’t of Justice (Sept. 9, 2013) [HOCR-3PPP000336] (emphasis added).

<sup>267</sup>*Id.*; see, e.g., Press Release, SunTrust Banks, Inc., SunTrust Statement on Certain Account Closures (Aug. 8, 2014).

<sup>268</sup>Federal Deposit Insurance Corporation, Who is the FDIC?, available at <https://www.fdic.gov/about/learn/symbol/>.

<sup>269</sup>*The Department of Justice’s “Operation Choke Point”: Hearing before Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Services*, 113th Cong. (July 15, 2013) (written statement of Richard J. Osterman, Jr., Acting General Counsel, Federal Deposit Insurance Corporation).

<sup>270</sup>*Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department’s Operation Choke Point: Hearing before the H. Comm. On the Judiciary*, 113th Cong. (Jul. 17, 2014) (statement of Stuart F. Delery, Assistant Att’y Gen., Civil Division, U.S. Dep’t of Justice, in response to a question from Rep. Darrell Issa).

<sup>271</sup>See, e.g., e-mail from FDIC Deputy Regional Director to FDIC officials (Apr. 17, 2011, 09:37) (“Step one is the article for the Supervisory Insights Journal which goes out to bankers and examiners”), [FDICHOGR00002582].

<sup>272</sup>Michael Benardo, Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, Federal Deposit Insurance Corporation, et al., *Managing Risks in Third-Party Payment Processor Relationships*, 8 SUPERVISORY INSIGHTS 3 (Summer 2011).

<sup>273</sup>*Id.* at 6.

While the article provided no explanation for the inclusion of any single identified merchant category, it did offer four criteria associated with high-risk activity: 1) the consumer's lack of familiarity with the merchant, 2) uncertainty with respect to the quality of goods and services being offered, 3) online or telephonic sales, and 4) the consumer's ability to verify the identity or legitimacy of the merchant.<sup>274</sup> However, these vague standards provide no explanation for the implicit equation of such legitimate and regulated activities as *coin dealers* and *firearms and ammunition sales* with inherently pernicious or patently illegal activities such as Ponzi schemes, racist materials, or drug paraphernalia.

Documents produced to the Committee record the months-long internal deliberations and multi-tiered review of the *Supervisory Insights* article. Unfortunately, these documents reflect the total absence of a critical review of the high-risk merchant list. Preliminary drafts of the article were subject to an intensive agency-wide review process.<sup>275</sup> No official in FDIC's Division of Depositor and Consumer Protection, Division of Risk Management Supervision, the Legal Division, or the Office of the Chairman inquired into or commented on the list or on the inclusion of any particular merchant category. Similarly, no documents record or reference the agency's reasoning in creating the list. The lack of such a record raises the possibility it is little more than a haphazard and idiosyncratic reflection of the authors' personal opinions.

Furthermore, documents produced to the Committee reveal that FDIC officials explicitly intended the list to influence the FDIC examination process. In one email exchange, senior officials at FDIC headquarters request that an Assistant Regional Director join as a co-author of the article, in an effort to ensure that the list "gets attention by both [Risk Management] and [Depositor and Consumer Protection] examiners."<sup>276</sup> Offering feedback on the article, one Regional Office explicitly focused on how the high-risk merchant list would influence the examination process: "we believe the articles will assist examiners and others in understanding the broad risk considerations that are present **in these business lines** and will help focus more detailed analysis during examinations."<sup>277</sup>

Following publication of the *Supervisory Insights* article, FDIC staff began the process of formalizing its prescripts into an official guidance document, known as a Financial Institution Letter ("FIL").<sup>278</sup> FILs are understood by supervised institutions to be the formal policy of the FDIC, and are

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<sup>274</sup> *Id.*

<sup>275</sup> The author circulated the first draft in March 2011. See e-mail from Chief, Cyber-Fraud and Financial Crimes Section, Division of Risk Management Supervision, to Managing Editor, *Supervisory Insights*, Division of Risk Management Supervision (Mar. 30, 2011, 22:45), [FDICHOGR00002079]. FDIC published the summer 2011 issue of *Supervisory Insights* on July 14, 2011.

<sup>276</sup> E-mail from Chief, Cyber-Fraud and Financial Crimes Section, Division of Risk Management Supervision, to an Assistant Regional Director, Division of Depositor and Consumer Protection (Apr. 5, 2011, 15:33), [FDICHOGR00002011].

<sup>277</sup> E-mail from Charlotte Territory Supervisor, on behalf of Atlanta Regional Director Thomas Dujenksi, to the Managing Editor of *Supervisory Insights* at FDIC headquarters (May 8, 2011, 21:06), [FDICHOGR00002644] (emphasis added)..

<sup>278</sup> E-mail from FDIC Deputy Regional Director to FDIC officials (Apr. 17, 2011, 09:37) ("Step one is the article for the *Supervisory Insights* Journal . . . Step two is a Financial Institution Letter which should be easy to prepare now that the article is draft."), [FDICHOGR00002582].

interpreted by bank compliance and legal officers as tantamount to compulsory rules.<sup>279</sup> The earliest drafts of the FIL did not contain an enumerated list of high-risk merchants: an early draft from June 2011 does not specify any particular industry for heightened scrutiny.<sup>280</sup> However, by September 2011, a footnote appears on page 4: “Businesses with elevated risk may include offshore companies, online gambling-related operations, and online payday lenders. Other businesses with elevated risks include credit repair schemes, debt consolidation and forgiveness, pharmaceutical sales, telemarketing entities, and online sale of tobacco products.”<sup>281</sup>

In November 2011, FDIC staff briefed then-Acting Chairman Gruenberg on the proposed FIL.<sup>282</sup> Documents produced to the Committee reveal that the Acting Chairman himself explicitly instructed FDIC staff to expand and emphasize the list of targeted industries.<sup>283</sup> One official attempted the extremely unusual step of including the list on the FIL’s *cover page*, in an effort to “grab some attention.”<sup>284</sup> The official even expressed concern about “putting anything later in the document as the reader **may not get the message**.”<sup>285</sup>

It is difficult to understate the significance and impact of the high-risk merchant list. In addition to influencing both regulators’ examination policy and banks’ private business decisions, the list was often directly incorporated into FDIC-mandated Memorandums of Understanding (MOUs) and Consent Orders as “prohibited businesses.”<sup>286</sup> The experience of one entry on the list – firearms and ammunitions merchants – effectively traces the downstream influence of the high-risk merchants list. MOUs between supervised banks and FDIC Regional Offices, as well as bank policies submitted pursuant to FDIC Consent Orders, variously “prohibit” payment processing for firearms merchants, characterize loans to firearms dealers as “undesirable,” and generally subject firearms and ammunitions merchants to significantly higher due diligence standards.<sup>287</sup>

The inclusion of firearm merchants on the high-risk list did not just impact the behavior of FDIC supervisory and enforcement staff. A number of private companies create and sell compliance and risk management training software for bank employees; at least two companies, AML Services International and MSB Compliance, directly incorporated the FDIC list into its designation of high-

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<sup>279</sup> Federal Deposit Insurance Corporation, Financial Institution Letters, *available at* <https://www.fdic.gov/news/news/financial/>.

<sup>280</sup> June 2011 draft of Financial Institution Letter concerning Payment Processor Relationships, [FDICHOGR00002128].

<sup>281</sup> September 2011 draft of Financial Institution Letter concerning Payment Processor Relationships, [FDICHOGR00002033].

<sup>282</sup> E-mail from a Senior Examination Specialist, Div. of Depositor and Consumer Protection, to the Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, [FDICHOGR00002173].

<sup>283</sup> E-mail from Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, to the Deputy Director, Div. of Risk Management Supervision, [FDICHOGR00002183].

<sup>284</sup> E-mail from a Senior Examination Specialist, Div. of Depositor and Consumer Protection, to the Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, FDICHOGR00002173.

<sup>285</sup> *Id.* (emphasis added).

<sup>286</sup> *See, e.g.*, letter from unnamed bank to Thomas Dujenksi, Regional Director, Federal Deposit Insurance Corporation, Aug. 1, 2013 (concerning terms of a §§ 15(a) and 15(b) Consent Order, revising the bank’s ACH policy to prohibit certain businesses; name of bank redacted by FDIC), [FDICHOGR00004062].

<sup>287</sup> [FDICHOGR00004097; FDICHOGR00004101; FDICHOGR00004092; FDICHOGR00004190].

risk merchant and originator categories.<sup>288</sup> One training package offered by FIS Global educates and tests bank compliance officers for “Types of Higher Risk Individuals and Non-Individuals.” The program includes the following entry:<sup>289</sup>

**Arms and Ammunition Dealers**

Arms and Ammunition Dealers are identified as higher risk businesses because they have a higher risk of being associated with terrorism and terrorist acts.

Such spurious claims are an inherent product of the list’s opacity; in both the *Supervisory Insights* article and the Financial Institution Letter, FDIC did not justify or explain why it believes relationships with firearms and ammunition merchants present a “high risk” to supervised financial institutions.

### **FDIC Partnered with the Department of Justice**

Documents produced to the Committee by the FDIC reveal the intensity of their collaboration with the DOJ on Operation Choke Point. Through March, April, and May 2013, numerous meetings were held involving senior officials within the FDIC and the DOJ on determining how to combine efforts.<sup>290</sup> Officials such as Michael Bresnick, Executive Director of the President’s Financial Fraud Enforcement Task Force and Joel Sweet – the DOJ Trial Attorney who initially proposed Operation Choke Point – were consulting frequently with FDIC attorneys. In fact, an FDIC Counsel within the Legal Division reached out to DOJ to discuss a potential detail as a Special Assistant United States Attorney on Operation Choke Point.<sup>291</sup> Not only were FDIC officials frequently collaborating with DOJ staff, they were also having discussions of legal investigative theories regarding the initiative.<sup>292</sup>

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<sup>288</sup> AML Services International Webinar, FDICHOGR00004147; MSB Compliance presentation, [FDICHOGR00004167].

<sup>289</sup> FIS Global, AML and Sanctions, Types of Higher Risk Individuals and Non Individuals (on file with Committee staff).

<sup>290</sup> E-mail from a Counsel, Legal Division, Consumer Enforcement Unit, Federal Deposit Insurance Corporation, to Joel Sweet, Trial Attorney, Consumer Protection Branch, U.S. Dep’t of Justice (Mar. 11, 2013 13:50), [FDICHOGR00000724]; e-mail from a Counsel, Legal Division, Consumer Enforcement Unit, Federal Deposit Insurance Corporation, to Joel Sweet, Trial Attorney, Consumer Protection Branch, U.S. Dep’t of Justice (Apr. 23, 2013 12:15), [FDICHOGR00000974]; e-mail from a Counsel, Legal Division, Consumer Enforcement Unit, FDIC to Joel Sweet, Trial Attorney, Consumer Protection Branch, DOJ (May 20, 2013 10:26), [FDICHOGR00001021].

<sup>291</sup> E-mail from a Counsel, Legal Division, Consumer Enforcement Unit, Federal Deposit Insurance Corporation to Joel Sweet, Trial Attorney, Consumer Protection Branch, U.S. Dep’t of Justice (Apr. 29, 2013 13:12), [FDICHOGR0000071]; e-mail from Joel Sweet, Trial Attorney, Consumer Protection Branch, U.S. Dep’t of Justice to Counsels, Legal Division, Consumer Enforcement Unit, Federal Deposit Insurance Corporation, and Michael Bresnick, Executive Director, Financial Fraud Enforcement Task Force (May 20, 2013 16:23), [FDICHOGR00001029].

<sup>292</sup> E-mail from a Counsel, Consumer Enforcement Unit, Legal Division, Federal Deposit Insurance Corporation to Joel Sweet, Trial Attorney, Consumer Protection Branch, U.S. Dep’t of Justice (Apr. 26, 2013 08:47), [FDICHOGR00000980].

In summer 2013, an FDIC attorney from the Consumer Enforcement Unit within the Legal Division instructed staff within FDIC's Legal Division to create a folder specifically named "Operation Chokepoint" to assist in the review of documents received in response to subpoenas.<sup>293</sup> Furthermore, DOJ began allowing two FDIC attorneys direct access to a Justice Department system database named "Operation Choke Point."<sup>294</sup> Over the next several months, FDIC attorneys utilized this database to directly participate in the program.

Documents produced to the Committee demonstrate that FDIC worked closely with DOJ on Operation Choke Point. This collaboration was intense, in fact, that Justice Department attached FDIC's list of "high-risk" merchants to the back of DOJ subpoenas served to banks and payment processors.<sup>295</sup> During a hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust law of the House Judiciary Committee, Representative Issa entered into the record one such subpoena provided by a whistleblower. The subpoena was identical to those that were served to various banks and payment processors. In response to questions from Members of the Subcommittee, Assistant Attorney General Stuart Delery confirmed that the FDIC guidance was in fact stapled to the subpoenas, all of which he signed.<sup>296</sup>

The inclusion of the FDIC guidance in a subpoena is extremely significant, as it effectively "weaponized" the high-risk merchants list. Banks were compelled to remove those clients from their portfolios, or risk a federal investigation by the Department of Justice. Tellingly, the concerted effort by DOJ and FDIC was actually described by an FDIC Counsel as being "our DOJ/Spike Lee Joint."<sup>297</sup> Although this phrase was meant facetiously, it is indicative of the close cooperation between FDIC and DOJ in Operation Choke Point.

### *A CONTINUING PROBLEM*

By forcing private banks to enforce the Obama Administration's political agenda, Operation Choke Point is uniquely offensive to accountability, transparency, and the rule of law. Accordingly, it has received widespread condemnation from a variety of commentators. William Isaac, a former Chairman of the Federal Deposit Insurance Corporation, characterized the initiative an "attack on market economy."<sup>298</sup> Frank Keating, president and CEO of the American Bankers Association and a

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<sup>293</sup> E-mail from a Counsel, Consumer Enforcement Unit, Legal Division, Federal Deposit Insurance Corporation to staff within the Legal Division, Federal Deposit Insurance Corporation, (Jun. 27, 2013, 16:58), [FDICHOGR00003533].

<sup>294</sup> E-mail from a Counsel, Consumer Enforcement Unit, Legal Division, Federal Deposit Insurance Corporation to official in Charles Dunn, Civil Division, U.S. Dep't of Justice (Jul. 31, 2013 16:51), [FDICHOGR00001062].

<sup>295</sup> Memorandum from the Director of Consumer Protection Branch, Civil Division, U.S. Dep't of Justice, to the Acting Assistant Attorney General, Civil Division, U.S. Dep't of Justice (July 8, 2013), [HOG3PPP000167].

<sup>296</sup> *Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's Operation Choke Point: Hearing before the H. Comm. On the Judiciary*, 113th Cong. (Jul. 17, 2014).

<sup>297</sup> E-mail from Counsel, Consumer Enforcement Unit, Legal Division, to staff within the Legal Division, Consumer Section (Jul. 23, 2013, 16:02), [FDICHOGR00003557].

<sup>298</sup> William Isaac, *Operation Choke Point: Way Out of Control*, AMERICAN BANKER, Mar. 21, 2014.

former U.S. Attorney and Associate Attorney General, has called the Department’s strategy “legally dubious.”<sup>299</sup> In an op-ed in *The Wall Street Journal*, Mr. Keating explained:

[The Department] is pressuring banks to shut down accounts without pressing charges against a merchant or even establishing that the merchant broke the law. It’s clear enough that there’s fraud to shut down the account, Justice asserts, but apparently not enough for the highest law-enforcement agency in the land to prosecute. . .

[The Department] is now blurring these boundaries and punishing the banks that help them fight crime. If a bank doesn’t shut down a questionable account when directed to do so, Justice slaps the institution with a penalty for wrongdoing that may or may not have happened. The government is compelling banks to deny service to unpopular but perfectly legal industries by threatening penalties.<sup>300</sup>

Writing in *USA Today*, Glenn Reynolds expressed concern with the unforeseen consequences of allowing federal regulators to pressure banks to shut down the accounts of legal industries: “while abortion clinics and environmental groups are probably safe under the Obama Administration, if this sort of thing stands, they will be vulnerable to the same tactics if a different administration adopts this same thuggish approach toward the businesses that it dislikes.”<sup>301</sup> Such a possibility is far from outlandish: at the same time the Administration is pressuring banks to terminate relationships with legal industries, it is providing formal guidance to banks on how to provide financial services to the marijuana industry.<sup>302</sup>

Fortunately, the Committee’s oversight of the Operation Choke Point has had a discernible impact, and there is evidence the Administration is being held to account for the program. Documents obtained by the Committee, and its analysis of those documents, has empowered a wide range of stakeholders, including Congress, the private sector, and independent non-governmental watchdogs. Within Congress, the Committee’s investigation of Operation Choke Point laid the groundwork for robust and wide-ranging congressional oversight. Following release of the Committee staff report, both the House Judiciary Committee and the House Financial Services Committee called hearings on Operation Choke Point, and received testimony from top officials at the Department of Justice, the FDIC, the Federal Reserve, and the Office of the Comptroller of the Currency.<sup>303</sup> On November 20, 2014, Representative Blaine Luetkemeyer introduced legislation to correct the most serious abuses by DOJ and banking regulators. Rep. Luetkemeyer’s bill, the

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<sup>299</sup> Frank Keating, Op-Ed., *Justice Puts Banks in a Choke Hold*, WALL ST. J., Apr 24, 2014.

<sup>300</sup> *Id.*

<sup>301</sup> Glenn Harlan Reynolds, *Justice Department shuts down porn money: Column*, USA TODAY, May 26, 2014.

<sup>302</sup> See Financial Crimes Enforcement Network, U.S. Dep’t of the Treasury, Guidance: BSA Expectations Regarding Marijuana-Related Businesses, Feb. 14, 2014; see also Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep’t of Justice, to All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

<sup>303</sup> *Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department’s Operation Choke Point: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014); *The Department of Justice’s “Operation Choke Point”: Hearing Before the H. Comm. on Financial Services*, 113th Cong. (2014).

Financial Institution Customer Protection Act, attracted bipartisan cosponsorship.<sup>304</sup> On October 6, 2014, Republican members of the Senate Banking Committee blasted Operation Choke Point in a letter to the Attorney General.<sup>305</sup> Finally, over thirty Members of Congress requested the Inspectors General of DOJ and FDIC open investigations into their agencies involvement in Operation Choke Point. The letters to the IGs explicitly predicated their request on findings of the Committee's investigation.<sup>306</sup>

The Committee's oversight of Operation Choke Point has also laid the groundwork for judicial review of the program. On June 5, 2014, the Community Financial Services Association filed a lawsuit against federal financial regulators in the U.S. District Court for the District of Columbia.<sup>307</sup> The complaint, primarily sourced to the Committee staff report, alleges that by forcing banks to close the accounts of legal-yet-disfavored industries, federal regulators have exceeded their statutory authority, engaged in arbitrary and capricious rulemaking in violation of the Administrative Procedure Act, and violated due process of law.<sup>308</sup> *Amicus curiae* briefs in support of the litigation have been filed on behalf of a wide range of stakeholders, including the State of South Carolina, the Third Party Payment Processors Association, the National Organization for African Americans in Housing, a former Chairman of the FDIC, and a business group dedicated to economic empowerment in the U.S. Hispanic community.<sup>309</sup> As of the conclusion of the 113th Congress, the suit is continuing through the judicial system.

In a letter to Chairman Tim Johnson of the Senate Committee on Banking, Housing, and Urban Affairs on June 24, 2014, DOJ stated it had issued no new subpoenas since 2013.<sup>310</sup> At a July hearing before the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, the Assistant Attorney General for the Civil Division struggled to defend the propriety of the Operation Choke Point and the incorporation of the FDIC high-risk merchant list into DOJ subpoenas.<sup>311</sup> Eleven days later, in what the *American Banker* called a "dramatic turn," the FDIC officially withdrew the high-risk merchants list, striking all mention of it from its website, articles, and Financial Institution Letters.

However, at the conclusion of the 113<sup>th</sup> Congress, reports of abrupt and inexplicable account terminations continued to surface. Troublingly, many of these reports concerned accounts held at banks regulated by the Office of the Comptroller of the Currency and the Federal Reserve Board.

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<sup>304</sup> Financial Institution Customer Protection Act, H.R. 5758, 113th Cong. (2014).

<sup>305</sup> Letter from Sen. Mike Crapo, Ranking Member, S. Comm. on Banking, Housing, and Urban Affairs, et al., to Eric H. Holder, Jr., Attorney General, U.S. Dep't of Justice, Oct. 6, 2014.

<sup>306</sup> Letter from Members of Congress to Michael Horowitz, Inspector General, U.S. Dep't of Justice, and Robin Ashton, Counsel, Office of Professional Responsibility, U.S. Dep't of Justice, Oct. 16, 2014; letter from Members of Congress to Fred W. Gibson, Acting Inspector General, Federal Deposit Insurance Corporation, Oct. 16, 2014.

<sup>307</sup> Community Fin. Servs. Ass'n of America v. Fed. Deposit Ins. Corp., et al., available at [http://cfsaa.com/Portals/0/legal/lawsuit/cfsa\\_complaint.pdf](http://cfsaa.com/Portals/0/legal/lawsuit/cfsa_complaint.pdf).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Leg. Affairs, U.S. Dep't of Justice, to Tim Johnson, Chairman, S. Comm. on Banking, Housing, and Urban Affairs, June 24, 2014.

<sup>311</sup> *Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's Operation Choke Point: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Stuart F. Delery, Assistant Attorney General for the Civil Division, in response to questions from Rep. Darrell Issa).

SunTrust Bank – 17th largest bank in the United States, with more than 400,000 small business clients – went as far as to publicly announce it was a victim of Operation Choke Point. On August 8, 2014, SunTrust issued a statement in response to several well-publicized account closures: “We have decided to discontinue banking relationships with three types of businesses – specifically payday lenders, pawn shops and dedicated check-cashers – due to compliance requirements.”<sup>312</sup> SunTrust Bank is regulated by the Federal Reserve Board; the Board’s enforcement of a compliance regime that forces banks to sever all relations with legal and legitimate customers is totally unacceptable. Accordingly, the Committee expanded its investigation to the Federal Reserve and the Office of the Comptroller of the Currency. At the conclusion of the 113<sup>th</sup> Congress, the Committee remains extremely vigilant of all agencies involved Operation Choke Point.

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<sup>312</sup> Press Release, SunTrust Banks, Inc., SunTrust Statement on Certain Account Closures (Aug. 8, 2014).

## IRS TARGETING

For over two years, beginning almost immediately after the United States Supreme Court handed down its decision in *Citizens United v. Federal Election Commission* in January, 2010, the Internal Revenue Service systematically targeted and delayed applications for tax-exempt status filed by conservative and certain other organizations. When targeted applicants began complaining about the mistreatment in early 2012, the Committee on Oversight and Government Reform began asking questions of the IRS.<sup>313</sup> The IRS – and, in particular, Exempt Organizations Director Lois Lerner – responded by denying that any mistreatment was occurring.<sup>314</sup> The IRS continued to deny misconduct for more than a year, until finally in May 2013, at a politically obscure Friday morning tax conference, Lerner responded to a planted question that “line people in Cincinnati” had selected certain applicants for heightened review because they “used names like Tea Party or Patriots,” but that “they didn’t do it with a higher level of review.”<sup>315</sup>

Since IRS’s first admission of wrongdoing, the Committee has conducted an exhaustive investigation of the IRS’s targeting. The Committee reviewed over a million pages of documents from the IRS, the Treasury Department, the Justice Department, the Federal Election Commission, the IRS Oversight Board, the Treasury Inspector General for Tax Administration, and other custodians. The Committee conducted 52 transcribed interviews, totaling 309 hours of testimony. Despite noncooperation from the Administration and the destruction of a sizeable number of e-mails from Lois Lerner, the investigation presented clear findings. A review of public information showed that while more than 80 percent of delayed applications were associated with conservative groups, less than seven percent were associated with progressive or liberal agendas.<sup>316</sup> Between February 2010 and May 2013, not a single group identifying itself as “Tea Party” was approved by the IRS.<sup>317</sup>

The IRS’s targeting of conservative tax-exempt applicants highlights the dangers of a politicized bureaucracy. Because “[t]he power to tax involves the power to destroy,”<sup>318</sup> American taxpayers always expect the IRS to be independent and apolitical. In recent years, however, the IRS has departed from its traditional role as neutral administrator of federal tax law. The IRS has grown to become a partisan policy-making body and a full-fledged arm of the Administration in power. This politicization can be vividly seen in how the IRS identified and treated tax-exempt applications filed by conservative groups engaged in political speech – and also in how the agency attempted to cover up its misdeeds.

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<sup>313</sup> See, e.g., Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Lois Lerner, Internal Revenue Serv. (Mar. 27, 2012).

<sup>314</sup> See Letter from Lois G. Lerner, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (Apr. 26, 2012); Letter from Lois G. Lerner, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (May 4, 2012).

<sup>315</sup> Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37AM), <http://electionlawblog.org/?p=5016>.

<sup>316</sup> H. COMM. ON OVERSIGHT & GOV’T REFORM, *DEBUNKING THE MYTH THAT THE IRS TARGETED PROGRESSIVES: HOW THE IRS AND CONGRESSIONAL DEMOCRATS MISLED AMERICA ABOUT DISPARATE TREATMENT* (Apr. 7, 2014).

<sup>317</sup> *Id.*

<sup>318</sup> *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

### *CITIZENS UNITED AND 501(C)(4) STATUS*

Freedom of speech and freedom of assembly are rights so fundamental to Americans that they are enshrined in the First Amendment of the Constitution's Bill of Rights.<sup>319</sup> In *Citizens United v. Federal Election Commission*, the Supreme Court affirmed the nation's long-held guarantees of free speech and free association.<sup>320</sup> "Speech is an essential mechanism of democracy," the Court declared, "for it is the means to hold officials accountable to the people."<sup>321</sup> Accordingly, the Court explained that the First Amendment's guarantee of free political speech "has its fullest and most urgent application to speech uttered during a campaign for political office."<sup>322</sup>

In *Citizens United*, the Supreme Court struck down an arbitrary restriction on free political speech under the First Amendment, holding that Congress could not bar a nonprofit corporation from independently expressing support or disapproval of a candidate for public office.<sup>323</sup> Tracing precedents invalidating previous restrictions on speech, the Court noted that the restriction at issue went further as "an outright ban, backed by criminal sanctions."<sup>324</sup> Because the First Amendment is premised on a "mistrust of governmental power," the Court explained that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."<sup>325</sup>

The Court further explained that the fundamental right to free political speech extends to groups of citizens who assembled together for a common purpose.<sup>326</sup> Nonprofit corporations organized under section 501(c)(4) of the Internal Revenue Code, are formed "for the promotion of social welfare," and accordingly they are allowed to engage in political speech, like a for-profit corporation or union.<sup>327</sup> Federal law protects 501(c)(4) organizations from publicly disclosing their contributors,<sup>328</sup> and the Supreme Court has protected the right to anonymous political speech due to threat of harassment or repercussion.<sup>329</sup>

### *POLITICAL PRESSURE ON THE IRS TO "FIX THE PROBLEM"*

During his State of the Union Address in January 2010, President Obama delivered a stunning rebuke of the Supreme Court's *Citizens United* decision. "With all due deference to separation of powers," the President intoned, "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections."<sup>330</sup>

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<sup>319</sup> U.S. CONST. amend. I.

<sup>320</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>321</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

<sup>322</sup> *Id.* (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 265, 272 (1971)) (internal quotation marks omitted).

<sup>323</sup> *Id.* at 319-22.

<sup>324</sup> *Id.* at 336-37.

<sup>325</sup> *Id.* at 340.

<sup>326</sup> *Id.* at 313.

<sup>327</sup> I.R.C. § 501(c)(4).

<sup>328</sup> I.R.C. § 6104.

<sup>329</sup> *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>330</sup> The White House, Remarks by the President in the State of the Union Address (Jan. 27, 2010).

Over the next ten months, in the lead-up to the 2010 midterm election, the President, members of his Administration, and allies in Congress carried out an orchestrated effort to discourage political speech by conservative nonprofit groups in an effort to fix the *Citizens United* decision. On the campaign trail, the President called conservative groups “shadowy” entities with “innocuous” and “benign-sounding” names that in reality “are running millions of dollars of attack ads against Democratic candidates.”<sup>331</sup> Calling them “phony” and “front groups,” the President urged a “fix” to the *Citizens United* decision, which he believed allowed these allegedly nefarious groups to “pose” as nonprofits.<sup>332</sup> The President’s allies in Congress and elsewhere echoed this call, working aggressively to delegitimize the Court’s decision and the Constitutional protections for nonprofit political speech.<sup>333</sup> Senator Jeff Merkley urged action “so that no longer do you have a shadowy front group,”<sup>334</sup> and Senator Charles Schumer similarly complained that “the public is under siege by advertising from shadowy special interest groups.”<sup>335</sup>

This rhetorical assault on the legitimacy of tax-exempt groups engaged in political speech was felt by the IRS’s Exempt Organizations Division. As the President’s public statements generated media attention, the IRS identified a Tea Party group applying for tax-exempt status as a “potentially politically embarrassing case.”<sup>336</sup> Due to media attention, the IRS’s Washington office ordered the application to be elevated to Washington.<sup>337</sup> The attention on media continued through the fall. In response to a tax-law journal article in September 2010,<sup>338</sup> Lerner initiated a “c4 project” to assess the political activity of certain nonprofits in wake of *Citizens United*.<sup>339</sup> She told her subordinates: “We need to have a plan. We need to be cautious so it isn’t a *per se* political project. More a c4 project that will look at levels of lobbying and pol. activity along with exempt activity.”<sup>340</sup>

In October 2010, Lerner articulated the political pressure exerted on the IRS to take action on tax-exempt groups engaged in political speech activities. During a discussion at Duke University, she stated:

What happened last year was the Supreme Court – the law kept getting chipped away, chipped away in the federal election arena. The Supreme Court dealt a huge

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<sup>331</sup> See, e.g., The White House, Remarks by the President on the DISCLOSE ACT (July 26, 2010); The White House, Weekly Address: President Obama Calls on Congress to Enact Reforms to Stop a “Corporate Takeover of Our Elections” (May 1, 2010); The White House, Remarks by the President at Finance Reception for Congressman Sestak (Sept. 20, 2010); The White House, Remarks by the President at DNC Gen44 Event (Sept. 30, 2010).

<sup>332</sup> See, e.g., The White House, Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the *Citizens United* Decision (Sept. 18, 2010); The White House, Remarks by the President at a DNC Finance Event in Chicago, Illinois (Aug. 5, 2010); The White House, Remarks by the President at an Event for Senator Boxer in Los Angeles, California (Oct. 22, 2010).

<sup>333</sup> See also H. COMM. ON OVERSIGHT & GOV’T REFORM, HOW POLITICS LED THE IRS TO TARGET CONSERVATIVE TAX-EXEMPT APPLICANTS FOR THEIR POLITICAL BELIEFS (June 16, 2014).

<sup>334</sup> Transcript, Senate Democrats Hold a News Conference on the DISCLOSE Act (Sept. 22, 2010).

<sup>335</sup> *Id.*

<sup>336</sup> E-mail from Sharon Camarillo, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (Feb. 25, 2010).

<sup>337</sup> *Id.*

<sup>338</sup> Paul Streckfus, EO Tax J. 2010-130 (Sept. 15, 2010).

<sup>339</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Internal Revenue Serv. (Sept. 15, 2010).

<sup>340</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 16, 2010).

blow, overturning a 100-year old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it.

**They want the IRS to fix the problem... "Fix it now before the election. Can't you see how much these people are spending?"**<sup>341</sup>

This political pressure against *Citizens United* and so-called "shadow" groups "posing" as nonprofits led to the IRS's targeting of conservative tax-exempt applicants. With jurisdiction over nonprofits and tax law, IRS employees read and acted upon the news reports. As the President's political rhetoric drove the national dialogue and shaped public opinion, the IRS received and responded to the political stimuli.

#### *DISPARATE TREATMENT OF CONSERVATIVE TAX-EXEMPT APPLICANTS*

For twenty-seven months, from February 2010 until May 2012, the Internal Revenue Service systematically targeted conservative tax-exempt applicants for additional scrutiny and delay. The heated political rhetoric and pressure on the IRS to "fix the problem" led to IRS employees to hold a skeptical view of the merits of applications filed by conservative groups. Line-level IRS employees, trained to identify and elevate any applications that could draw media attention, flagged the first Tea Party applications for their Washington superiors.<sup>342</sup> The IRS identified additional applications using inappropriate criteria such as "Tea Party," "Patriots," and "9/12."<sup>343</sup> As Washington employees evaluated these applications, they wondered whether the groups' activities were "good" nonprofit activities or merely "emotional" propaganda with "little educational value."<sup>344</sup> With heavy skepticism, the IRS subjected these groups to years of needless delays and burdensome questioning, including questions about the groups' donors and political beliefs. The founder of one such group, Jenny Beth Martin of the Tea Party Patriots, testified before an Oversight Subcommittee in January 2014 about the three-year delay and intrusive questioning her organization received from the IRS.<sup>345</sup>

This misconduct hurt the victims of the targeting by effectively silencing conservative nonprofits during the 2012 election cycle. As the IRS ignored tax-exempt applications, donors stopped giving to the groups, overall interest waned, and some groups even stopped their operations.<sup>346</sup> The IRS's delays also resulted in the automatic revocation of some groups' exemptions by operation of law

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<sup>341</sup> See "Lois Lerner Discusses Political Pressure on IRS in 2010," [www.youtube.com](http://www.youtube.com) (last visited May 13, 2014) (transcription by Committee).

<sup>342</sup> E-mail from Sharon Camarillo, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (Feb. 25, 2010).

<sup>343</sup> See H. COMM. ON OVERSIGHT & GOV'T REFORM, DEBUNKING THE MYTH THAT THE IRS TARGETED PROGRESSIVES: HOW THE IRS AND CONGRESSIONAL DEMOCRATS MISLED AMERICA ABOUT DISPARATE TREATMENT (Apr. 7, 2014).

<sup>344</sup> See Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda,'* USA TODAY, Sept. 18, 2013.

<sup>345</sup> "The Administration's Proposed Restrictions on Political Speech: Doubling Down on IRS Targeting": Hearing before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov't Reform, 113th Cong. (2014) (testimony of Jenny Beth Martin, Tea Party Patriots).

<sup>346</sup> See Patrick O'Connor, *Groups Recount Tax Battle's Toll,* WALL ST. J., May 14, 2013.

because the groups had been waiting for resolutions so long that they did not file for renewal within the statutorily proscribed period.<sup>347</sup>

That the IRS targeting impacted conservative groups disproportionately is borne out by the numbers:

- During that same period that it delayed conservative tax-exempt applicants, the IRS approved dozens of applications from similar liberal and progressive groups.<sup>348</sup>
- In September 2013, *USA Today* published an independent analysis of a list of about 160 applications in the IRS backlog.<sup>349</sup> This analysis showed that 80 percent of the applications in the backlog were filed by conservative groups while less than seven percent were filed by liberal groups.<sup>350</sup>
- A separate analysis from the Ways and Means Committee proves that the IRS systematically targeted conservative organizations. Although a small number of progressive and liberal groups were caught up in the application backlog, the Ways and Means Committee's review shows that the backlog was 83 percent conservative and only 10 percent were liberal-oriented.<sup>351</sup>
- Moreover, the IRS approved 70 percent of the liberal-leaning groups and only 45 percent of the conservative groups.<sup>352</sup> The IRS approved every group with the word "progressive" in its name.<sup>353</sup>

#### *FAILURE TO BE CANDID AND FORTHCOMING WITH CONGRESS*

The harm experienced by the victims of the IRS's targeting was exacerbated by the IRS's deliberate effort to cover-up its wrongdoing. When asked about allegations of IRS targeting, senior IRS officials – including former Commissioner Doug Shulman and Exempt Organizations Director Lois Lerner – gave incomplete and misleading information to Congress. Shulman specifically gave Congress "assurances" in March 2012 that the IRS was not targeting Tea Party groups, when he knew at that time that those groups had been identified using inappropriate criteria, that they had been subjected to excessive delays, and that they had been harassed with unnecessary and burdensome questioning.<sup>354</sup> Lerner, likewise, made several false statements to the Committee, and specifically defended to the Committee the IRS's use of certain questions that the IRS had already

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<sup>347</sup> See, e.g., E-mail from Lois Lerner, Internal Revenue Serv., to Steven Miller & Sarah Hall Ingram, Internal Revenue Serv. (June 26, 2012).

<sup>348</sup> See Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.

<sup>349</sup> See Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda'*, USA TODAY, Sept. 18, 2013.

<sup>350</sup> *Id.*

<sup>351</sup> *Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 113th Con. (2013) (opening statement of Chairman Charles Boustany) [hereinafter "Ways and Means Committee September 18th Hearing"].

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Transcribed interview of Douglas Shulman, in Wash., D.C. (Dec. 4, 2013).

identified internally as inappropriate.<sup>355</sup> Worse still, when it was finally ready to acknowledge the targeting, the IRS attempted to bury the bad news by preemptively disclosing it on a Friday at an obscure tax-law function before the public release of a report by the IRS's inspector general.<sup>356</sup>

### *FAILURE TO ACCEPT RESPONSIBILITY FOR THE TARGETING*

In initial wake of Lois Lerner's disclosure of the IRS's targeting in May of 2013, the Administration feigned outrage and President Obama even called it "inexcusable."<sup>357</sup> But as weeks wore on and the initial outrage faded, a deliberate effort emerged to minimize and obfuscate the misconduct. Within days of Lerner's statement to the press, the Administration claimed the misconduct was the responsibility of rogue line-level agents in the IRS Cincinnati office,<sup>358</sup> even as the IRS gave "assurances" to Congress more than a year before that targeting was not occurring.<sup>359</sup> A senior congressional Democrat proclaimed the "case is solved" just days after the exhaustive investigation began.<sup>360</sup> Treasury Secretary Lew implied that the misconduct amounted to a "phony" scandal.<sup>361</sup> The President, who had earlier called the conduct inexcusable, now wrote the allegations off as nothing more than a bureaucratic "list" confined to "an office in Cincinnati."<sup>362</sup>

The Administration refused to accept any responsibility or accountability. Attorney General Eric Holder appointed Barbara Bosserman, a substantial contributor to President Obama's past political campaigns, as a leading Justice Department investigator.<sup>363</sup> The other Justice Department entities involved in the IRS investigation – the Public Integrity Section and the Federal Bureau of Investigation – are similarly conflicted, having met with Lois Lerner and the IRS to discuss the potential for criminally prosecuting politically active nonprofits as early as October, 2010.<sup>364</sup> Well before all the facts related to the IRS targeting scandal could be gathered, leaks from the Justice Department in January, 2014, promised that no criminal charges would be filed.<sup>365</sup> The following

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<sup>355</sup> See Letter from Lois G. Lerner, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov't Reform (Apr. 26, 2012); Letter from Lois G. Lerner, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov't Reform (May 4, 2012).

<sup>356</sup> *"The IRS: Targeting Americans for their Political Beliefs": Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).

<sup>357</sup> The White House, Statement by the President (May 15, 2013).

<sup>358</sup> The White House, Press Briefing by Jay Carney (May 21, 2013) (noting that "IRS line personnel had improperly targeted conservative groups"); Chelsea J. Carter, Drew Griffin, & David Fitzpatrick, *'Angry' Obama Announces IRS Leader's Ouster after Conservatives Targeted*, CNN (May 16, 2013), <http://www.cnn.com/2013/05/15/politics/irs-conservative-targeting/> (noting that "the IRS has identified two 'rogue' employees in the agency's Cincinnati office as being principally responsible").

<sup>359</sup> *Internal Revenue Service Operations and the 2012 Tax Return Filing Season: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 112th Cong. (2012) (question and answer with Chairman Boustany).

<sup>360</sup> *State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Representative Elijah E. Cummings).

<sup>361</sup> *Fox News Sunday* (Fox News television broadcast July 28, 2013) (interview with Treasury Secretary Jacob Lew).

<sup>362</sup> *Hardball with Chris Matthews* (MSNBC television broadcast Dec. 5, 2013) (interview with President Barack Obama).

<sup>363</sup> See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to Eric H. Holder, Jr., U.S. Dep't of Justice (Jan. 8, 2014). Between 2004 and 2012, Bosserman contributed more than \$6,500 to political campaigns supporting President Obama's candidacy. *Id.*

<sup>364</sup> See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to Eric H. Holder, Jr., U.S. Dep't of Justice (May 22, 2014).

<sup>365</sup> See Devlin Barrett, *Criminal charges not expected in IRS probe*, WALL ST. J., Jan. 13, 2014.

week, President Obama told a national television audience that there was “not even a smidgeon of corruption” in the IRS targeting.<sup>366</sup> Meanwhile, the White House refused to assist the Committee in its investigation, declining requests for documents and testimony.<sup>367</sup>

Amid fiery protestations by the Administration and Democrat Minority that the IRS actions were not politically motivated,<sup>368</sup> the Committee learned in June, 2014, that the IRS had lost emails sent or received by Lois Lerner from January 2009 to April 2013.<sup>369</sup> The new IRS Commissioner, John Koskinen – who was appointed by the President to restore trust in the beleaguered agency – dismissed concerns about the missing e-mails as partisan maneuvers of those “who don’t want [the investigation] to end.”<sup>370</sup> Given Lois Lerner’s refusal to answer the Committee’s questions and her invocation of the Fifth Amendment right against self-incrimination,<sup>371</sup> and the inexplicable “loss” of all e-mails that could shed light on the truth, it is unclear whether American taxpayers will ever receive answers. The IRS’s targeting of conservative tax-exempt applicants is a painful reminder of the power of an unaccountable federal agency; it is a demonstration of the harm improper political influence can cause and yet another example of why vigorous oversight of agency action is not only beneficial, but necessary.

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<sup>366</sup> “*Not even a smidgeon of corruption*”: *Obama downplays IRS, other scandals*, FOX NEWS, Feb. 3, 2014.

<sup>367</sup> Letter from Kathryn H. Ruemmler, Exec. Office of the Pres., to Darrell E. Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform (Nov. 6, 2013); Letter from W. Neil Eggleston, Exec. Office of the Pres., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (June 23, 2014).

<sup>368</sup> *See, e.g., State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Representative Elijah E. Cummings).

<sup>369</sup> Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance (June 13, 2014).

<sup>370</sup> Bernie Becker, *IRS Chief: Republicans ‘don’t want this to end,’* HILL, July 31, 2014.

<sup>371</sup> *Hearing on the IRS: Targeting Americans for Their Political Beliefs: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. 22 (2013) (H. Rept. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) (“I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. . . . After very careful consideration, I have decided to follow my counsel’s advice and not testify or answer any of the questions today.”).

## POLITICIZATION OF FOIA PROCESS

The Freedom of Information Act (“FOIA”)<sup>372</sup> is the cornerstone of federal transparency law. Enacted in 1966 after eleven years of legislative development in the House of Representatives and almost six years of consideration in the Senate, the statute, as amended, gives the public a formal method to request and receive information from the government. The U.S. Supreme Court has explained the importance of FOIA in plain terms: “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>373</sup> Therefore, neglect and abuse of the FOIA process – unnecessary delays within agencies or objections by officials to legitimate requests – are intricately tied to the disruption of oversight by the people of government activities.

The statute gives individuals, members of the media, watchdog organizations, good-government groups, corporations, and other entities “presumptive access to unpublished, existing and identifiable records of the agencies of the Federal executive branch without having to demonstrate a need or reason for such request.”<sup>374</sup> According to FOIA, each agency must publish where, from whom, and how members of the public may obtain information.<sup>375</sup> Agencies must generally respond to FOIA requests within 20 business days,<sup>376</sup> but may withhold records in certain limited situations where an exemption exists – such as where the response would compromise law enforcement proceedings,<sup>377</sup> would disclose personal or medical information that would constitute an unwarranted invasion of privacy,<sup>378</sup> or where the information is specifically protected under an Executive order “in the interest of national defense or foreign policy.”<sup>379</sup>

### *A LAUDABLE PLAN, POORLY IMPLEMENTED*

Although the U.S. Federal Government is unmatched in the world’s history in terms of its size and complexity, the American people still have a right to know how it spends their tax dollars. FOIA guarantees this right and provides what should be a straight-forward process by which taxpayers can request information from opaque federal agencies. Unfortunately, despite strong bipartisan support for the transparency goals promoted by FOIA, and a call for “a presumption in favor of disclosure” in FOIA compliance from President on his first day in office,<sup>380</sup> obtaining information from the Federal Government is not as easy as the law envisions. When agencies do not honor the language and intent of the law, and when political appointees insert themselves into the FOIA process in an attempt to withhold information, the American system, premised upon transparency in government operation, suffers.

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<sup>372</sup> Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552).

<sup>373</sup> Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

<sup>374</sup> Harold C. Relyea, *Federal Freedom of Information Policy: Highlights of Recent Developments*, 26 GOV’T INFO. QUARTERLY 314 (2009).

<sup>375</sup> 5 U.S.C. § 552(a)(1)(A) (2012).

<sup>376</sup> *Id.* § 552(a)(6)(A). The 20-day response time may be extended by up to ten additional days where the agency needs additional time to respond. *Id.* § 552(a)(6)(B).

<sup>377</sup> *Id.* § 552(b)(7).

<sup>378</sup> *Id.* § 552(b)(6).

<sup>379</sup> *Id.* § 552(b)(1).

<sup>380</sup> Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009).

### *POLITICAL INTERFERENCE OF FOIA PROCESS AT DHS*

In 2010, then-Ranking Member Darrell Issa began an investigation into allegations that the Department of Homeland Security (“DHS”) had corrupted the agency’s FOIA compliance procedures and exerted political pressure on FOIA compliance officers in order to impede and delay the process. During the course of its investigation, the Committee found that DHS political staff increased the workload on already overtaxed career FOIA professionals by instituting and regularly amending a complex and burdensome review and approval process.<sup>381</sup> On March 31, 2011, Chairman Issa convened a Full Committee hearing with DHS Chief Privacy Officer Mary Ellen Callahan, DHS General Counsel Ivan Fong, DHS Acting Inspector General Charles Edwards, and the Electronic Privacy Information Center’s John Verdi.<sup>382</sup>

The Committee also learned that DHS political staff, aware that FOIA interference could prove scandalous, had shifted much of the review and approval process away from official DHS email to telephone. Moreover, Secretary Napolitano’s political staff attempted to frustrate the Committee’s investigation through official non-cooperation, witness tampering, and the attempted theft of Committee documents.<sup>383</sup> Staff reviewed thousands of pages of internal emails during the course of its investigation.

In light of DHS obstruction, whistleblower testimony proved essential to a thorough investigation. One of these interviews was of a whistleblower employed by DHS. The Committee conducted six transcribed interviews during its investigation, including Catherine Papoi, who served as Deputy Chief FOIA Officer for DHS. Ms. Papoi described DHS political staff as deliberately non-responsive to FOIA requests, which burdened her office.<sup>384</sup> She described additional delays in the Office of General Counsel (“OGC”), where she suspected OGC would make further redactions or coordinate with political staff to coordinate the timing of document release.<sup>385</sup> As a result of her candidness to the Committee, DHS took retaliatory action against Ms. Papoi by demoting her.

### *FOIA RECORDS SCORECARD*

In order to conduct oversight over agency efforts to comply with FOIA, Chairman Issa sent a letter to 180 entities representing 100 government agencies on January 25, 2011, requesting information about their FOIA tracking systems. The letter requested each entity provide an electronic and sortable copy of its FOIA logs. An agency’s ability and willingness to provide this information served as the basis of an objective evaluation of agency FOIA management. On March 15, 2012, the Committee released a report entitled, *Report Card on Federal Government’s Efforts to Track and Manage FOIA Requests*.<sup>386</sup>

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<sup>381</sup>Staff of H. Comm. on Oversight & Gov’t Reform, *A New Era of Openness? How and Why Political Staff a DHS Interfered with the FOIA Process*, 112th Congress (Mar. 30, 2011) [hereinafter *A New Era of Openness?*].

<sup>382</sup>*Why Isn’t the Department of Homeland Security Meeting the President’s Standards on FOIA?: Hearing Before the H. Comm. on Oversight and Gov’t Reform* (Mar. 31, 2011).

<sup>383</sup>*A New Era of Openness?*, *supra* note 381.

<sup>384</sup>*Id.* at 55, 56.

<sup>385</sup>*Id.* at 76.

<sup>386</sup>*Report Card on Federal Government’s Efforts to Track and Manage FOIA Requests: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2012).

Agencies were assigned a grade A through F based upon the number of components they successfully met, such as whether or not tracking numbers are assigned to FOIA cases that cannot be resolved within 10 days, or whether or not the agency kept electronic records. Overall, the Federal Government earned a C- based on the averages of 17 cabinet level departments. Agencies that did not respond with any records or failed to produce them in digital format received an F. Additionally, the Committee found that:

- Nearly half of all logs were insufficient, but sufficient logs often included additional and helpful information
- Many FOIA logs were vague, missing information, and lacking uniformity
- Some agencies failed to track types of requesters, despite different categories of requesters receiving different treatment
- Legally required tracking numbers for requests that cannot be resolved within 10 days were often missing
- Some agencies could not produce electronic logs
- Some logs did not list status or disposition of requests
- Logs at the Department of Justice, which sets FOIA policy for the rest of the Federal Government were grossly insufficient

The Committee found that the three agencies that receive the most requests – the Department of Homeland Security, the Department of Defense, and the Department of Justice – were all missing critical information from their FOIA tracking logs. The Department of Justice only provided information for 11 of its 40 components that respond to FOIA requests. The Department of Education, Department of Energy, Department of Labor, and Department of Transportation received top grades for demonstrating an ability to track and provide information as requested, but the report cautioned that agencies who meet basic standards for FOIA processing could still be deficient in meeting their legal responsibilities under FOIA – something that this report did not evaluate.

### *PROMOTING TECHNOLOGY TO IMPROVE FOIA*

On March 21, 2012, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, chaired by Rep. James Lankford, held a hearing, *FOIA in the 21<sup>st</sup> Century: Using Technology to Improve Transparency in Government*.<sup>387</sup> The hearing featured testimony from Ms. Melanie Ann Pustay, the Director of the Office of Information Policy at the U.S. Department of Justice (“DOJ-OIP”), which oversees agency compliance with FOIA, and Ms. Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration, which acts as a mediator between FOIA requestors and agencies and serves as a FOIA ombudsman. The hearing also featured testimony from Sean Moulton, Director of Federal Information Policy at the Center for Effective Government, formerly OMBWatch.

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<sup>387</sup> *FOIA in the 21<sup>st</sup> Century: Using Technology to Improve Transparency in Government: Hearing before Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2012).

Mr. Andrew Baffin, Director of the Office of Information Collection at the Environmental Protection Agency, provided testimony on FOIAOnline, a centralized portal built on EPA's successful Regulations.gov platform, which allows FOIA requestors to easily submit and track FOIA requests at several participating agencies. The hearing's goal was to highlight the potential for efforts like FOIAOnline to significantly improve the processing and tracking of FOIA requests. On October 31, 2013, the White House released a report titled the *Second Open Government National Action Plan for the United States of America* and included a provision committing to "improve the customer experience through a consolidated online FOIA service."<sup>388</sup>

### *REFORMING FOIA*

Building on previous Committee efforts as well as the work conducted by outside groups on the oversight and management of FOIA, Chairman Issa and Ranking Member Cummings sent a letter on February 4, 2013 to Ms. Pustay at DOJ-OIP posing 24 questions for the agency on longstanding problems in FOIA and the Department's role improving federal agency compliance with the transparency law.<sup>389</sup> The letter noted that in fiscal year 2011, agencies made more than 30,000 full denials and more than 171,000 partial denials, and that DOJ itself increased the number of times it invoked the widely abused deliberative process exemption (referred to as "Exemption 5") by over 20 percent between fiscal years 2010 and 2011.

The letter also noted that some agencies may be violating the OPEN Government Act of 2007.<sup>390</sup> The OPEN Government Act amended agency FOIA fee structures, and broadened the types of requesters who qualify for FOIA fee waivers. The letter pointed out that 56 agencies had not updated their FOIA regulations to comply with major changes enacted by Congress in the OPEN Government Act of 2007. In addition, the letter noted that some agencies may not have been in compliance with the Act's provisions concerning fee waivers, and the 1996 E-FOIA Act that requires frequently requested records to be posted online.

The letter laid out an effective case that while FOIA as a statute did not need fundamental reform, many statutory changes could enhance agency compliance. Accordingly, Chairman Issa and Ranking Member Cummings introduced legislation in March 2013 to address many of the FOIA concerns raised by the Committee in its previous oversight work.<sup>391</sup> H.R. 1211, FOIA Oversight and Implementation Act of 2013, established a statutory presumption of openness, strengthened requirements for agencies to post frequently requested information, required the Federal Government to establish a single portal for FOIA requests, strengthened the ombudsman and mediator role of the Office of Government Information Services, and mandated agencies to update

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<sup>388</sup>THE WHITE HOUSE, THE OPEN GOVERNMENT PARTNERSHIP: SECOND OPEN GOVERNMENT NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA: A PREVIEW REPORT (October 31, 2013) *available at* [http://www.whitehouse.gov/sites/default/files/docs/preview\\_report\\_of\\_open\\_gov\\_national\\_action\\_plan.pdf](http://www.whitehouse.gov/sites/default/files/docs/preview_report_of_open_gov_national_action_plan.pdf).

<sup>389</sup> Letter from the Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Ms. Melanie Ann Pustay, Dir., Office of Info. Policy, U.S. Dept. of Justice (Feb. 4, 2013).

<sup>390</sup> Honest Leadership and Open Government Act of 2007, 121 Stat. 735, 2 U.S.C. § 1601 (2012).

<sup>391</sup> For more information on the FOIA Oversight and Implementation Act, see the Legislative Activities section of the Report above.

FOIA regulations.<sup>392</sup> The legislation was unanimously approved by the House of Representatives by a vote of 410-0 on February 25, 2014, but was not taken up before the end of the 113th Congress.

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<sup>392</sup> FOIA Oversight and Implementation Act of 2014, H.R. 1211 (introduced Mar. 15, 2013).

## OBSTRUCTION OF INSPECTORS GENERALS

The Obama Administration has been hostile to oversight from the community of inspectors general as far back as 2009, when the President unlawfully removed Gerald Walpin from his post as Inspector General for the Corporation for National and Community Service. After removing Walpin, who aggressively investigated a political ally of the President for misusing AmeriCorps funds, the Obama Administration targeted two more IGs: Special Inspector General for the Troubled Asset Relief Program Neil Barofsky, and International Trade Commission Acting Inspector General Judith Gwynne. The President left a number of inspector general posts vacant, sometimes for years, which resulted in less aggressive oversight of federal agencies that controlled hundreds of billions of taxpayer dollars.

The Administration's hostility towards the IGs reached a tipping point when, on August 5, 2014, 47 Inspectors General sent an unprecedented letter to Congress describing "serious limitations on access to records that have recently impeded the work of Inspectors General." The letter identified three IGs whose work has been obstructed—Department of Justice Inspector General Michael Horowitz, Environmental Protection Agency Inspector General Arthur Elkins, and Peace Corps Inspector General Kathy Buller.

### *ROLE AND IMPORTANCE OF INSPECTORS GENERAL*

Inspectors General play a key role in improving our government's efficiency. They conduct investigations and audits to detect and prevent waste, fraud, and mismanagement in their agencies' programs. In fact, they have proven to be one of Congress' best investments. In the last fiscal year, they used their \$2.5 billion budget to identify potential cost savings to taxpayers totaling about \$51.8 billion.<sup>393</sup>

To fulfill their statutory obligation, federal law requires agencies to provide full and timely access to agency records to their respective Inspectors General. The Administration, however, has been obstructing the Inspectors General work by refusing, restricting or delaying IG access to agency records. This obstruction leads to incomplete, inaccurate, or significantly delayed findings and recommendations. Hindering IG work undermines congressional intent and wastes taxpayer dollars. In the face of agency obstruction, the Committee has supported the work of the IGs by pressuring agencies to cooperate with the OIGs.

The IGs make recommendations based on their independent audits, evaluations, and investigations. Their recommendations often involve practical methods to reduce agency waste and mismanagement, while improving operations. The community of IGs is comprised of individuals across the Federal Government who work tirelessly on behalf of taxpayers to promote good stewardship of taxpayer dollars and improve the effectiveness of government.

During fiscal year 2013, over 14,000 employees at 72 Offices of Inspector General ("OIGs") across Executive Branch departments and agencies conducted audits, inspections, evaluations, and

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<sup>393</sup> Council of the Inspectors General on Integrity and Efficiency, Progress Report to the President Fiscal Year 2013 2 (2013), available at <https://www.ignet.gov/sites/default/files/files/CIGIE%202013%20Progress%20Report.pdf>.

investigations.<sup>394</sup> IG recommendations made to Executive Branch departments and agencies focused on detecting and preventing waste, fraud, and abuse.<sup>395</sup>

The OIGs' recommendations for fiscal year 2013 identified potential cost savings to taxpayers totaling about \$51.8 billion.<sup>396</sup> With the OIG community's fiscal year 2012 budget of \$2.5 billion, the potential cost savings identified represents approximately a \$21 return on every dollar spent.<sup>397</sup> Specifically, the OIGs' recommendations included cost savings of \$37 billion from audit recommendations agreed to by management-level employees.<sup>398</sup> The OIGs also uncovered \$14.8 billion in potential cost savings measures from investigative receivables and recoveries, which reflect the results of criminal and civil cases that were ordered, plus any voluntary repayments.<sup>399</sup>

Throughout FY 2012, the OIGs processed over 619,000 hotline complaints, closed over 25,000 investigations, and completed over 7,600 audit, inspection, and evaluation reports.<sup>400</sup> The OIGs also successfully brought actions against wrongdoers across the Federal Government.<sup>401</sup> With the assistance of the OIGs, over 6,750 indictments and "criminal informations" (a DOJ term used in conjunction with a plea bargain) were brought against wrongdoers, and more than 5,800 prosecutions and over 1,300 civil actions were successful.<sup>402</sup>

#### *SECTION 6(A)(1)*

Section 6(a)(1) of the Inspector General Act of 1978 grants IGs the authority to access "all records, reports, documents, or materials available to the agency" relating to IG program responsibilities.<sup>403</sup> Access to information is a key component of IG independence. During the Obama Administration, however, agency lawyers have attempted to use common law privileges and other statutes to justify withholding documents and information from the IGs.

#### *ENVIRONMENTAL PROTECTION AGENCY OFFICE OF INSPECTOR GENERAL*

##### **Chemical Safety Board's Misuse of Attorney-Client Privilege**

In the fall of 2012, the EPA Inspector General began investigating allegations that CSB General Counsel Richard Loeb learned the identities of several CSB whistleblowers who filed complaints with the U.S. Office of Special Counsel ("OSC"). The whistleblowers – all of whom worked in the Office of General Counsel – had been exposed to retaliation by virtue of the leak. Because of the likelihood that managers may retaliate against whistleblowers who file complaints with OSC, federal law requires OSC to protect the identities of complainants.

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<sup>394</sup> Council of the Inspectors General on Integrity & Efficiency, *Progress Report to the Pres., Fiscal Year 2013 Results at a Glance* (2013), available at <http://www.ignet.gov/randp/CIGIE-2013-Progress-Report.pdf>.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> 5 U.S.C. § 6(a)(1).

In light of the seriousness of the allegations against Loeb and the OSC employee who leaked information to him, it was imperative that Loeb and CSB Chairman Dr. Rafael Moure-Eraso fully cooperated with the IG's investigation. They did not. Instead, Loeb-with Moure-Eraso's consent-refused to provide key documents to the Inspector General, citing attorney-client privilege. The EPA IG discovered that CSB leadership used personal e-mail accounts to conduct official business to avoid scrutiny from investigators. Loeb's novel-and mistaken-application of attorney-client privilege to documents that may have implicated him in the leak, and his and his colleagues' use of personal e-mail accounts to avoid scrutiny, caused the IG to eventually bring the matter to the attention of Congress.

On September 5, 2013, EPA Inspector General Arthur A. Elkins, Jr. sent a "seven-day letter" to Congress regarding CSB's refusal to cooperate with his leak investigation. Section 5(d) of the Inspector General Act, as amended, requires IGs to report immediately to the agency head whenever the IG becomes aware of "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs or operations."<sup>404</sup> Reports made pursuant to Section 5(d) of the IG Act are commonly referred to as "seven-day letters."<sup>405</sup> Because IGs typically reserve the use of a seven-day letter for only the most urgent matters, Congress-and the House Committee on Oversight and Government Reform specifically-takes these matters very seriously.

On June 19, 2014, the Committee held a hearing addressing both the seven-day letter and gross mismanagement and dysfunction at the Chemical Safety Board. In conjunction with the hearing Chairman Issa and Science, Space, and Technology Committee Chairman Lamar Smith, released an 84-page joint staff report titled, *Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board*.

### **Obstruction of the OIG's Misconduct Investigations**

In its December 2013 report about former EPA official John Beale,<sup>406</sup> who committed fraud in claiming to be a CIA operative, the OIG confirmed that the EPA was slow to report the Beale matter and obstructed parts of the investigation.<sup>407</sup> Beale impersonated a CIA agent and remained on the EPA payroll for years despite performing minimal work for the EPA. The report noted that an attorney in the Office of General Counsel declined an OIG interview, despite being required to do so under the Inspector General Act.<sup>408</sup> As a result, the OIG was "limited in [its] ability to determine OGC's involvement in, knowledge of and actions relating to the Beale matter."<sup>409</sup>

On May 7, 2014, the Committee held a hearing about obstruction of the EPA OIG by the EPA Office of Homeland Security ("EPA-OHS"). The OIG representative testified that the office "cannot assure

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<sup>404</sup> Inspector General Act of 1978, Pub. L. 110-409.

<sup>405</sup> *Id.*

<sup>406</sup> A more detailed discussion of the Committee's oversight efforts related to the EPA and John Beale are discussed later in this report in Chapter 6 in the section *The EPA's Secret Agent*.

<sup>407</sup> U.S. ENVIRON. PROTECTION AGENCY, OFFICE OF INSPECTOR GENERAL, EARLY WARNING REPORT: INTERNAL CONTROLS AND MANAGEMENT ACTIONS CONCERNING JOHN C. BEALE PAY ISSUES, Report. No. 14-P-0036, 5 (Dec. 11, 2013), available at <http://www.epa.gov/oig/reports/2014/20131211-14-P-0036.pdf>.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

the Committee that we are doing everything possible to root out other "John Beales" because of the EPA's refusal to grant OIG access to information.

According to the EPA OIG Semiannual Report to Congress, multiple offices within the EPA have been obstructing the OIG, including the Office of Homeland Security, the Office of Chief Financial Officer, the Office of Chemical Safety and Pollution Prevention, as well as the Office of General Counsel.<sup>410</sup>

According to IG Arthur Elkins, EPA officials have intimidated and obstructed the OIG from conducting numerous investigations over the past year.<sup>411</sup> In a February 2014 letter to Senator David Vitter, Mr. Elkins stated, "over the past 12 months there have been several EPA officials who have taken action to prevent [the office of investigations] from conducting investigations or who have attempted to obstruct investigations through intimidation."<sup>412</sup> In fact, the EPA-OHS relationship with the OIG has turned toxic. On October 24, 2013, EPA-OHS Intelligence Advisor Steven Williams assaulted Special Agent Elisabeth Heller while she was on duty. Mr. Williams approached Ms. Heller in an extremely aggressive manner, shouting, and forcibly impeding her ability to conduct her official duties.<sup>413</sup> The Federal Protective Service investigated the incident and sent findings supporting a misdemeanor assault charge to the U.S. Attorney's Office.<sup>414</sup> The EPA OIG recused itself from investigating the incident involving Ms. Heller, and the Department of Defense OIG is currently investigating. Mr. Williams continues to work at the EPA-OHS without punishment.

#### *PEACE CORPS OFFICE OF INSPECTOR GENERAL*

The Peace Corps has refused to provide the Office of Inspector General access to information related to sexual assaults on Peace Corps volunteers. This has prevented the IG from tracking sexual assaults pursuant to requirements in the Kate Puzey Volunteer Protection Act of 2011. The Peace Corps's position is contrary to the plain language of the Inspector General Act and it undermines the OIG's independence.

Following the tragic death of a Peace Corps volunteer, the Kate Puzey Act was enacted to curb the problem of sexual assaults among Peace Corps volunteers and staff and to develop a consistent policy that addresses the sexual assault problem in the Peace Corps, which is widespread. The Kate Puzey Act requires, in part, the Peace Corps Inspector General to generate a report on the effectiveness of the Act's programs to help identify program-wide trends and make

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<sup>410</sup> EPA, OFFICE OF INSPECTOR GENERAL, SEMIANNUAL REP. TO CONG. EPA-350-R-I4-001 (May 2014), *available at* [http://www.epa.gov/oig/reports/2014/Semiannual\\_Report\\_to\\_Congress-March\\_2014.pdf](http://www.epa.gov/oig/reports/2014/Semiannual_Report_to_Congress-March_2014.pdf).

<sup>411</sup> Letter to the Hon. David Vitter, Ranking Member S. Comm. on Environment and Public Works, from Arthur A. Elkins Jr., Inspector General for the U.S. Environ. Protection Agency (Feb. 25, 2014), *available at* [http://www.epa.gov/oig/reports/2014/IG\\_response\\_letter\\_2-25-2014.pdf](http://www.epa.gov/oig/reports/2014/IG_response_letter_2-25-2014.pdf).

<sup>412</sup> *Id.*

<sup>413</sup> *Is EPA Leadership Obstructing it's own Inspector General?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014), *available at* <http://oversight.house.gov/hearing/epa-leadership-obstructing-inspector-general/>.

<sup>414</sup> Jim McElhatton, *EPA chief Gina McCarthy intervened to halt internal inquiry*, WASH. TIMES, Apr. 29, 2014, *available at* <http://www.washingtontimes.com/news/2014/apr/29/epa-chief-gina-mccarthy-intervened-to-halt-to-inte/?page=all#pagebreak>.

recommendations to better protect Peace Corps volunteers. The Act also requires the IG to notify Congress about “misconduct, mismanagement, or policy violations of Peace Corps staff, any breaches of the confidentiality of volunteers, and any actions taken to assure the safety of volunteers who provide such reports.”

The Peace Corps has denied the OIG access to data related to sexual assaults, specifically those assaults that are tracked through the "restrictive reporting" channel. In a summary of its legal position, the Peace Corps claims that the Kate Puzey Act overrides the IG Act's requirement that an agency provide its IG all requested documents and information. The Kate Puzey Act does not explicitly or implicitly prohibit or limit the OIG's access to information and documents. In fact, under the Act, the OIG must meet certain congressional reporting requirements, which can only occur if the IG has access to the information the Peace Corps has refused to provide.

On June 24, 2014, Committee staff conducted a deposition of the Peace Corps General Counsel. Shortly before the deposition, the Peace Corps and the IG reached a memorandum of understanding that allowed the IG to access restricted reporting information. The Committee remains concerned that the IG had no alternative but to enter into such an agreement to obtain materials to which she is legally entitled under the IG Act.

#### *DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL*

##### **DOJ OIG Cannot Investigate Attorney Misconduct**

The OIG wants to remove a portion of section 8E in the IG Act, which gives the Office of Professional Responsibility jurisdiction over allegations of misconduct involving DOJ lawyers and law enforcement personnel. The section has prevented the IG from taking action in a number of significant matters, including DOJ's decision not to investigate the New Black Panther Party for voter intimidation, the investigation of prosecutorial misconduct with respect to the prosecution of Senator Ted Stevens, and DOJ's internal review of the conduct of the drafters of a memorandum that advised the Bush White House on torture. The Office of Professional Responsibility is not independent, nor does it publicly release its reports.

##### **Access to Documents**

The OIG wants to remove a portion of section 8E in the IG Act, which automatically denies access to certain categories of documents-such as 6(e) Grand Jury documents and national security-related documents. To gain access, the IG must receive approval from the Deputy Attorney General or the federal courts. This process slows down investigations and presents independence issues. In fact, not having automatic access to documents slowed down the IG's investigation into Operation Fast and Furious.

#### *COMMITTEE ACTIONS TO IMPROVE IG ACCESS TO AGENCY RECORDS*

In each of these instances, the Committee conducted an investigation and/or held a hearing to pressure the agency to cooperate with its Inspector General. In addition, following the letter from the 47 Inspectors General sent August 5, 2014, the Committee held a hearing on September 10,

2014 entitled, *Obstructing Oversight: Concerns from Inspectors General*.<sup>415</sup> The Committee heard from the IG community – including Department of Justice Inspector General Michael Horowitz, Environmental Protection Agency Inspector General Arthur Elkins and Peace Corps Inspector General Kathy Buller – about how the Administration had obstructed their work.

Further, Committee passed the Inspector General Empowerment Act on September 17, 2014.<sup>416</sup> This bill strengthens the IG community by giving them additional tools that will allow them to follow the facts where they lead, including testimonial subpoena authority to get answers from federal contractors and former federal employees.

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<sup>415</sup> *Obstructing Oversight: Concerns from Inspectors General: Hearing Before H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

<sup>416</sup> H.R. 5492, 113th Cong. (as reported to the House, Sept. 16, 2014).

## WHISTLEBLOWER PROTECTION

The Administration's posture towards its internal watchdogs extended to the way it treated agency whistleblowers. Whistleblowers who came forward to advance several of the Committee's investigations – including Fast and Furious and Benghazi – experienced retaliation at the hands of Obama Administration political appointees. The Obama Administration has been especially aggressive with respect to national security whistleblowers, prosecuting more whistleblowers under the Espionage Act than any President before.

The Committee's investigation of the FDA's whistleblower surveillance program showed the lengths that some agencies will go to identify and take action against employees who communicate with Congress. In that case, the FDA installed monitoring software that captured communications with Congress, the Office of Special Counsel, the Inspector General, and even with the whistleblowers' personal attorneys. Whistleblowers who came to the Committee were frequent targets of retaliation by their managers. The Administration's most frequent tactic was to strip the employee of responsibilities and opportunities for advancement while carefully avoiding taking an action that would allow the whistleblower to file a lawsuit. The following are but a few of many examples.

### *DHS FOIA INVESTIGATION*

The Committee investigated political interference with the Department of Homeland Security's FOIA operation in 2009.<sup>417</sup> A witness in that case, Ms. Catherine Papoi, attended her interview with the Committee on March 3, 2011. The next day, March 4, Deputy Chief Privacy Officer John Kropf called Ms. Papoi to notify her that she was being demoted effective March 14, 2011. Ms. Papoi was replaced by a newly-minted member of the Senior Executive Service ("SES"). The new SES, who now serves as Ms. Papoi's supervisor, was given her title – Deputy Chief Privacy Officer – and her office. Ms. Papoi was moved to an office formerly occupied by her subordinate and given a narrower set of responsibilities.

The new SES accepted the job on January 10, 2011 and received security clearance on February 24, 2011. The decision to wait until March 4 – the day after her interview – to notify Ms. Papoi of her demotion appears to have been made for reasons other than logistics. By notifying Ms. Papoi of her less desirable office assignment and diminished job responsibilities the day after she appeared before the Committee, the Department created the appearance of retaliation against a witness who did not allow representatives from the OGC to attend her interview.

The decision to demote Ms. Papoi itself also appeared to be an act of retaliation because of her history of providing information to the OIG, and the Department's belief – whether founded or not – that Ms. Papoi was providing information to this Committee.

### *BENGHAZI*

Over the course of the Committee's investigation into the attack on the United States Embassy in Benghazi, Libya, numerous individuals approached the Committee to provide information. Some of

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<sup>417</sup> The details of this investigation are provided in an oversight report published by the Committee in 2011. See Staff of H. Cmte. on Oversight & Gov't Reform, *A New Era of Openness? How and Why Political Staff at DHS Interfered with the FOIA Process*, 112th Cong (2011).

these witnesses described mismanagement by senior administration officials related to the attacks and subsequent attempts to obstruct the congressional investigation. Witnesses who contacted the Committee were frequently concerned that providing information to Congress may expose them to retaliation from Department leadership.

With that in mind, Chairman Issa requested that Principal Deputy Legal Adviser Mary McLeod make clear to all State Department employees that they are free to furnish information to Congress in accordance with their statutory rights.<sup>418</sup> The Department never took this small but meaningful step to assure employees that they will not face retaliation from their supervisors if they choose to communicate with Congress about the Benghazi attacks. To the contrary, it appears that the Administration attempted to intimidate employees who cooperated with the Committee's investigation. Victoria Toensing, counsel for a witness in the investigation of the Benghazi attacks, recently revealed that Obama Administration officials have threatened her client and others.<sup>419</sup> She stated:

They're doing some very despicable threats to people. . . . They're taking career people and making them well aware that their careers will be over [if they cooperate with congressional investigators].<sup>420</sup>

These allegations are serious. Retaliation against employees who communicate with Congress does grave harm to those brave individuals who report mismanagement at their own risk and creates a chilling effect on other employees who may be considering coming forward to assist the Committee.

#### *FDA SURVEILLANCE*<sup>421</sup>

In January 2009, several national news outlets, including the *New York Times*, *Associated Press*, and the *Wall Street Journal*, reported that U.S. Food and Drug Administration ("FDA") scientists had lodged complaints that the agency was approving unsafe and risky medical devices.<sup>422</sup> In March 2010, the *New York Times* published a follow-up article reporting allegations by FDA scientists that the FDA ignored radiation warnings when approving certain medical devices.<sup>423</sup>

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<sup>418</sup> 5 U.S.C. § 7211 states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

<sup>419</sup> James Rosen, *Obama administration officials threatened whistle-blowers on Benghazi, lawyer says*, FOXNEWS.COM, Apr. 29, 2013, <http://www.foxnews.com/politics/2013/04/29/obama-administration-officials-have-threatened-whistle-blowers-on-benghazi>.

<sup>420</sup> *Id.* (emphasis added) (parenthetical in original).

<sup>421</sup> Together with the staff of Sen. Charles E. Grassley, Ranking Member, S. Cmte. on the Judiciary, the staff of the Committee published a report detailing this joint investigation. See Joint Staff, H. Cmte. on Oversight & Gov't Reform and Minority Staff, S. Cmte. on Judiciary, *Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers*, 113th Cong. (2014).

<sup>422</sup> Gardiner Harris, *In F.D.A. Files, Claims of Rush to Approve Devices*, N.Y. TIMES, Jan. 13, 2009, available at [http://www.nytimes.com/2009/01/13/health/policy/13fda.html?\\_r=0](http://www.nytimes.com/2009/01/13/health/policy/13fda.html?_r=0) (last visited Jan. 10, 2014); Ricardo Alonso-Zaldivar, *FDA Scientists Complain to Obama of 'Corruption,'* ASSOC. PRESS, Jan. 8, 2009; Alicia Mundy & Jared Favole, *FDA Scientists Ask Obama to Restructure Drug Agency*, WALL ST. J., Jan. 8, 2009, available at <http://online.wsj.com/news/articles/SB123142562104564381> (last visited Jan. 10, 2014).

<sup>423</sup> Gardiner Harris, *Scientists Say F.D.A. Ignored Radiation Warnings*, N.Y. TIMES, Mar. 28, 2010, available at <http://www.nytimes.com/2010/03/29/health/policy/29fda.html?pagewanted=all> (last visited Jan. 10, 2014).

Upon learning that these scientists – scientists within the FDA’s Center for Devices and Radiological Health (“CDRH”) – publicly disclosed information about pending device applications, known as “510(k) applications,” CDRH management initiated an electronic surveillance program of unprecedented scope. To determine which scientists were disclosing information and what specific information they were disclosing, the CDRH engaged two contractors working on the FDA’s information technology security systems in April 2010 to begin monitoring Dr. Robert Smith, whose name appeared in one of the news stories.<sup>424</sup> Using a software monitoring program, called Spector 360, that took screenshots of FDA employees’ computers every five seconds,<sup>425</sup> FDA officials were able to obtain sensitive information and protected communications their employees, including attorney-client communications, communications with Congress, and communications with the FDA’s Office of Special Counsel (“OSC”). The FDA intercepted communications with congressional staffers and draft versions of whistleblower complaints complete with editing notes in the margins.<sup>426</sup> The agency also took electronic snapshots of the computer desktops of the FDA employees and reviewed documents they saved on the hard drives of their government computers.<sup>427</sup> The contractors conducting the investigation prepared an interim report to update FDA officials.<sup>428</sup> After receiving this report, the FDA expanded the computer monitoring to include three additional CDRH scientists<sup>429</sup> and declined to renew Dr. Smith’s contract.<sup>430</sup>

FDA’s overly-invasive monitoring program came to light in January 2012, when Dr. Smith and several of his colleagues filed a lawsuit in U.S. District Court in Washington. The suit alleged that information gathered during the monitoring was used to harass or dismiss at least six current and former FDA employees. House Committee on Oversight and Government Reform Chairman Darrell Issa and Senate Committee on the Judiciary Ranking Member Charles Grassley (together, “the Committees”) subsequently launched a joint investigation into the monitoring program.

Witnesses who contacted the Committees voiced concerns about the intrusive nature of the surveillance. They believed that the FDA conducted surveillance for the sole purpose of retaliating against the scientists for raising concerns about the medical device review process.

The Committees conducted seven transcribed interviews with current and former FDA employees and contractors and reviewed approximately 70,000 documents. The pace of the Committees’ investigation was slowed by FDA’s unwillingness to cooperate. The FDA repeatedly cited the ongoing litigation with Dr. Smith and his colleagues to withhold documents and information.

Documents and information obtained by the Committees show the FDA conducted this monitoring program without regard for employees’ rights to communicate with Congress, the OSC, or their

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<sup>424</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Ruth McKee, at 7-9 (Nov. 13, 2012).

<sup>425</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Christopher Newsom, at 10-11 (Oct. 2, 2012).

<sup>426</sup> Ellen Nakashima and Lisa Rein, *FDA staffers sue agency over surveillance of personal e-mail*, WASH. POST, Jan. 29, 2012.

<sup>427</sup> *Id.*

<sup>428</sup> Memorandum from Joseph Hoofnagle, Incident Response & Forensic Lead & Christopher Newsom, Incident Response & Forensic Investigator, *Interim Report of Investigation – Robert C. Smith* (June 3, 2010).

<sup>429</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Ruth McKee, at 16 (Nov. 13, 2012).

<sup>430</sup> *Id.* at 33.

personal attorneys. The Committees' investigation also found that data collected could be used to justify adverse personnel actions against agency whistleblowers. Absent a lawful purpose, an agency should not conduct such invasive monitoring of employees' computer activity. The FDA failed not only to manage the monitoring program responsibly, but also to consider any potential legal ramifications. The Committees' investigation has shown that agencies need effective policies addressing appropriate monitoring practices to ensure that agency officials do not order or conduct surveillance to retaliate against whistleblowers, especially in such a way that chills whistleblower communications with Congress and the OSC. Congress has a strong interest in keeping such lines of communication open, primarily as a deterrent to waste, fraud, and abuse in Executive Branch departments and agencies. On February 26, 2014, the Committee held a hearing on this issue. The hearing allowed Members to better understand the full extent of the FDA's surveillance program and assess whether the FDA had taken appropriate steps to prevent the monitoring program from capturing protected communications.

### *PROTECTING WHISTLEBLOWERS IN THE FUTURE*

The Obama Administration has often proclaimed its commitment to transparency and accountability. Yet, it has consistently denied inspectors general the records they need to conduct oversight, failed to fill inspector general vacancies, and retaliated against whistleblowers who report waste, fraud, and abuse to Congress. This posture towards oversight weakened the effectiveness of the inspector general community, exposing American taxpayer dollars to waste, fraud, and abuse. Retaliation against employees who communicate with Congress does grave harm to those brave individuals who report mismanagement at their own risk and creates a chilling effect on other employees who may be considering coming forward to assist the Committee.

For these reasons, it is unlawful to retaliate against federal employees who report mismanagement to Congress.<sup>431</sup> Retaliation occurs whenever a federal agency takes an adverse personnel action against a whistleblower because he or she communicated with Congress.<sup>432</sup> The mere threat of an adverse personnel action interferes with the investigative process by discouraging employees from disclosing relevant information to Committee investigators. Federal statutes that cover obstruction of a congressional investigation prohibit interference with the Committee's access to information.<sup>433</sup> These statutes carry penalties of both fines and imprisonment. Congress should consider whether, in light of this Administration's tactics with respect to whistleblowers, these laws need to be strengthened.

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<sup>431</sup> 5 U.S.C. § 2302, in pertinent part, prohibits a federal agency from taking, or failing to take, a personnel action against any employee because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

<sup>432</sup> 5 U.S.C. § 2302.

<sup>433</sup> 18 U.S.C. § 1505 states, in pertinent part: "Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress-- Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both."

## QUID PRO QUO: DOJ'S SETTLEMENT WITH ST. PAUL

The Department of Justice is the agency chiefly charged with the enforcement of federal laws. The Department's mission, in part, is "to ensure fair and impartial administration of justice for all Americans."<sup>434</sup> In 2012, by executing a closed-door *quid pro quo* agreement with the City of St. Paul, Minnesota, the Department failed to live up to its lofty standards. In this deal, led by then-Assistant Attorney General Thomas Perez, the Justice Department sacrificed the recovery of millions of fraudulently allocated taxpayer dollars to protect a legal doctrine from Supreme Court scrutiny. The Justice Department's *quid pro quo* with St. Paul undercut the Department's commitment to the rule of law and damaged its reputation as a fair and impartial arbiter of justice.

### *HOW PROTECTING "DISPARATE IMPACT" COSTS TAXPAYERS MILLIONS*

The story of the Justice Department's *quid pro quo* with the City of St. Paul is complex, but it begins with a Supreme Court appeal known as *Magner v. Gallagher*. In the early 2000s, St. Paul began aggressively enforcing the health and safety provisions of its housing code, targeting rental properties for increased inspections and stricter certifications.<sup>435</sup> The owners of these properties sued the St. Paul, arguing that the aggressive code enforcement had an illegal "disparate impact" on their mostly minority tenants. The lawsuit worked its way through the federal court system for years, eventually yielding St. Paul's appeal to the United States Supreme Court. In November 2011, the Supreme Court agreed to hear the case, *Magner v. Gallagher*, to decide whether the Fair Housing Act allowed for claims of disparate impact.

The theory of disparate impact allows a court to find discrimination without having to consider any intent to discriminate – in other words, courts could "draw an inference of actual intent to discriminate from evidence of disproportionate impact."<sup>436</sup> Because disparate impact lawsuits do not require the plaintiff to prove intent, the theory is favored by liberal activists to force discrimination settlements with little evidence of any actual intentional discrimination. For this reason, Assistant Attorney General Perez greatly supported disparate impact theory – and was threatened by the Supreme Court's decision to hear St. Paul's appeal in *Magner*.<sup>437</sup>

Shortly after the Supreme Court granted certiorari in *Magner* on November 7, 2011, Assistant Attorney General Perez sprung into action.<sup>438</sup> In mid-November, he reached out to two prominent

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<sup>434</sup> U.S. Dep't of Justice, About DOJ, <http://www.justice.gov/about/about-doj>.

<sup>435</sup> See Fredrick Melo, *St. Paul Landlords Discuss their Fight over City Rental Housing Inspection Practices*, PIONEER PRESS, Oct. 15, 2012; Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, STAR TRIBUNE (Feb. 10, 2012).

<sup>436</sup> Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 426 (1998).

<sup>437</sup> Staff of H. Comm. on Oversight & Gov't Reform, S. Comm. on the Judiciary, & H. Comm. on the Judiciary, *DOJ's quid pro quo with St. Paul: How Assistant Attorney General Thomas Perez manipulated justice and ignored the rule of law*, 113th Cong. (2013).

<sup>438</sup> Assistant Attorney General Perez testified that he did not become aware of the *Magner* case until after the Court agreed to hear the appeal; however, HUD Deputy Assistant Secretary Sara Pratt told the Committees that she and Perez likely had discussions about the case before the Court granted certiorari.

Minnesota attorneys, David Lillehaug and Thomas Fraser, to discuss St. Paul's appeal.<sup>439</sup> During a subsequent phone call, Perez came to learn about an unrelated False Claims Act litigation, known as *United States ex rel. Newell v. City of St. Paul*, in which a whistleblower alleged that St. Paul had defrauded the Federal Government out of \$62 million in Housing and Urban Development funds.<sup>440</sup> As a whistleblower allegation of fraud perpetrated against the government, the Justice Department had the opportunity to intervene in the case to prosecute it with federal resources. At the time of Perez's phone call, the Department was considering whether to intervene. Unbeknownst to Perez, career Justice Department and HUD attorneys had already reviewed the *Newell* case and had recommended federal intervention because they believed it be a "particularly egregious example" of fraud.<sup>441</sup> In fact, according to the internal memorandum drafted on the case, the Justice Department found that St. Paul's actions to "obtain HUD funds were actually more than reckless and that the City had actual knowledge that [its certifications] were false."<sup>442</sup>

Nonetheless, during Perez's phone call with Lillehaug and Fraser, a proposal was raised to link the resolution of *Newell* with the withdrawal of *Magner*. Perez, however, did not have the authority to resolve the *Newell* case, which was the jurisdiction of the Department's Civil Division, led by then-Assistant Attorney General Tony West. The Department of Housing and Urban Development, as the victim of St. Paul's fraud, also had an interest in the *Newell* case. Perez immediately reached out to HUD Deputy Assistant Secretary Sara Pratt, HUD General Counsel Helen Kanovsky, and Assistant Attorney General West to begin lobbying them on a deal. In late November 2011, HUD officially changed its position on intervention in *Newell*. Perez continued working on West and the Civil Division to convince them to forego intervention. By early January 2012, Perez had reached a "consensus" with the Civil Division that it would decline intervention in *Newell* to secure St. Paul's withdrawal of its appeal in *Magner*.<sup>443</sup>

In January 2012, Perez began personally leading negotiations with St. Paul about the Department declining intervention in *Newell* in exchange for the City withdrawing *Magner*. The sides traded proposals, and by late January – with only days before the Supreme Court's oral argument in *Magner* – the prospect of an agreement looked bleak.<sup>444</sup> On February 3, 2012, Perez met with St. Paul Mayor Christopher Coleman at City Hall in a last ditch effort to reach an agreement. After a short deliberation, Mayor Coleman accepted Perez's *quid pro quo*. The next week, DOJ formally declined to intervene in *Newell* and the City formally withdrew its appeal in *Magner*. The *quid pro quo* was effectuated.

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<sup>439</sup> H. Comm. on Oversight & Gov't Reform, S. Comm. on the Judiciary, & H. Comm. on the Judiciary, *DOJ's quid pro quo with St. Paul: How Assistant Attorney General Thomas Perez manipulated justice and ignored the rule of law*, 113th Cong. (2013).

<sup>440</sup> Amended Complaint, *United States ex rel. Newell v. City of Saint Paul*, No. 0:09-cv-1177 (D. Minn. Mar. 12, 2012).

<sup>441</sup> U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011).

<sup>442</sup> *Id.*

<sup>443</sup> H. Comm. on Oversight & Gov't Reform, S. Comm. on the Judiciary, & H. Comm. on the Judiciary, *DOJ's quid pro quo with St. Paul: How Assistant Attorney General Thomas Perez manipulated justice and ignored the rule of law*, 113th Cong. (2013).

<sup>444</sup> *Id.*

### *THE CONSEQUENCES OF THE QUID PRO QUO*

The Justice Department's *quid pro quo* with St. Paul is a terrifying example of improper influence circumventing the rule of law to arrive at a politically favored result. But the *quid pro quo* is not merely a theoretical proposition. The *quid pro quo* had direct and discernible real-world effects. The manner in which the Department of Justice – and in particular Assistant Attorney General Thomas Perez – sought to encourage a private litigant to forego its Supreme Court appeal and the leverage used to achieve that goal have lasting consequences for taxpayers, future whistleblowers, and the rule of law.

First, the *quid pro quo* had a direct cost to the American taxpayers of over \$200 million. According to the Justice Department memorandum analyzing the *Newell* case, St. Paul's fraud totaled over \$86 million.<sup>445</sup> Because the False Claims Act allows for recovery up to three times the amount of the fraud, the United States was poised to potentially recover over \$200 million.<sup>446</sup> The deal reached by Assistant Attorney General Thomas Perez prevented the United States from ever having a chance to recover that money – and odds were high that the case would be successful. The Administration was so unconcerned about the potential recovery for taxpayers that then-HUD official Elliot Minberg offhandedly told the Committee that \$200 million “wasn't all that much money anyway.”<sup>447</sup>

Second, the *quid pro quo* sets a bad precedent for future whistleblowers. Without the assistance of private whistleblowers in uncovering waste, fraud, and abuse, the Justice Department's enforcement of the False Claims Act would not be as robust. In Perez's orchestrated deal, the Department abandoned the whistleblower – who possessed a strong case of “particularly egregious” fraud – and used his case as a bargaining chip for political ends. This type of treatment and horse trading will likely discourage other potential whistleblowers from risking their time, money, and reputations to fight fraud.

Third, the actions of the Justice Department in facilitating and executing the *quid pro quo* represent a tremendous disregard for the rule of law. Rather than allowing the Supreme Court to impartially adjudicate *Magner*, an appeal that the Court had affirmatively chosen to hear, Perez openly worked to get the appeal off of the Court's docket. Rather than allowing the normal intervention decision-making process to occur within the Civil Division, Perez usurped the process to ensure his preferred result. Perez violated internal controls and exerted arbitrary authority to manipulate the Supreme Court's docket and prevent adjudication of an uncertain legal doctrine, and he did it all for purely political purposes.

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<sup>445</sup> U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011).

<sup>446</sup> In his amended complaint, Newell valued the fraud at \$62 million, meaning the government could have recovered over \$180 million. See First Amended Complaint, *United States ex rel. Newell v. City of St. Paul, Minnesota*, No. 09-SC-1177 (D. Minn. filed Mar. 12, 2012).

<sup>447</sup> H. Comm. on Oversight & Gov't Reform, S. Comm. on the Judiciary, & H. Comm. on the Judiciary, *DOJ's quid pro quo with St. Paul: How Assistant Attorney General Thomas Perez manipulated justice and ignored the rule of law*, 113th Cong. (2013).

As a whole, the Justice Department's *quid pro quo* with the City of St. Paul demonstrated the Administration's willingness to put ideology over objectivity and politics over the rule of law. The Justice Department sacrificed its own reputation and \$200 million in taxpayer recovery to protect a politically favored but legally questionable doctrine from Supreme Court scrutiny. The *quid pro quo* will likely have lasting consequences to the American taxpayers, but it should be a stark reminder to how politicized public servants can improperly influence the machine of government.

## BAD SCIENCE MAKES BAD RULES

Since 2009, the Obama Administration has continually relied upon bad science to make bad rules, choosing to rely on its political agenda rather than “sound science” to craft regulations and justify actions that are harmful to economic growth and job creation. One example of the Administration’s use of bad science to further its agenda is found in the U.S. Environmental Protection Agency’s (“EPA”) action related to the calculation of methane emissions at natural gas production sites. In this instance, the EPA furthered its well-established policy goal of legislating climate change at the expense of using sound science to establish well-informed rules. It also appears that this was an attempt by EPA to limit and regulate the natural gas industry and in particular the practice of hydraulic fracturing.

### *RECALCULATING METHANE EMISSIONS*

Hydraulic fracturing has long been credited with ushering in a period of expansive natural gas production in the United States, allowing operators to tap resources long thought to be unobtainable. However, many environmental groups criticize hydraulic fracturing because they feel that it is detrimental to the water supply, despite the fact that there have been limited examples of hydraulic fracturing actually contaminating drinking water. Increases in domestic natural gas production have been credited with creating many high-paying jobs and increased access to affordable energy for the American people. Additionally, increased natural gas resources have allowed for the potential of making the United States a net exporter of natural gas. EPA’s attempts to limit natural gas production by way of the recalculation of methane emissions during production reflect how political goals have trumped proper government action and have been carried out at the expense of the American taxpayer.

In 2011, EPA re-established estimates for methane emissions produced during natural gas development. These estimates were subsequently provided to an international body, the Intergovernmental Panel on Climate Change as a correction to previous estimates. The revision estimated increased methane emissions from natural gas systems between 46.5 and 119.7 percent each year between 1990 and 2008.<sup>448</sup> EPA’s revisions appear to have been calculated in an attempt to induce further regulation on the natural gas industry. However, EPA’s estimates were strongly criticized by studies and reports that analyzed EPA’s data. In a 2011 report by IHS CERA it was found that EPA’s methodology was so flawed that it “should not be used as a basis for analysis and decision making.”<sup>449</sup> A study by the URS Corporation concluded that EPA potentially overestimated methane emissions by 1200 percent.<sup>450</sup>

The Committee raised concerns about the “bad science” of EPA’s methane emission calculations in a December 6, 2011, letter to EPA Administrator Lisa Jackson. The letter raised concerns about how the miscalculation on EPA’s part could create a “ripple effect” in terms of misleading policymakers

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<sup>448</sup> EPA, *Recalculations and Improvements*, 2011 U.S. GREENHOUSE GAS INVENTORY REPORT, available at <http://epa.gov/climatechange/emissions/usinventoryreport.html>.

<sup>449</sup> IHS CERA, *MISMEASURING METHANE: ESTIMATING GREENHOUSE GAS EMISSIONS FROM UPSTREAM FROM UPSTREAM NATURAL GAS DEVELOPMENT 5* (2014), available at <http://www.cred.org/wp-content/uploads/2014/07/Mismeasuring-Methane-.pdf>.

<sup>450</sup> URS Gas Well Completion Data Analysis, Nov. 28, 2011, available at <http://epa.gov/quality/informationguidelines/documents/12003-attB.pdf>.

and investors as to the environmental impact of natural gas as well as contaminating regulatory cost-benefit analysis conducted by the agency in future rulemaking. The Committee was also concerned about how the inaccurate figures could affect the natural gas industry, which at the time, and currently remains, an area of high economic growth within the United States, generating revenue and creating jobs. Shortly after the Committee sent its letter, EPA briefed the Committee on its re-calculation of methane emissions and stood by its figures. However, in April 2013, EPA produced a report on methane emissions from natural gas production in which it lowered its estimation of emissions from the period of 1990 through 2010.<sup>451</sup> In fact, EPA reported that natural gas producers had actually lowered methane emissions across that timeline. Despite the EPA report, many environmental groups have still called for tighter regulation of methane emissions from natural gas sites.

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<sup>451</sup> <http://bigstory.ap.org/article/epa-methane-report-further-divides-fracking-camps>

## ACORN: ABUSE OF FEDERAL FUNDS AND EVADING THE LAW

The Association of Community Organizations for Reform Now (“ACORN”) first came under the scrutiny of the Committee on Oversight and Government Reform (the “Committee”) in 2009, when then-Ranking Member Darrell Issa began an investigation of the organization’s political activities. ACORN was founded in 1970 by Wade Rathke, and through a network of relationships with banks, federal and state agencies, and other nonprofit groups, ACORN became a “major force in helping low-income families buy homes and bringing marginalized voters to the polls.”<sup>452</sup> The Committee’s oversight of ACORN’s activities took place after a number of complaints about the organization surfaced, including allegations of improper political activity, voter fraud, embezzlement and corporate mismanagement.<sup>453</sup>

The Committee ultimately found that ACORN used a complex organizational structure of overlapping nonprofit community initiatives and political lobbying activities to conceal the partisan political use of taxpayer and private monies originally designated for the public benefit. Over time, ACORN grew to include hundreds of subsidiary organizations; of particular importance are affiliates Project Vote and ACORN Housing. ACORN, a 501(c)(4) corporation,<sup>454</sup> used its nonprofit corporate status to engage its affiliated organizations, specifically their 501(c)(3) tax-exempt nonprofits, in improper political electioneering prohibited by the Internal Revenue Service (“IRS”). Through the intermingling of ACORN and its subsidiaries’ assets, activities, and employees, ACORN was able to actively campaign in a partisan manner with the use of federal funds, a prohibition clearly spelled out with IRS Code. Additionally, ACORN used these funds, and the funds of tax-exempt nonprofit affiliate organizations, to actively commit voter fraud and evade IRS and Campaign finance laws. Ultimately the toll of illegality was too much and ACORN dissolved in 2010, not long after Congress continually voted to defund the organization (which is further discussed below).

### *IMPROPER USE OF FEDERAL FUNDS*

Many argue that it is undisputed that ACORN engaged in political partisan activity.<sup>455</sup> However, ACORN was also an organization that received a substantial amount of federal funds, a total of up to \$53 million from 1994 up until Congress defunded ACORN in 2009. Nonprofit organizations, such as ACORN and its affiliates, are barred from receiving federal funds when they engage in partisan political activity. Under Section 18 of the Lobbying Disclosure Act of 1995<sup>456</sup> prohibits 501(c)(4) organizations from receiving “federal grants, loans, or other awards if they are engaged in lobbying activities. Furthermore, such lobbying activities while permissible are limited.”<sup>457</sup> For example, involvement and participation in political campaigns cannot be the organization’s primary activity.

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<sup>452</sup> Lena H. Sun, *ACORN Reportedly on the Verge of Bankruptcy*, WASH. POST, Mar. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032003172.html>.

<sup>453</sup> See generally Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Is ACORN Intentionally Structured as a Criminal Enterprise?* 111th Cong. (2009).

<sup>454</sup> Under the IRS Tax code 501(c)(4) organizations account for social welfare organizations. These organizations are not tax-exempt, unlike 501(c)(3)s which are tax-exempt charitable organizations.

<sup>455</sup> See e.g. Glenn Beck, *Investigating ACORN*, FOX NEWS, May 8, 2009, available at <http://www.foxnews.com/story/0,2933,519520,00.html> (last visited May 8, 2009).

<sup>456</sup> Erika Lunder & L. Paige Whitaker, Cong. Res. Serv., 501(C)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws 5 (2009).

<sup>457</sup> ERIKA LUNDER, CONG. RESEARCH SERV., TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE (2007).

By intentionally blurring the legal distinctions between tax-exempt and non-exempt entities, ACORN diverted taxpayer and tax-exempt monies into partisan political activities.

ACORN, as a 501(c)(4) social welfare organization, was limited to participation in lobbying efforts that further the purpose of the organization. ACORN's primary purpose was to help marginalized individuals find affordable housing and register to vote. Furthermore, a number of ACORN affiliates, most notably, Project Vote, are 501(c)(3) charitable organizations. Organizations filled as 501(c)(3)'s are tax-exempt and are therefore, "absolutely prohibited directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office."<sup>458</sup> Project Vote is a "national nonpartisan, nonprofit...that works to empower, educate, and mobilize low-income, minority, youth, and other marginalized and under-represented voters." Project Vote hired ACORN to conduct voter registration drives. Both ACORN and its affiliates were non-profit organizations with the primary purpose of social welfare, and therefore their activities had to further the purpose of social welfare as opposed to impermissible political advocacy.

However, the activities of ACORN and Project Vote became increasingly intertwined blurring the lines between the 501(c)(4) and 501(c)(3) distinction. The use of federal funds under 501(c)(3)'s in any partisan political purpose is expressly prohibited by the IRS<sup>459</sup> and the use of federal funds under 501(c)(4)'s is also expressly limited. Although limitations existed, ACORN continuously engaged in substantial partisan political activities that reached beyond their organizations purpose and into the realm of illegality. For example, during the 2008 election cycle ACORN became a prominent "player in the Democrats' effort to win the White House."<sup>460</sup>

Overall improper lobbying became the centerpiece to ACORN's business. While the purpose of ACORN and Project Vote were to enable and assist marginalized individuals to register to vote, their activities went far beyond crossing the line of non-partisan activities. Lobbying was a substantial part of what ACORN did. It endorsed Senator Sherrod Brown, Representative Albert Wynn, and Representative Donna Edwards. ACORN kept donor records from the Clinton, Kerry and Obama campaigns with the intent to engage in prohibited communications. ACORN received federal funding yet engaged in improper lobbying. ACORN and its nonprofit affiliates do not have separate accounts. Neither ACORN nor any of its affiliates properly reported their political activities to the IRS. The continual concealment of ACORN's activities along with the inability to decipher the line between 501(c)(4) and 501(c)(3) affiliate activities lead to numerous investigations.

#### *ILLEGAL VOTER FRAUD ACTIVITIES*

ACORN employees have continually been prosecuted for various voter fraud allegations. In June 2009, seven ACORN workers in Pennsylvania were charged with forging 51 signatures and violating election laws in advance of the 2008 presidential election.<sup>461</sup> In May 2009, two ACORN staff

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<sup>458</sup> IRS, *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations* (2014).

<sup>459</sup> *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 856 (10th Cir. 1972).

<sup>460</sup> Elizabeth Williamson and Brody Mullins, *Democratic Ally Mobilizes In Housing Crunch*, WALL ST. J., Jul. 31, 2008, at A1.

<sup>461</sup> Walter F. Roche Jr., *Another Allegheny ex-ACORN worker will stand trial*, PITT. TRIBUNE-REV., June 5, 2009, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s\\_628302.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_628302.html).

members were prosecuted in Clark County, Nevada for paying bonuses to workers who registered over 21 individuals per day.<sup>462</sup> In July 2008, three ACORN workers were convicted of voter fraud in Kansas City because they flooded voter registration rolls with over 35,000 false or questionable registration forms.<sup>463</sup> In March 2008, an ACORN employee in West Reading, Pennsylvania, was sentenced to up to 23 months in prison for identity theft and tampering with records,<sup>464</sup> and forging 29 voter registration forms in order to collect a cash bonus.<sup>465</sup>

A series of illegal activities within ACORN were prosecuted in 2007. Three ACORN employees pled guilty, and four more were charged, in the worst case of voter registration fraud in Washington state history.<sup>466</sup> In 2007, a man in Reynoldsburg, Ohio was indicated on two felony counts of illegal voting and false registration, after being registered by ACORN to vote in two separate counties.<sup>467</sup> In 2006, eight ACORN employees in St. Louis, Missouri were indicted on federal election fraud charges.<sup>468</sup> In 2005, two ex-ACORN employees were convicted in Denver, CO of perjury for submitting false voter registrations.<sup>469</sup> In 2004, a grand jury indicted a Columbus, Ohio ACORN worker for submitting a false signature and false voter registration form.<sup>470</sup> In 1998, a contractor with ACORN-affiliated Project Vote was arrested in Arkansas for falsifying 400 voter registration cards. In addition to Nevada, Missouri, Pennsylvania, Washington, Arkansas, Colorado, Kansas, and Ohio, there have been prosecutions against ACORN workers in Connecticut, Texas, Wisconsin, and Michigan.<sup>471</sup> These cases highlight a few examples of the fraudulent activity conduct by ACORN.

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<sup>462</sup> See ATTORNEY GENERAL'S COMPLAINT, available at <http://sos.state.nv.us/information/news/press/2009/pdf/complaint-acorn> (last visited June 22, 2009).

<sup>463</sup> Department of Justice Press Release, available at <http://kansascity.fbi.gov/dojpressrel/pressrel07/identitytheft010507.htm> (last visited May 4, 2009).

<sup>464</sup> News Staff, *West Reading man gets jail for phony forms*, READING EAGLE (Mar. 1, 2008), available at <http://www.readingeagle.com/article.aspx?id=82467> (last visited July 8, 2009).

<sup>465</sup> Editorial, *RNC: Obama & Acorn Fact Sheet*, FOX. BUS. NEWS, Oct. 4, 2008, available at: <http://www.foxbusiness.com/story/rnc-obama--acorn-fact-sheet/> (last visited June 1, 2009).

<sup>466</sup> Keith Ervin, *Three plead guilty in fake voter scheme*, SEATTLE TIMES, Oct. 30, 2007, at B5; See also Shailla Dewan, *A Vote Drive By Democrats In Louisiana Stirs Concern*, N.Y. TIMES, Jun. 15, 2008, available at: <http://www.nytimes.com/2008/06/15/us/politics/15vote.html> (last visited June 10, 2009).

<sup>467</sup> Bruce Cadwallader, *Man voted in 2 counties in 1 election*, COLUMBUS DISPATCH, May 9, 2007, at 04B.

<sup>468</sup> *Guilty pleas in election fraud*, AP, Apr. 3, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9D00E7DB153DF930A35757C0A96E9C8B63&partner=rsnyt&emc=rss> (last visited June 22, 2009).

<sup>469</sup> *Briefing*, ROCKY MTN NEWS, Jan. 4, 2005 at 21A.

<sup>470</sup> Terrence Scanlon, *Democratic Deception*, WASH. TIMES, Oct. 18, 2004, available at <http://washingtontimes.com/news/2004/oct/18/20041018-093522-3974r/> (last visited June 2, 2009).

<sup>471</sup> See generally Reggie Sheffield, *Former temp worker accused of bogus voter registrations*, PATRIOT NEWS, Jul. 24, 2008 at B02; Ken Dixon, *ACORN voter signups questioned*, CONN. POST, Aug 16, 2008, available at: [http://www.connpost.com/news/ci\\_10219729](http://www.connpost.com/news/ci_10219729) (last visited March 10, 2009); Alan Bernstein, *ACORN planting voter registrars in certain areas*, HOUSTON CHRONICLE, Aug. 17, 2008 at B1; Molly Ball, *Election fraud task force formed; Investigators already looking into voter registration issues*, LAS VEGAS REVIEW-J., Aug. 1, 2008 at 2B; Larry Sandler, *Vote workers investigated*, MILWAUKEE J.-SENTINEL, Aug. 29, 2008 at B3; Larry Sandler, *More voter registration workers under scrutiny*, MILWAUKEE J.-SENTINEL, Aug. 20, 2008 at B1; L.L. Brasier, *Bad voter applications found*, DETROIT FREE PRESS, Sept. 14, 2008 at 1.

### *TIES TO THE PRESIDENT*

President Obama was directly involved with ACORN and its affiliates in a number of capacities prior to his Presidency. As early as 1995, President Obama viewed a position in politics as a way to work as a community organizer, welcoming the label.<sup>472</sup> President Obama's previous involvement in ACORN, particularly due to its alleged partisan voter fraud activity, brought serious attention to the 2008 election cycle and heavy criticism to then-President Elect Obama. Throughout the decades prior to his Presidential election, Obama was an actor in both ACORN and its affiliates activities, whether through voter registering campaigns or direct legal counsel. In 1992, President Obama headed on of Project Vote's voter registration campaigns which registered a total of 150,000 voters.<sup>473</sup> The campaign led to election of Senator Carol Mosely Braun. Additionally, Obama represented ACORN in a lawsuit. The lawsuit alleged ACORN violated federal polling laws.<sup>474</sup> Most notably, Obama, prior to his election, had his campaign pay over \$800,000 to Citizen Services Inc., and affiliate of ACORN, for "get-out-the-vote" efforts. However, the Obama Administration and campaign vehemently denied any ties between the President and ACORN's questionable voter registration drives.<sup>475</sup>

### *A SHELL OF A CORPORATION*

Apart from the improper use of federal funds for lobbying and electioneering prohibited under the Lobbying Disclosure Act, ACORN was the product of nothing more than a corporate "shell". The management of ACORN was ridden with flaws from lack of corporate formalities, comingling of assets, illegal voter fraud, coercive and threatening practices, and embezzlement. ACORN hid behind a paper wall of nonprofit corporate protections to conceal a criminal conspiracy on the part of its directors, to launder federal money in order to pursue a partisan political agenda and to manipulate the American electorate.

One of the most problematic and critical aspect of ACORN's management was the comingling and intentional blurring of lines between ACORN, a taxed organization, and its tax-exempt affiliates. The manipulation of the corporate form made it utterly impractical, if not impossible, to determine which funds were supporting which activities. It was regularly alleged that ACORN was merely using their 501(c)(4) shield to transfer funding from tax-exempt nonpartisan 501(c)(3) and in turn using the funds for partisan political lobbying, which in itself was potentially violative of the Lobbying Disclosure Act. Furthermore, the board of ACORN affiliate Project Vote was entirely composed of ACORN staff and two, dues-paying ACORN members, some of whom were unaware they were even on a board of directors.<sup>476</sup> Additionally, employees of ACORN were often times employees of Project Vote. The comingling of staff, employees, and assets created an extremely

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<sup>472</sup> Peter Dreier, *Will Obama Inspire a New Generation of Organizers?*, DISSENT, July 3, 2007, available at [http://www.dissentmagazine.org/online\\_articles/will-obama-inspire-a-new-generation-of-organizers](http://www.dissentmagazine.org/online_articles/will-obama-inspire-a-new-generation-of-organizers).

<sup>473</sup> Charlotte Allen, *From Little ACORNs, Big Scandals Grow*, THE WEEKLY STANDARD, Nov. 3, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/015/746zemwq.asp?page=1>.

<sup>474</sup> *Id.*

<sup>475</sup> Stephanie Strom, *Acorn Report Raises Issues of Legality*, NY TIMES, Oct. 21, 2008, [http://www.nytimes.com/2008/10/22/us/22acorn.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2008/10/22/us/22acorn.html?pagewanted=all&_r=1&).

<sup>476</sup> Charlotte Allen, *From Little ACORNs, Big Scandals Grow*, THE WEEKLY STANDARD, Nov. 3, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/015/746zemwq.asp>.

problematic environment, since there was no way to determine which assets and activities fell under ACORN and which of those fell under Project Vote. The distinction is crucial, as explained above, in regards to which funds can support which activities due to the two different tax statuses of the organizations.

In an extraordinary measure to avoid liability the organization swept allegations of Dale Rathke, brother of founder Wade Rathke, embezzling over one million dollars<sup>477</sup> under the rug for nearly a decade before disclosing the embezzlement to members of the organization. The embezzlement began between 1998 and 2000 but was not disclosed until 2008. In the aftermath of the initial embezzlement allegations in 2000, Dale Rathke entered into a contract to repay \$30,000 of stolen funds a year until the entire amount was repaid, which would result in repayment plan of over 30 plus years.<sup>478</sup> In the mean time, Dale Rathke remained a paid employee of ACORN up until the time his embezzlement was finally disclosed. Overall, ACORN as an organization was poorly run, which enabled it to blur the lines between permissible and impermissible activities of its own, as well as those of its affiliates, such as Project Vote.

### *DEFUND ACORN ACT*

In response to allegations that the Association of Community Organizations for Reform Now (“ACORN”) had engaged in systemic fraud in furtherance of a partisan political agenda while claiming nonprofit corporate protections, the Committee on Oversight and Government Reform, under the leadership of then-Ranking Member Darrell Issa, conducted extensive oversight of ACORN’s activities. The Minority Staff issued a report in 2009 finding, among other things, that the alleged nonprofit had hid behind a paper wall of nonprofit corporate protections to conceal a criminal conspiracy on the part of its directors, to launder federal money in order to pursue a partisan political agenda and to manipulate the American electorate.<sup>479</sup> Self-identified as a nonprofit corporation established for the organizing of a constituency of low-to-moderate-income people across the United States, ACORN was registered to do business in 43 states and the District of Columbia, had organized over 1200 neighborhood chapters in 104 cities<sup>480</sup> and received millions of federal taxpayer dollars through federal grants.<sup>481</sup> The report, which detailed stories of voter registration fraud, embezzlement of funds by corporate fiduciaries, mismanagement of operations by corporate officers and employee training manuals that “clearly detail, condone and . . . require illegal acts,”<sup>482</sup> was followed by a series of investigations by numerous Secretaries of States, federal agencies and state and local prosecutors.<sup>483</sup>

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<sup>477</sup> Testimony of David Caldwell, HOUSE COMM. OVERSIGHT AND GOV’T REFORM & HOUSE JUDICIARY COMM., ACORN FORUM, Dec. 1, 2009, at 2.

<sup>478</sup> This would account for thirty years of repayment before the one million dollars embezzled by Rathke will be repaid.

<sup>479</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Is ACORN Intentionally Structured as a Criminal Enterprise?*, 111th Cong. 3 (2009).

<sup>480</sup> *Id.* at 12.

<sup>481</sup> Cynthia Bowers, *ACORN May Lose Gov’t Funds after Scandal*, CBS NEWS, Sept. 15, 2009, <http://www.cbsnews.com/news/acorn-may-lose-govt-funds-after-scandal/>.

<sup>482</sup> *Id.* at 8.

<sup>483</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Follow the Money: ACORN, SEIU and their Political Allies*, 111th Cong. 2 (2010).

In the wake of the 2009 Minority Staff report, Speaker John Boehner introduced legislation seeking to bar ACORN from receiving any funds from the Federal Government. The legislation, titled the “Defund ACORN Act” and supported by over 160 Members of the House, prohibited the award of any federal funds, contracts, grants or other agreements to an organization that has been indicted for violating campaign financing laws, has had its charter cancelled due to failure to comply with lobbying disclosure requirements, or maintains employees that have been indicted under laws relating to an election for federal or state office.<sup>484</sup> Language prohibiting the availability of funds for ACORN, including any of its affiliates, subsidiaries or allied organizations was ultimately included in enacted language as part of the Continuing Appropriations Resolution of 2010,<sup>485</sup> the FY 2010 Consolidated Appropriations Act,<sup>486</sup> the Department of Interior, Environmental and Related Agencies Appropriations Act of 2010<sup>487</sup> and the Department of Defense Appropriations Act of 2010.<sup>488</sup>

ACORN thereafter sued the United States of America in a Federal District Court in New York.<sup>489</sup> Alleging that the legislative prohibition on fund distributions was unconstitutional, ACORN continued its argument before the Second Circuit Court of Appeals in New York. Supporting the authority of Congress, the court stated: “Congress must have the authority to suspend federal funds to an organization that has admitted to significant mismanagement.”<sup>490</sup> Even before the Circuit Court’s had issued its decision, 15 of the organizations 30 state chapters<sup>491</sup> had been closed and the organization had announced plans to disband.<sup>492</sup> Ironically, it was on Election Day in 2010 that ACORN announced its plans to liquidate operations under Chapter 7 of the Federal Bankruptcy Code.<sup>493</sup>

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<sup>484</sup> Defund ACORN Act, H.R. 3571, 111th Cong. (as introduced, Sept. 15, 2009).

<sup>485</sup> Pub. L. No. 111-68, § 163.

<sup>486</sup> Pub. L. No. 111-117, §§ 418, 534, & 511.

<sup>487</sup> Pub. L. No. 111-88, § 427.

<sup>488</sup> Pub. L. No. 111-118, § 8013.

<sup>489</sup> ACORN v. United States, 552 F. Supp. 2d 285 (2009).

<sup>490</sup> ACORN v. United States, 518 F.3d 125, 137 (2010).

<sup>491</sup> Ian Urbina, *Acorn on Brink of Bankruptcy, Officials Say*, NEW YORK TIMES (Mar. 19, 2010), available at [http://www.nytimes.com/2010/03/20/us/politics/20acorn.html?\\_r=0](http://www.nytimes.com/2010/03/20/us/politics/20acorn.html?_r=0) (last accessed Dec. 16, 2014).

<sup>492</sup> Associated Press, *Acorn Closing in Wake of Scandal*, FOX NEWS (Mar. 22, 2010), available at <http://www.foxnews.com/story/2010/03/22/acorn-closing-in-wake-scandal/> (last accessed Dec. 16, 2014).

<sup>493</sup> Michael A. Memoli, *ACORN filing for Chapter 7 bankruptcy*, L.A. TIMES (Nov. 2, 2010), available at <http://articles.latimes.com/2010/nov/02/news/la-pn-acorn-bankruptcy-20101103> (last accessed Dec. 16, 2014).

## HATCH ACT VIOLATIONS

The Hatch Act prevents taxpayer money from being used for political activity.<sup>494</sup> In particular, it prohibits federal employees from using their official authority or influence for the purpose of interfering with or affecting the results of an election.<sup>495</sup> When acting in an official government capacity, the Hatch Act prohibits an employee from activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group.<sup>496</sup>

### *THE COMMITTEE'S OFFICE OF POLITICAL AFFAIRS INVESTIGATION*

President Obama closed the Office of Political Affairs in 2011, just days before the U.S. Office of Special Counsel issued a report that found the basic structure of OPA violated federal law,<sup>497</sup> and that the political activities of OPA staff amounted to a misuse of taxpayer funds.<sup>498</sup> On January 24, 2014, the White House announced the reinstatement of OPA,<sup>499</sup> for the purpose of “defending Democratic control of the Senate and taking back the House from Republicans.”<sup>500</sup>

The Committee’s concern about the reopening of OPA under the name of Office of Political Strategy and Outreach (“OPSO”) was heightened when U.S. Special Counsel Carolyn Lerner told the Committee that the White House did not consult OSC before opening the office.<sup>501</sup> In response to this information, the Committee wrote to the White House on March 18, 2014, to request documents and a briefing that would shed light on whether OPSO was complying with the Hatch Act.<sup>502</sup> Then-Counsel to the President Kathryn Ruemmler responded with a ten-sentence letter that contained no documents and made no mention of the requested briefing, and concluded by stating that “I trust that this addresses your interest in the new office.”<sup>503</sup>

Finding Ms. Ruemmler’s response insufficient, the Committee again requested the same documents and information, and the White House again failed to provide the information or a briefing.<sup>504</sup> Because there was no indication that the White House would comply with the Committee’s multiple requests, the Committee invited David Simas, Director of OPSO, to testify at a Committee hearing in

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<sup>494</sup> 5 U.S.C. §§ 7321-632.

<sup>495</sup> 5 U.S.C. § 7323(a)(1).

<sup>496</sup> U.S. Office of Special Counsel, *Less Restricted Employees – Political Restrictions and Prohibited Activities*, available at <http://www.osc.gov/haFederalLessRestrictionandActivities.htm>.

<sup>497</sup> Josh Gerstein, *New Obama politics shop faces old questions*, POLITICO, Jan. 30, 2014.

<sup>498</sup> See U.S. Office of Special Counsel, *Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections* (Jan. 2011), available at <https://www.judicialwatch.org/files/documents/2011/2006MidTermElectionWHPolActivities.pdf>.

<sup>499</sup> The White House, Press Release, *President Obama Announces Key White House Posts* (Jan. 24, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/24/president-obama-announces-key-white-house-posts>.

<sup>500</sup> Michael D. Shear, *White House Comeback for Political Affairs Office*, N.Y. TIMES, Jan. 24, 2014, available at [http://www.nytimes.com/2014/01/25/us/politics/white-house-comeback-for-political-affairs-office.html?\\_r=0](http://www.nytimes.com/2014/01/25/us/politics/white-house-comeback-for-political-affairs-office.html?_r=0).

<sup>501</sup> Letter from Hon. Carolyn N. Lerner, U.S. Special Counsel, to Hon. Darrell F. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 11, 2014).

<sup>502</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Denis McDonough, Chief of Staff, White House (Mar. 18, 2014).

<sup>503</sup> Letter from Kathryn H. Ruemmler, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Mar. 26, 2014).

<sup>504</sup> Letter from W. Neil Eggleston, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (June 13, 2014).

which Members and the public could hear him explain how OPSO uses taxpayer dollars.<sup>505</sup> It was not until one week after the Committee invited Mr. Simas to testify that the White House finally acknowledged the Committee's outstanding request for documents and a briefing.<sup>506</sup> It was immediately clear, however, that the White House's document production was not made in good faith because the production consisted primarily of the 2008 Waxman report and the 2011 OSC report.<sup>507</sup> The White House also refused to make Mr. Simas available to answer the Committee's questions about the office he directs and stated the invitation for him to testify was "not appropriate."<sup>508</sup>

The Committee was left with no choice but to issue a subpoena to Mr. Simas to compel him to answer the Committee's questions at a hearing on July 16, 2014, with the understanding that a briefing might obviate the need for Mr. Simas to appear.<sup>509</sup> An attorney from the White House Counsel's Office briefed Committee staff on July 15, 2014. Mr. Simas did not attend the briefing, nor did any other staff from OPSA. The next day, Mr. Simas did not appear, even to announce that the President had asserted privilege over this testimony. Rather, the White House chose to ignore the *Miers* precedent in favor of an extreme position that would expand the concept of separation of powers to the point that one of Congress' most important oversight tools—the subpoena—would be severely diminished.<sup>510</sup> Indeed, in prior administrations, White House political officials have encountered difficulties squaring their activities with the prohibitions on political or campaign-related activities of federal officials outlined in the Hatch Act. It strains credulity that the Obama Administration has, in contrast to its predecessors, uniquely resolved all concerns about political activity and should not be subject to the same level of congressional oversight requests as previous administrations.

The Committee offered Mr. Simas a second chance to appear at a reconvened hearing on July 25, 2014, but Mr. Simas again refused to comply with the subpoena.<sup>511</sup> Rather than proceed immediately to enforcing the subpoena, the Committee engaged in the accommodations process with the White House to try to find a way to hear from Mr. Simas.<sup>512</sup> Although the Committee rejected the White House's claim that the President's advisers are absolutely immune from being compelled to testify before Congress, the Committee engaged with the White House to find another way to get the information.<sup>513</sup>

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<sup>505</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to David Simas, Dir., Office of Political Strategy & Outreach, White House (July 3, 2014).

<sup>506</sup> Letter from W. Neil Eggleston, Counsel to the President, White House, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (July 10, 2014).

<sup>507</sup> *Id.*

<sup>508</sup> Letter from W. Neil Eggleston, *supra* note 506.

<sup>509</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to W. Neil Eggleston, Counsel to the President, White House (July 11, 2014).

<sup>510</sup> *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

<sup>511</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to W. Neil Eggleston, Counsel to the President, White House (July 18, 2014).

<sup>512</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to W. Neil Eggleston, Counsel to the President, White House (July 24, 2014).

<sup>513</sup> *Id.*

On August 12, 2014, to further accommodate the White House's separation of powers concerns, the Committee narrowed the scope of its original documents request.<sup>514</sup> The request covered three topics, including OPSO's purpose and basic governance, documents related to two specific presidential trips, and OPSO's involvement in coordinating political activity for Cabinet officials.<sup>515</sup> The narrowed request did not produce any additional documents, nor did the White House state if or when the Committee would hear from Mr. Simas. Consequently, the Committee issued a subpoena to compel the production of the August 12, 2014 request.<sup>516</sup>

On August 29, 2014, after eight letters and two subpoenas, the White House provided documents related to OPSO. The documents indicate that the Committee's investigation resulted in the White House sending multiple notices instructing staff to comply with the Hatch Act. Moreover, the White House seemingly consulted with OSC regarding OPSO as a result of the Committee's inquiry.

### *2012 PRESIDENTIAL ELECTION: CABINET SECRETARIES VIOLATING THE HATCH ACT*

The Committee's long-standing interest in political activity in the White House was based in part on reports that two members of President Obama's Cabinet violated the Hatch Act during the 2012 election cycle. The Committee learned that Labor Secretary Hilda Solis solicited campaign contributions from a subordinate employee by calling the employee's government-issued BlackBerry.<sup>517</sup> Health and Human Services Secretary Kathleen Sebelius attended an event at taxpayer expense, and then urged the audience to make sure President Obama "continues to be President for another four years."<sup>518</sup>

The Committee invited Sebelius and Solis to testify about using taxpayer dollars to support partisan political activity, as well as the White House's role in coordinating such activity. Unfortunately, Ranking Member Cummings rejected the Committee's bipartisan offer to jointly invite Sebelius and Solis to testify despite the Minority's expressed desire to see evidence of wrongdoing and exhaust other options of looking at White House coordination of problematic political activity. Moreover, Sebelius and Solis retreated from appearing before the Committee by declining hearing invitations.

The Clinton White House, Bush White House, and other Administrations before have all faced congressional oversight of political activity supported by taxpayer funds. Under this Administration, like previous Administrations, members of President Obama's cabinet have committed violations of the Hatch Act, which draws a line between campaign and official business. The Committee has written to House Appropriations Chairman Hal Rogers, urging that his Committee continue oversight of OPSO.

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<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

<sup>516</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to W. Neil Eggleston, Counsel to the President, White House (August 22, 2014).

<sup>517</sup> Paul Pringle, *Solis Faced Federal Inquiry Concerning Role in Obama Fundraiser*, L.A. TIMES, Jan. 31, 2014, available at <http://www.latimes.com/local/la-me-0201-solis-inquiry-20140201-story.html>.

<sup>518</sup> Byron Tau, *Sebelius Will Reimburse Taxpayers for 'Political' Trip*, POLITICO, Mar. 2, 2012, available at <http://www.politico.com/politico44/2012/03/sebelius-rescinds-endorsement-will-reimburse-taxpayers-116248.html>.

## CHAPTER 2. FEDERAL BINGE: STIMULUS SPENDING, FEDERAL BAILOUTS AND TAXPAYER FUNDING

As 2014 comes to a close, the U.S. national debt has climbed to nearly \$13 trillion – more than double the amount of publicly held debt existing at when President Barack Obama took office on January 20, 2009.<sup>519</sup> The amount of debt owed by the United States increases when Federal Government revenues – mainly received by the government in the form of taxes paid by individual and corporate citizens – is less than Federal Government spending. The United States Postal Service has been a continuing problem for America's bottom-line, and efforts at reform have faced considerable opposition. As detailed below, the Postal Service is in dire need of reorganization, notwithstanding the new Postmaster General's hope that it can "continue to evolve and operate more like a private-sector business."<sup>520</sup> Wasteful spending under the American Recovery and Reinvestment Act and the Troubled Asset Relief Program, as discussed below, help to highlight the Federal Government's binge spending. This section of the report highlights the Committee's oversight efforts to provide Americans with information about how their money is spent.

### IT'S TIME TO STOP THE BLEEDING: U.S. POSTAL REFORM

Today, the United States Postal Service is insolvent. Since its peak in fiscal year 2006, mail volume is down more than 25 percent and revenue is down \$10 billion.<sup>521</sup> In fiscal year 2012, the Postal Service posted a record loss of \$15.9 billion, its largest loss in history.<sup>522</sup> With the close of fiscal year 2014, the Postal Service has posted billion dollar losses for eight straight years and defaulted on more than \$20 billion in payments owed to the Federal Government to prefund retiree health care benefits that have already been earned by postal employees.<sup>523</sup> The Postal Service's debt to the Federal Government is only expected to increase over time, as mail volume continues to diminish. This debt comes in a number of forms, including \$15 billion in direct debt to the Treasury, as well as billions in employee benefit liabilities the Postal Service may not be able to afford. Unfortunately, rather than reform the system so that the Postal Service can function as the independent business it has been since 1970, Ranking Member Elijah Cummings and other Members of Congress in both chambers have repeatedly blocked efforts to streamline the struggling agency. Those opposed to reform continue to avoid seeing what has become reality: the U.S. Postal Service must be reformed or hundreds of thousands of Americans could lose retirement benefits they were promised after a lifetime of work and all Americans could lose access to affordable mail services. It is time to stop the bleeding.

While the growth of package delivery as a result of the e-commerce boom has been of tremendous benefit to the Postal Service, it is not enough to fully replace the revenue lost from Americans'

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<sup>519</sup> Matthew Bruno, *U.S. National Debt More than Doubles under Obama's Wasteful Watch*, AMERICANS FOR TAX REFORM (Dec. 4, 2014, 9:30 AM), <http://www.atr.org/us-national-debt-more-doubles-under-obama%E2%80%99s-wasteful-watch>.

<sup>520</sup> Laura Stevens, *New Postmaster's Goal: Act Like Private Sector*, WALL ST. J., Nov. 23, 2014.

<sup>521</sup> U.S. Postal Serv., Annual Report (Form 10-K) (2013); U.S. Postal Serv., Annual Report (Form 10-K) (2006).

<sup>522</sup> Ron Nixon, *Postal Service Reports Loss of \$15 Billion*, N.Y. TIMES, Nov. 15, 2012.

<sup>523</sup> U.S. Postal Serv., Annual Report (Form 10-K) (2013).

continued shift away from paper-based communication and toward digital communication. Despite significant cost cutting, including restructuring that has allowed the Postal Service to reduce its workforce by more than 125,000 since 2009<sup>524</sup>, revenue is still not in line with expenses and that situation will only deteriorate as mail volume further diminishes. As a result of the Postal Service's diminishing fortunes, the agency had amassed a staggering \$113 billion in combined unfunded liabilities by the end of fiscal year 2013. These liabilities include \$84 billion in unfunded postal employee pensions, workers' compensation benefits, and health care benefits. Other liabilities include \$15 billion in debt from the U.S. Treasury and more than \$13 billion in an array of smaller liabilities such as unpaid sick leave and long-term lease agreements.<sup>525</sup> Despite operating on a self-funding basis since the Postal Reorganization Act of 1970, the Postal Service maintains an implicit federal backing and if the Postal Service fails in meeting these liabilities they will almost certainly fall on the taxpayer.

### *THE POSTAL REORGANIZATION ACT OF 1970*

In response to worker strikes that halted essential delivery services in the 1960s,<sup>526</sup> Congress enacted the Postal Reorganization Act ("PRA") in 1970. Originally a cabinet-level agency fully funded by taxpayer investment, the "Post Office Department" was transformed into the "Postal Service" by the PRA, making the agency a self-supporting, independent establishment within the executive branch. The motivation for this transition from a government-subsidized enterprise to a more accountable quasi-private entity was to give the agency the ability to manage itself, rather than rely on an often laggard Congress for even the smallest decisions on topics from postage rate increases to pay raises.

The law was immediately successful in addressing a number of concerns. Of particular note, the new Postal Service was able to introduce improved wages for postal employees that lifted many postal employees out of poverty and gave the institution much greater ability to raise revenue and make needed investments in new technology. However, one item initially left unclear by the 1970 postal reform was the division of responsibility for the pension obligations of individuals who worked for both the Post Office Department and its successor entity, the Postal Service. Prior to enactment of the Postal Reform Act in 1970, pension obligations were solely the obligation of the Federal Government and the taxpayer. In 1974, with the enactment of P.L. 93-349<sup>527</sup>, Congress attempted to clarify relative responsibilities for Civil Service Retirement System ("CSRS") pension funding. Under the new law, Congress created a framework that required the taxpayer to cover the full cost of all postal pensions up until the day the Postal Service was created and the Postal Service would be responsible for any subsequent pension costs. Since the greatest value of most pensions is earned in the last few years of employment, the Postal Service would be responsible for a greater share of the total pension costs than if the costs were allocated by simply dividing the pension costs

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<sup>524</sup> The number of career Postal Service employees declined to 491,017 at the end of FY2013, compared to 623,128 at the end of FY2009.

<sup>525</sup> U.S. Postal Serv., Annual Report (Form 10-K) (2013).

<sup>526</sup> THE PRESIDENT'S COMMISSION ON POSTAL ORGANIZATION, TOWARDS POSTAL EXCELLENCE (1968), available at <http://hdl.handle.net/2027/mdp.39015078700625>.

<sup>527</sup> Pub. L. No. 93-349, 88 Stat. 354 (1974).

by the number of years worked under each entity. The House and Senate Committee Reports<sup>528</sup> on law make the point the taxpayer should not pay for raises, and in the corresponding pension increases, unilaterally granted by the Postal Service to postal employees since the taxpayer would have no input in such discussions. Further, the Reports make clear that the full cost of future pensions being paid for by the Postal Service was an equitable exchange, explicitly endorsed by the Postal Service, in return for the free transfer of all Post Office Department employees and property to the new Postal Service.

### *DEBUNKING THE “OVERPAYMENT” MYTH*

Since the direct taxpayer subsidy to the agency ended in the early 1980s, the agency has been able to successfully function as a self-funding entity for more than 30 years. The recent losses, however, threaten that streak and could expose the taxpayer to billions in new costs. In early 2010 both the U.S. Postal Service Office of Inspector General (the “IG”) and the Postal Regulatory Commission (“PRC”)<sup>529</sup> issued reports alleging that the Office of Personnel Management’s (“OPM”) current method of allocating responsibility for CSRS pension benefits for the applicable retirees under P.L. 93–349 requires the Postal Service to shoulder an excessive share of employee retirement obligations. The U.S. Postal Service IG and the PRC proposed alternative methodologies for allocating responsibility for employee pension funding that would return between \$56 billion to \$85 billion in what they termed pension “overpayments” from the Federal government back to the Postal Service.

These claims were contested by many congressional Republicans, the Bush<sup>530</sup> and Obama<sup>531</sup> Administrations, and the Office of Personnel Management Office of Inspector General.<sup>532</sup> Ultimately, after the Government Accountability Office thoroughly debunked the USPS OIG’s claims, opponent’s of structural reform at the Postal Service moved on to other potential sources for cash that could be used to delay reform.

GAO’s report<sup>533</sup>, released in October 2011, refuted the “overpayment” argument unequivocally. First, it found that OPM’s current methodology complies with current law, despite allegations made to the contrary in the USPS OIG’s report. As the GAO report states, “Congress created USPS in 1971 as an independent, self-sustaining entity with a package of assets and obligations as well as competitive advantages and disadvantages.”

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<sup>528</sup>JEROME R. WALDIE, POSTAL SERVICE PAYMENTS TO RETIRMENT FUND, H.R. Rep. No. 93-120 (1973); GALE W. MCGEE, PAYMENTS ON UNFUNDED LIABILITY BY THE U.S. POSTAL CIVIL SERVICE RETIREMENT FUND, S. Rep. No. 93-947 (1974).

<sup>529</sup> The PRC serves as the Postal Service’s regulator. The agency approves Postal Service rate increases, new product offerings, and major service-level changes.

<sup>530</sup> Letter from Ronald P. Sanders, Assoc. Dir. for Strategic Human Res. Policy, U.S. Office of Personnel Mgmt., to John E. Potter, Postmaster Gen., U.S. Postal Serv. (Sept. 16, 2004).

<sup>531</sup> Letter from Daniel A. Green, Deputy Dir., U.S. Office of Personnel Mgmt., to David C. Williams, Inspector Gen., U.S. Postal Serv. (May 10, 2010).

<sup>532</sup> OFFICE OF THE INSPECTOR GEN., U.S. OFFICE OF PERSONNEL MANAGEMENT, A STUDY OF THE RISKS AND CONSEQUENCES OF THE USPS OIG’S PROPOSALS TO CHANGE USPS’S FUNDING OF RETIREE BENEFITS (2011).

<sup>533</sup> U.S. POSTAL SERV.: ALLOCATION OF RESPONSIBILITY FOR PENSION BENEFITS BETWEEN THE POSTAL SERV. AND THE FEDERAL GOV’T (U.S. Gov’t Accountability Office) (Oct. 13, 2011).

Second, GAO found that no CSRS refund is owed to the Postal Service. The “overpayments” referred to by the USPS OIG and others implied an error of some type had occurred in determining pension cost allegations, whether mathematical, actuarial, or accounting. GAO found no evidence of error of these types. The GAO concludes, “a refund would require a reallocation of CSRS benefit responsibility that would be a significant change from a policy that has been in place since 1974 and not a correction of any actuarial or accounting methodological error.”

Third, GAO found that any change in the pension cost allocation formula that puts more of the funding burden on the Government would come at a dollar for dollar cost to the taxpayer. By transferring assets out of the CSRS fund to USPS based on the current proposals would be to increase the Federal government’s current and future unfunded pension liability by an estimated \$56 billion to \$85 billion. A liability, as the GAO states, that “would then be funded by the Federal Government using tax revenue, borrowing, or both.”

On October 13, 2011, the same day as the release of the GAO report, the Committee held a business meeting where it considered the Postal Reform Act of 2012 (“PRA”). During that business meeting a number of Members began to distance themselves from the “overpayment” and the PRA was ordered favorably reported by the Committee.<sup>534</sup> In subsequent months, a new bipartisan postal reform bill was introduced by the Senate committee of jurisdiction without provisions for a return of the “overpayment,” despite both sponsors previous support for the change.<sup>535</sup> Further, as the debate over postal reform continued into the 113th Congress, no legislation introduced by the Chairman or Ranking member of the committees of jurisdiction in either chamber has included a return of the “overpayment” and it is no longer mentioned in serious discussions of postal reform.

#### *OTHER OPPORTUNITIES? PLANS FOR REDUCING RETIREMENT SURPLUS AND PAYDAY LENDING*

Next on the list was a projected surplus in the Postal Service’s Federal Employee Retirement System (“FERS”) account. Based on actuarial accounting methods, the Postal Service has recently posted a slight surplus in its funding levels for its FERS account, but the amount has varied dramatically year to year from more than \$12 billion<sup>536</sup> to just \$600 million<sup>537</sup>, depending on the source. With the CSRS pension issue settled, many, such as Postal Service Subcommittee Ranking Member Stephen Lynch and the postal unions argued that a projected FERS surplus should be immediately fully returned to the Postal Service and that the agency should be free to spend that money in the manner it deemed best. Essentially, under this plan, funds set aside for workers’ benefits would have been used to fund operating losses at the agency, a situation that would have been shouted down as irresponsible if a private sector company ever contemplated such a plan and it was repeatedly opposed by Chairman Issa and most Republicans. Ultimately, the FERS issue also faded into the background as the projected surplus continued to shrink to its current level of less than \$1 billion.

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<sup>534</sup> Postal Reform Act of 2012, H.R. 2309, 112th Cong. (as reported by the Cmte. on Oversight & Gov’t Reform, Jan. 17, 2012).

<sup>535</sup> 21st Century Postal Service Act of 2012, S. 1789, 112th Cong. (as introduced Nov. 2, 2011).

<sup>536</sup> CAUSES OF THE POSTAL SERVICE FERS SURPLUS – 2012 UPDATE, Rep. No. RARC-WP-13-002 (U.S. Postal Serv. Office of Inspector Gen.) (Dec. 4, 2012).

<sup>537</sup> U.S. Postal Serv., Annual Report (Form 10-K) (2013).

Still, those opposed to structural reforms sought out new methods to prevent a Postal Service restructuring. The most recent effort came from a 2014 USPS OIG white paper suggesting that the Postal Service offer non-bank financial services, such as payday loans.<sup>538</sup> The USPS OIG even suggested that the Postal Service could garnish tax refunds of individuals who were forced to default on a payday loan as a way to keep interest rates low. While some groups, such as postal unions, have promoted this idea, it has developed very little widespread appeal. Furthermore, many independent observers seriously doubt that the Postal Service would be able to make a profit in such a venture given the relatively expensive nature of its window clerk workforce compared to banks, payday lenders, and credit unions.

#### *A TOUGH REALITY, BUT REALITY NONETHELESS*

Unfortunately, with alternative after alternative to structural reform falling apart, congressional Democrats, led by Ranking Member Cummings have repeatedly chosen to avoid negotiating seriously to find ways to implement commonsense rightsizing plans that protects workers and the benefits they have earned. In multiple closed door meetings over four years Ranking Member Cummings and his staff have never shown willingness to accept or proposed any action to rightsize the Postal Service no matter what was offered in return. In fact, Mr. Cummings even refused to support President Obama's own plan to reform the Postal Service which Chairman Issa offered to introduce and vote in favor of.<sup>539</sup> Thankfully, even though congressional Democrats remain intransigent on the needed reform, the American people understand that their relationship with the Postal Service has changed and that the agency needs to adapt. According to one of the latest polls, 80 percent of Americans support the Postal Service should move to a 5-day mail/6-day package delivery schedule and slim majorities even supported closing their own post office if it is necessary to save the agency.<sup>540</sup> Most recently, the Postal Service announced plans to close 82 mail processing plants beginning in January 2015.<sup>541</sup> Despite strenuous efforts from congressional Democrats, as of this writing the plant closures remain on schedule.

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<sup>538</sup> PROVIDING NON-BANK FINANCIAL SERVICES FOR THE UNDERSERVED, Rep. No. RARC-WP-14-007 (U.S. Postal Serv. Office of Inspector Gen.) (Jan. 7, 2014).

<sup>539</sup> Press Release, Comm. On Oversight & Gov't Reform, Issa to Oversight Dems: Do You Support President Obama's Postal Reforms (May 7, 2014) (on file with author).

<sup>540</sup> IPSOS OMNIBUS RESULTS: POLL ON CHANGES TO USPS SATURDAY DELIVERY (Ipsos Public Affairs) (2013).

<sup>541</sup> Letter from Sen. Bernie Sanders et al., to Sen. Barbara Mikulski et al., Postal Appropriations Letter (Aug. 14, 2014) (on file with author).

## ARRA: LOTS OF MONEY, LITTLE STIMULATION

According to President Barack Obama's plan for "stimulus funding," the use of American Taxpayer dollars to spur the economy:

Most of the money we're investing as part of this plan will get out the door immediately and go directly to job-creation, generating or saving three to four million new jobs. And the vast majority of these jobs will be created in the private sector . . . Instead of just throwing money at our problems, we'll try something new in Washington – we'll invest in what works.<sup>542</sup>

Now, six years after the Great Recession began in late 2008, some areas are seeing marked recovery while others are still struggling. As described by the Washington Post in late 2014:

[b]ig metro areas are mostly booming after the recession, and everywhere else is still digging out. . . . That's a 1.5 percent gain [in jobs] for the big metros and a 0.7 percent loss everywhere else. The gap would be much wider if not for an oil- and gas-drilling bonanza that is lifting job growth . . . . Those diverging fortunes help explain why people in broad swaths of the country perceive that the recession, which ended officially in mid-2009, still hasn't loosened its grip on their lives.<sup>543</sup>

### *THE AMERICAN RECOVERY AND REINVESTMENT ACT*

President Barack Obama signed into law the American Recovery and Reinvestment Act ("ARRA" or "The Stimulus") on February 17, 2009. The legislation was hastily written and approved by Democrat majorities in Congress in response to the Great Recession – the greatest economic crisis America has suffered since the Great Depression of the 1930s. The President and his allies promised that the bill would stimulate the economy and create millions of jobs to reverse the path of the soaring unemployment rate. Simply put, it did neither.

Chairman Darrell Issa began to focus the attention of the Committee on Oversight and Government Reform on the Obama Administration's efforts to jump-start the economy through "stimulus" funding while still serving as Ranking Member in early 2009. President Obama and White House officials made major promises about how much the stimulus would help the economy, and carefully managed their messaging in an attempt to convince the American public that it would succeed.<sup>544</sup> However, American Taxpayers quickly began to question the positive impact if the billions of dollars that were being invested – and rightfully so. In one of the most egregious examples of waste, the Obama Administration directed the posting of signs to identify for the public where stimulus funds were being used. In one case, more than \$10,000 was spent on a sign at Dulles

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<sup>542</sup> President Barack Obama, Remarks of President Barack Obama on the Economy (Jan. 28, 2009)

<sup>543</sup> Jim Tankersley, *Big Cities Are Dominating the Recovery, Leaving the Rest of America Behind*, WASH. POST STORYLINES BLOG (Nov. 18, 2014, 10:41 AM), <http://www.washingtonpost.com/news/storyline/wp/2014/11/18/big-cities-are-dominating-the-economic-recovery-leaving-much-of-america-behind/>.

<sup>544</sup> *Bloomberg* reported that Obama campaign advisors David Axelrod, Jim Margolis, and Robert Gibbs were all advising the incoming Administration on what words to use when describing the stimulus, favoring words like "recovery" instead of "recession." See Hans Nichols and Lorraine Woellert, *Obama Uses Campaign Tactics to Sell Stimulus Plan*, BLOOMBERG, Jan. 9, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayF6GMG.c7vA>.

Airport – a sign that served no purpose other than advancing a political agenda ahead of the 2012 elections.<sup>545</sup>

During the years since the legislation was passed, the Committee’s oversight efforts have exposed gross mishandling of taxpayer dollars in amounts that dwarf the \$5 - \$10 million spent on ARRA signage.<sup>546</sup> According to the latest estimates from the Congressional Budget Office (“CBO”), spending under the ARRA is estimated to increase budget deficits by \$830 billion between fiscal years 2009 and 2019 – an increase of more than \$40 billion from the Administration’s initial estimates.<sup>547</sup> Unemployment skyrocketed above the Obama Administration’s promised high-water mark of 8 percent<sup>548</sup> to more than 10 percent in 2009, the highest rate since April 1983.<sup>549</sup> Today, as the rate remains at nearly 6 percent<sup>550</sup> and the long-term unemployed continue to struggle finding work, Americans wonder whether the Administration’s most recent initiative – a \$170 million grant program through the Department of Labor “for projects designed to help the long-term jobless get back to work” – will actually produce results.<sup>551</sup>

Consistent with its role as the House’s primary government watchdog, the Committee on Oversight and Government Reform began demanding accountability from the Administration while Republicans were still in the Minority. As Ranking Member, Darrell Issa drove the Committee’s efforts to oversee the distribution of \$87 billion to states to support Medicaid programs – thereby exposing state diversion of these funds to whatever projects they chose, undermining the promise that stimulus funds would be “targeted.”<sup>552</sup> As Chairman, Congressman Issa continued to investigate the impact of stimulus spending; below is a discussion of the Committee’s activities documenting the dangerous conditions and wasteful spending of an estimated \$5 billion associated with the Department of Energy’s “Weatherization Assistance Program.”

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<sup>545</sup> Staff Interview, Metropolitan Washington Airports Authority, (Feb. 16, 2010).

<sup>546</sup> As estimated by the Department of Transportation, the cost of producing and placing ARRA signage ranges between \$5 million and \$10 million dollars.

<sup>547</sup> CONGRESSIONAL BUDGET OFFICE, ESTIMATED IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON EMPLOYMENT AND ECONOMIC OUTPUT IN 2013 (2014), *available at* <https://www.cbo.gov/sites/default/files/45122-ARRA.pdf>. The Administration initially estimated the increase in budget deficits would be \$787 billion for the ten year period between 2009 and 2019. *Id.*

<sup>548</sup> CHRISTINA ROMER & JARED BERNSTEIN, THE JOB IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 4 (2009), *available at* [http://www.politico.com/pdf/PPM116\\_obamadoc.pdf](http://www.politico.com/pdf/PPM116_obamadoc.pdf).

<sup>549</sup> Bureau of Labor Statistics, USDL-09-1331, The Employment Situation – October 2009 (2009), *available at* [http://www.bls.gov/news.release/archives/empsit\\_11062009.pdf](http://www.bls.gov/news.release/archives/empsit_11062009.pdf).

<sup>550</sup> Bureau of Labor Statistics, USDL-14-1796, The Employment Situation – September 2014 (2014), *available at* <http://www.bls.gov/news.release/pdf/empsit.pdf>.

<sup>551</sup> *Obama Administration Follows Up on Long-Term Unemployed*, HUFFINGTON POST, Oct. 15, 2014, *available at* [http://www.huffingtonpost.com/2014/10/15/obama-unemployment\\_n\\_5986980.html](http://www.huffingtonpost.com/2014/10/15/obama-unemployment_n_5986980.html).

<sup>552</sup> H. Cmte. on Oversight & Gov’t Reform, *De-Targeting the Stimulus: States Diverting Medicaid funds Away from Helping Poor, Protecting Health Care Jobs*, 111th Cong. (2009).

### *THE \$5 BILLION WEATHERIZATION ASSISTANCE PROGRAM*<sup>553</sup>

In February 2009, President Obama declared, “We’re going to weatherize homes, that immediately puts people back to work and we’re going to train people who are out of work, including young people, to do the weatherization. As a consequence of weatherization, our energy bills go down and we reduce our dependence on foreign oil. What would be a more effective stimulus package than that?”<sup>554</sup> However, evidence gathered by the Committee suggests that the Department of Energy’s (“DOE”) Weatherization Assistance Program (“Weatherization Assistance Program” or “WAP”) is a stunning example of a management failure which has wasted billions of dollars, done little to achieve energy savings, and may have put people’s lives and homes at risk.

With some states exhibiting a failure rate 80 percent (12 out of every 15 homes fail inspection) due to substandard workmanship, this program is far from being a shining example of what the government can do for its citizens. DOE contractors left exposed wires in a home, installed windows that were easily pushed out of their frames, left a home with raw sewage standing in a crawl space, sealed a basement that accumulated mold and cat feces, left a hole in a wall, damaged a ceiling, replaced a door with a hollow door and left a house with an unvented kerosene heater. The stunning lack of oversight of this program by DOE created a situation where no one was checking the quality of the work performed, allowing poor workmanship to go undetected and undeterred. Many DOE contractors did not do the work promised by DOE and many of them actually damaged homes, created hazards and actually made houses less energy efficient. Even the Inspector General for the DOE said the weaknesses of the program “pose health and safety risks to residents.”

### **Overview of WAP Under ARRA**

Through the ARRA, the Department of Energy (“DOE”) received \$41.7 billion to allocate to loan and grant recipients.<sup>555</sup> These funds were to be spent quickly in hopes of creating government sponsored jobs. The Weatherization Assistance Program received \$5 billion of DOE’s stimulus money, a 2,000% increase over the prior year, which was to be spent on the weatherization of 600,000 homes.<sup>556</sup> The Weatherization Assistance Program’s previous annual allocation was only \$225 million.<sup>557</sup> At a hearing before the Committee in November, the DOE Inspector General (“IG”)

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<sup>553</sup> In addition to funding for its Weatherization Assistance Program, the Department of Energy also received funding intended to supplement its Loan Guarantee Program. Much of this funding was funneled to organizations with close ties to the Obama Administration, organizations that subsequently gambled with and lost billions of taxpayer dollars. For a discussion of the administration of stimulus funding through the Department of Energy’s Loan Guarantee Program, see Chapter 4.

<sup>554</sup> Interview by Katie Couric, Anchor, CBS Evening News, with President Obama, in Washington, D.C. (Mar. 10, 2009), [http://www.cbsnews.com/2100-18563\\_162-4773752.html](http://www.cbsnews.com/2100-18563_162-4773752.html).

<sup>555</sup> *Oversight of DOE Recovery Act Spending: Hearing before Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. (2011) (statement of Frank Rusco, Director, Natural Resources and Environment, Gov’t Accountability Office).

<sup>556</sup> *Id.*

<sup>557</sup> *Id.*

described pushing this much money through the Weatherization Assistance Program as being akin to hooking up a garden hose to a fire hydrant.<sup>558</sup>

Providing federal funds to weatherize homes of the economically disadvantaged is not a new concept. This practice was first authorized under the Energy Conservation and Production Act of 1976 (“ECA”), with the goal of mitigating the pain of high energy prices for low income households.<sup>559</sup> Between 1976 and 2008, the Weatherization Assistance Program had funded the weatherization of approximately six million homes.<sup>560</sup> This program had been administered on a small scale using known subcontracting partners for over three decades. Within six months of ARRA passage, all fifty-eight grantees received massive increases in funding, exceeding most grantees’ prior Weatherization Assistance Program budgets by an order of magnitude.<sup>561</sup> Despite the massive surge in WAP spending, DOE failed to adequately ramp up its oversight of this program.

### **Doing More Harm than Good: Shoddy Workmanship and Wasted Dollars**

Through the Weatherization Assistance Program, DOE awarded large sums of money to state-level entities, who in turn hired sub-grantees responsible for much of the work. Often the sub-grantees contracted the work out to a third party, after subtracting an administrative fee – with little or no supervision. But beyond the poor value obtained by the expenditure of taxpayer dollars, in some cases poor workmanship may actually have endangered the health and safety of the individuals whose homes were weatherized. Many DOE contractors actually damaged houses, created new hazards, or made houses less energy efficient.

This concern was conveyed by DOE’s Inspector General (“IG”), Gregory Friedman, who testified before Congress alleging that the program suffered from significant problems relating to workmanship quality, cost controls, and performance monitoring of grantees and contractors.<sup>562</sup> After his audit of the Weatherization Assistance Program’s implementation in Tennessee, the IG reported that weaknesses in the Program sometimes “pose health and safety risks to residents, hinder production, and increase program costs.”<sup>563</sup>

Other reports by DOE’s IG reveal how sub-grantees’ poor workmanship impeded the program’s ability to provide an actual benefit to recipients.<sup>564</sup> Friedman testified that substandard work

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<sup>558</sup> *The Green Energy Debacle: Where Has All the Taxpayer Money Gone?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. On Oversight and Gov’t Reform*, 112th Cong. (2011) (statement of Hon. Gregory H. Friedman, Inspector Gen., U.S. DOE).

<sup>559</sup> U.S. Dep’t of Energy, *History of the Weatherization Assistance Program* (2011), [http://www1.eere.energy.gov/wip/wap\\_history.html](http://www1.eere.energy.gov/wip/wap_history.html) (last visited Feb. 22, 2012).

<sup>560</sup> *Id.*

<sup>561</sup> U.S. DEP’T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY WEATHERIZATION AND INTERGOVERNMENTAL PROGRAM, MONITORING PLAN FOR WEATHERIZATION ASSISTANCE PROGRAM STATE ENERGY PROGRAM ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANTS (Aug. 14, 2009).

<sup>562</sup> *The Green Energy Debacle: Where Has All the Taxpayer Money Gone?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. On Oversight and Gov’t Reform*, 112th Cong. (2011) (statement of Hon. Gregory H. Friedman, Inspector Gen., U.S. DOE).

<sup>563</sup> U.S. DEP’T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-17, THE DEP’T OF ENERGY’S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF TENNESSEE (2011).

<sup>564</sup> *Id.*

caused 9 of 17 weatherized homes in Illinois to fail inspections (53 percent failure rate).<sup>565</sup> The IG noted that in some states, the failure rate was as high as 12 out of 15 homes in the program that failed subsequent inspection due to substandard workmanship (80 percent failure rate).<sup>566</sup> In a report released by the Committee March 20, 2012, scores of photographs demonstrate the extent of the shoddy workmanship and the danger created thereby;<sup>567</sup> below are just a few.



According to the IG, the core problem was lack of accountability within the Weatherization Assistance Program. For example, sub-grantees – those groups hired by the states to perform the weatherization services – needed proper training before they began to provide the services. However, the grantees – the states – faced immense pressure to hire new staff quickly to meet

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

<sup>567</sup> See H. Cmte. on Oversight & Gov't Reform, *The Department of Energy's Weatherization Program: Taxpayer Money Spent, Taxpayer Money Lost*, 112th Cong. (2012). Simonson Management Services, a company that received a contract from DOE to help with monitoring of the weatherization projects, delivered to DOE a series of internal Technical Assistance Reports highlighting both above average and substandard weatherization work across the country. These reports were produced to the Committee during the course of its oversight of the program in 2012.

weatherization deadlines. As a result, auditors found that the “rapid expenditure of Recovery Act funds prevent[ed] the normal learning curve for new auditors and contractors.”<sup>568</sup> As such, states failed to uniformly train contractors, assessors, and inspectors, which predictably resulted in substandard work and program waste.<sup>569</sup> The losers were the American taxpayer, who funded shoddy work, and the recipients, who in some cases were left worse off.

The Committee’s investigation independently examined DOE monitoring reports, which were conducted by a third party auditor, and uncovered a troubling pattern of low quality or even potentially dangerous work product in the homes of low income Americans. A few examples of the dangerous conditions created by lax program oversight by DOE include:

- DOE contractors in Alabama sprayed insulation on wires in a furnace compartment in a legally blind woman’s kitchen in a way that could have caused a fire.
- DOE contractors in Kentucky left exposed spliced wires posing the risk of electrocution to the home’s inhabitants.
- DOE contractors in Arkansas installed windows in a home in such a shoddy way that they could easily be pushed out of their frames, creating a potential hazard for small children.
- DOE contractors in New York weatherized a basement without addressing major health hazards. According to a monitoring report: “basement extensively air sealed in spite of possible mold and large, obviously long-standing accumulation of cat feces in basement sump hole.”
- DOE contractors in Massachusetts chiseled a large hole into an interior wall to insulate it. Rather than fix the problem they had created inside of a house, the contractors left the huge hole in the wall.
- DOE contractors in New York damaged the interior kitchen ceiling of a house in such a way that parts of the ceiling were stained and other parts fell down.
- DOE contractors in Tennessee did such a poor job weatherizing a home that the homeowner had to use rags to plug holes under the sink and around three doors where air leaked into the home and negated any weatherization energy efficiency savings.
- DOE contractors in North Carolina left a house with an unvented kerosene heater and created a potential carbon monoxide hazard.<sup>570</sup>

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<sup>568</sup> See H. Cmte. on Oversight & Gov’t Reform, *The Department of Energy’s Weatherization Program: Taxpayer Money Spent, Taxpayer Money Lost*, 112th Cong. (2012).

<sup>569</sup> U.S. DEP’T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-12, THE DEP’T OF ENERGY’S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF MISSOURI (2011).

<sup>570</sup> H. Cmte. on Oversight & Gov’t Reform, *The Department of Energy’s Weatherization Program: Taxpayer Money Spent, Taxpayer Money Lost*, 112th Cong. (2012).

These stories are just a small sample of the failures of the Weatherization Assistance Program. In many situations, the homeowners had no way of knowing that the contractors had done substandard work or had created health hazards in their home. In some cases, DOE auditors inspected the homes weeks or months later and only then discovered these significant problems.<sup>571</sup> Given the large size of WAP and the speed with which funding was expended by DOE and state grant recipients, it is likely that thousands of other problems and hazards have yet to be discovered and corrected in weatherized homes.

### **Perverse Incentives**

At the outset, DOE management of stimulus funds for the Weatherization Assistance Program created a perverse incentive for grantees to not reach project goals. DOE implemented a three-year project period for grantees that ends March 31, 2012,<sup>572</sup> and announced a goal to weatherize approximately 600,000 homes before the project ended. Before collecting funds to start the project, grantees had to submit a Weatherization Assistance Program Recovery Act plan to DOE. DOE's project plans implemented two 50 percent disbursements to grantees. After DOE approved a grantee's Weatherization Assistance Program Recovery Act plan, they scheduled the first disbursement. By the end of 2009, DOE approved each grantee's Recovery Act weatherization plans and distributed 50 percent of the allocated funds.<sup>573</sup> The second and final disbursement of Recovery Act funds to grantees, however, required a grantee to complete only thirty percent of its approved weatherization plan.<sup>574</sup> Accordingly, DOE's disbursement plan enabled a grantee to take all three years just to reach thirty percent completion, yet the grantee still received all of its allotted Recovery Act funds. Furthermore when the subcontractors are paid with taxpayer money no incentive exists to produce adequate work product. This disbursement plan did not produce the weatherization rates DOE anticipated and as of March 2011, two years into the project, only 44 out of 58 of the grantees had reached thirty percent completion.<sup>575</sup>

In instances where grantee states reached its Weatherization Assistance Program stimulus goal, DOE Inspector General ("IG") audits demonstrate that grantees circumvented or violated guidelines to meet their quota. For example, Tennessee reached its program goal of 10,500 homes; however, audits reveal seventy percent of homes inspected did not meet DOE standards and sixty-five

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<sup>571</sup> David Eggert & Doug Caruso, *Ohio Failed to Monitor Money to Weatherize Houses: Inspector General's Report Cites Lack of Inspections*, THE COLUMBUS DISPATCH (Nov. 30, 2011) available at <http://www.dispatch.com/content/stories/local/2011/11/30/ohio-failed-to-monitor-money-to-weatherize-houses.html> [hereinafter Eggert & Caruso].

<sup>572</sup> U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY WEATHERIZATION AND INTERGOVERNMENTAL PROGRAM, MONITORING PLAN FOR WEATHERIZATION ASSISTANCE PROGRAM STATE ENERGY PROGRAM ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANTS (Aug. 14, 2009).

<sup>573</sup> *Id.*

<sup>574</sup> *Id.*

<sup>575</sup> *Oversight of DOE Recovery Act Spending: Hearing before Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. (2011) (statement of Frank Rusco, Director, Natural Resources and Environment, Gov't Accountability Office).

percent of homes violated state directives.<sup>576</sup> As a result, the State Auditor questioned Tennessee's use of \$371,770 in Weatherization Assistance Program Recovery Act funding.<sup>577</sup>

### **WAP's Failed Oversight and Monitoring**

Although the stimulus provided unprecedented funding for the Weatherization Assistance Program, the Administration failed to put in place sufficient mechanisms to monitor and oversee the disbursement of billions of taxpayer dollars. The Committee tried to obtain all monitoring reports conducted by DOE in order to review the agency's due diligence.<sup>578</sup> However, DOE provided very few actual audits and instead delivered to the Committee work done by Simonson Management Services, a contractor DOE hired to assist with DOE audits. This distinction is important because the Committee tried, for months, to obtain complete information regarding DOE monitoring to no avail.<sup>579</sup> The Committee has not been able to determine the extent of DOE's monitoring work outside of the IG's audits.

Evidence gathered by the Committee does suggest that states did a poor job of meeting program monitoring requirements. On the state level, DOE advised grantees to monitor each sub-grantee once a year, to inspect five percent of completed units a year, and to submit their findings in a report to DOE.<sup>580</sup> Grantees, however, frequently ignored their obligations to conduct inspections. In Ohio, for example, the state failed to inspect five percent of weatherized homes because Ohio's WAP budget quadrupled and the state had insufficient staff to keep up with inspections.<sup>581</sup> But even grantees that did conduct inspections did a poor job. According to a Tennessee state audit, local agencies had passed 28 homes that should have failed.<sup>582</sup> In Missouri, IG audits revealed 11 of 20 homes, or 55 percent, failed final inspections in cases where the state had initially rated the work as acceptable.<sup>583</sup> Furthermore, failure to re-inspect homes revealed another problem with sub-grantee monitoring. In Ohio, for example, the state required sub-grantees to follow up with 25 percent of all weatherized units, but auditors found only three percent of homes had a documented follow-up inspection.<sup>584</sup>

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<sup>576</sup> U.S. DEP'T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-17, THE DEP'T OF ENERGY'S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF TENNESSEE (2011).

<sup>577</sup> *Id.*

<sup>578</sup> See Letter from the Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Steven Chu, Sec'y, U.S. Dep't of Energy (Sep. 9, 2011) (on file with author).

<sup>579</sup> *Id.*

<sup>580</sup> David Eggert & Doug Caruso, *Ohio Failed to Monitor Money to Weatherize Houses: Inspector General's Report Cites Lack of Inspections*, THE COLUMBUS DISPATCH (Nov. 30, 2011) available at <http://www.dispatch.com/content/stories/local/2011/11/30/ohio-failed-to-monitor-money-to-weatherize-houses.html>.

<sup>581</sup> *Id.*

<sup>582</sup> U.S. DEP'T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-17, THE DEP'T OF ENERGY'S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF TENNESSEE (2011).

<sup>583</sup> U.S. DEP'T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-12, THE DEP'T OF ENERGY'S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF MISSOURI (2011).

<sup>584</sup> U.S. DEP'T OF ENERGY, EXAMINATION REPORT ON "COMMUNITY ACTION PARTNERSHIP OF THE GREATER DAYTON AREA – WEATHERIZATION ASSISTANCE FUNDS PROVIDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009" (Sept. 2011), <http://energy.gov/sites/prod/files/OAS-RA-11-18.pdf>.

Another example of failed oversight is the program's inability to track past recipients of weatherization services, who would have been ineligible under this program. Prior to ARRA enactment, homes that had already received weatherization services were ineligible for future weatherization services.<sup>585</sup> However, ARRA expanded eligibility to include homes weatherized before September 30, 1994.<sup>586</sup> In order to implement this change, federal regulations required each grantee and sub-grantee to maintain records of the homes that had received weatherization services in the past.<sup>587</sup> Despite these regulations, the IG audits revealed numerous instances where states kept poor track of homes that had already been weatherized.<sup>588</sup> Indiana, for instance, weatherized homes that were most likely ineligible due to past assistance because the state only began keeping a record of weatherization services after 2000.<sup>589</sup> In Tennessee, the state did maintain a Weatherization Assistance Program database of homes previously weatherized, but auditors found sub-grantees gave weatherization services to ineligible homes regardless of their eligibility status.<sup>590</sup> Even in cases where homes had never received weatherization services, auditors identified sub-grantees that were providing weatherization services to homes ineligible for service. Specifically, the IG testified that "one sub-recipient gave preferential treatment to its employees and their relatives for weatherization services over other applicants, thus disadvantaging eligible elderly and handicapped residents."<sup>591</sup>

### **Dubious Sub-grantees**

Because the Stimulus Act flooded the existing weatherization infrastructure with billions of additional taxpayer dollars that needed to be spent on an expedited basis, grantees had to look beyond sub-grantees that met the standards set by a federal statute, such as cities, counties, community service centers, and housing services organizations. As a result, organizations with no previous experience weatherizing homes received contracts to weatherize homes and significantly increased the probability of mismanagement of taxpayer dollars. The Weatherization Assistance Program grants often dwarfed these organizations' primary operating budgets and introduced a new administrative burden of responsible monitoring for sub-grantees, including monthly reports, records of expenses, and whatever additional records the DOE deemed necessary.<sup>592</sup> A survey of

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<sup>585</sup> U.S. DEPT' OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-13, THE DEP'T OF ENERGY'S WEATHERIZATION ASSISTANCE PROGRAM FUNDED UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF INDIANA (2011).

<sup>586</sup> *Id.*

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> U.S. DEP'T OF ENERGY, OFFICE OF INSPECTOR GEN., AUDIT REP. OAS-RA-11-17, THE DEP'T OF ENERGY'S WEATHERIZATION ASSISTANCE PROGRAM UNDER THE AM. RECOVERY AND REINVESTMENT ACT IN THE STATE OF TENNESSEE (2011).

<sup>591</sup> U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY WEATHERIZATION AND INTERGOVERNMENTAL PROGRAM, MONITORING PLAN FOR WEATHERIZATION ASSISTANCE PROGRAM STATE ENERGY PROGRAM ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANTS (Aug. 14, 2009).

<sup>591</sup> *The Green Energy Debacle: Where Has All the Taxpayer Money Gone?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov't Spending of the H. Comm. On Oversight and Gov't Reform*, 112th Cong. (2011) (statement of Hon. Gregory H. Friedman, Inspector Gen., U.S. DOE).

<sup>592</sup> 10 C.F.R. § 440.24.

grantees in 2009 reported that 90% found complying with federal reporting requirements “challenging.”<sup>593</sup>

Some of the WAP funding recipients seem particularly ill-suited for participating in weatherization projects, leaving American Taxpayers to wonder whether advocacy in the arts is a sufficient qualification for an organization tasked with providing assistance to reduce energy costs by improving the energy efficiency of their homes.<sup>594</sup> For example, the African Heritage Center for African Dance and Music (the “African Heritage Center”) and Prosperity Media Enterprise, Inc., both located in Washington D.C. each received nearly one million dollars through WAP in late 2011.<sup>595</sup> Melvin Deal, Director of the Heritage Center, claims that his organization is a “natural fit” for WAP: “The Greening of America has to be led by people with artistic and flexible minds...money is not something that excites us. Our art excites us.”<sup>596</sup> Without a demonstrated base of knowledge for administering the weatherization assistance program, the wisdom of putting these groups in charge of millions of taxpayer dollars is highly questionable.

## Conclusion

The Weatherization Assistance Program, as administered by Energy Secretary Steven Chu, has resulted in excessive waste, fraud, and abuse of taxpayer dollars with very little benefit to show for it. The Weatherization Assistance Program represents the kind of failure that materializes when you have an economic stimulus strategy contingent on asking the federal bureaucracy to absorb billions of dollars when the structural infrastructure to administer, disseminate and manage that influx of new money is not put in place. Secretary Chu referred to this program as “one of our signature programs” and President Obama stated it was “exactly the kind of program that we should be funding.” The reality is this program is the signature example of how the Obama Administration’s government-first philosophy has resulted in significant waste of taxpayer dollars and brought very real material harm directly into the homes of the American people.

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<sup>593</sup> GOV’T ACCOUNTABILITY OFFICE, GAO-12-195, PROGRESS AND CHALLENGES IN SPENDING WEATHERIZATION FUNDS (2011).

<sup>594</sup> ProPublica has compiled a list of recipients of Department of Energy’s Weatherization Assistance for Low-Income Persons grant program within the District of Columbia. While the city’s government was the primary recipient of a grant of more than \$1.5 million, seven other organizations received smaller grants of nearly \$1 million each. See ProPublica, Recovery Tracker: How Much Stimulus Funding is Going to Your County?, Grant: Government of District of Columbia, Administering Agency: Department of Energy, available at <http://projects.propublica.org/recovery/item/20120630/27307> (last accessed Oct. 16, 2014).

<sup>595</sup> *Id.*

<sup>596</sup> *Dance Troupe and Other Non-Profits Boosted by Weatherization Program*, WAMU 88.5 FM AMERICAN UNIVERSITY RADIO, (Oct. 26, 2009), <http://w.thedianerehmsow.org/news/09/10/26.php>.

### *STIMULATING THROUGH MEDICAID, OR PATCHING STATE BUDGET GAPS?*

The American Recovery and Reinvestment Act of 2009 (“ARRA”) provided \$87.2 billion<sup>597</sup> to states to “help ensure that [state governors] don’t need to make cuts to essential services Americans rely on now more than ever.”<sup>598</sup> At the time, 49 million Americans relied on Medicaid for health insurance, and another 20 million more Americans were expected to apply for coverage under the program in the wake of the Great Recession.<sup>599</sup> The additional funding was intended to “provide much needed relief to every state through a temporary increase in the Federal share of Medicaid funding... [and] prevent states from making further cuts to a program that is already in dire circumstances due to the economic downturn.”<sup>600</sup>

However, within just a few months of the program’s initial distributions to states, the Committee on Oversight and Government Reform found that, due to a loophole in the legislation, states were able to effectively “de-target” the funding and use the windfall to close gaps in state budgets. While federal spending rose by 16.6 percent in fiscal year 2009 over the prior year due to ARRA spending, state funding actually decreased by 3 percent.<sup>601</sup> Rather than using the \$87 billion as intended – to ensure healthcare funding and services provided by states would not decrease during the recovery – the states were using the money to fill holes in their budgets.

### **Summary of Medicaid Provisions**

Medicaid provides health insurance to low-income children, pregnant women, parents of dependent children, the elderly and those with disabilities through a program funded jointly by the Federal Government and states. The Federal Government sets certain high-level standards for the provision of services through the program; in return for complying with the standards, the Federal Government pays 50 percent or more of the state’s costs under the program. The respective states are able to set the more detailed eligibility standards and benefit levels and pay for the remainder of the Medicaid expenses from their own budgets. Medicaid is a more comprehensive program than its counterpart, Medicare; Medicaid pays for prescriptions, dental services and nursing homes, and, as a percentage of state budgets, the costs of the program has generally grown over time. State

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<sup>597</sup> The Congressional Budget Office estimates the increase in federal spending due to the ARRA’s increase in Federal Medical Assistance Percentage (“FMAP”) funding would be \$87.2 billion over the five-year period between fiscal years 2009 and 2013. CLIFF BINDER, EVELYNE P. BAUMRUCKER & ELICIA J. HERZ, CONG. RESEARCH SERV., R40223, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA, PUB. L. NO. 111-5): TITLE V, MEDICAID PROVISIONS 5 (2009).

<sup>598</sup> Press Release, White House Office of the Press Sec’y, President Obama Announces \$15 Billion in Medicaid Relief from ARRA Headed to States (Feb. 23, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-15-Billion-in-Medicaid-Relief-from-ARRA-Headed-To-States/](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-15-Billion-in-Medicaid-Relief-from-ARRA-Headed-To-States/).

<sup>599</sup> *Id.*

<sup>600</sup> Senator Max Baucus, Floor Statement Regarding American Recovery and Reinvestment Act (Feb. 9, 2009), (congressional record – senate, vol 155, pt. 2, pg 2320).

<sup>601</sup> MARTHA HEBERLEIN & JOAN ALKER, GEORGETOWN UNIVERSITY HEALTH POLICY INSTITUTE, CENTER FOR CHILDREN AND FAMILIES, MEDICAID AND STATE BUDGETS: LOOKING AT THE FACTS 2 (2011), *available at* <http://ccf.georgetown.edu/wp-content/uploads/2012/03/Medicaid%20and%20state%20budgets-2011.pdf>.

spending on Medicaid rose from 7.2 percent of state budgets in 1970<sup>602</sup> to more than 17 percent in 2006.<sup>603</sup>

The ARRA included \$89.4 billion in increased federal Medicaid expenditures; of that amount, \$87.2 billion was due to a 27 month increase in the Federal Medical Assistance Percentage (“FMAP”).<sup>604</sup> FMAP is the percentage of state Medicaid spending that the Federal Government will reimburse; if a state’s FMAP is 50 percent, the Federal Government will reimburse 50 percent of the state’s expenditures on Medicaid services.<sup>605</sup> Generally, the reimbursement percentage varies by state – states with lower per capita income receive higher reimbursement (up to a maximum of 83 percent), while states with higher per capita income will receive lower reimbursement (not to fall below 50 percent).<sup>606</sup>

According to the FMAP increase in Section 5001 of the ARRA, all states were eligible for an increase in the reimbursement percentage of 6.2 points.<sup>607</sup> In order to qualify, however, states had to maintain compliance with certain standards. The terms of the increased FMAP funds required that states:

- Not change their Medicaid eligibility standards from those that were in effect on July 1, 2008;
- Continue to comply with Medicaid requirements for the prompt payment of health care providers who provide services under the program (and report to the Secretary of Health and Human Services such compliance);
- Not shift Medicaid costs to cities and local governments from the state budget based on what local governments were required to contribute on September 30, 2008;
- Submit a report to the Secretary of Health and Human Services detailing how the additional federal funds were used; and
- Not deposit or credit the additional funds received from the Federal Government to any “reserve or rainy day fund.”<sup>608</sup>

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<sup>602</sup> MARK E. RUSHEFSKY, PUBLIC POLICY IN THE UNITED STATES AT THE DAWN OF THE TWENTY-FIRST Century 184-85 (4th ed. 2008).

<sup>603</sup> MARTHA HEBERLEIN & JOAN ALKER, GEORGETOWN UNIVERSITY HEALTH POLICY INSTITUTE, CENTER FOR CHILDREN AND FAMILIES, MEDICAID AND STATE BUDGETS: LOOKING AT THE FACTS 2 (2011), available at <http://ccf.georgetown.edu/wp-content/uploads/2012/03/Medicaid%20and%20state%20budgets-2011.pdf>.

<sup>604</sup> CLIFF BINDER, EVELYNE P. BAUMRUCKER & ELICIA J. HERZ, CONG. RESEARCH SERV., R40223, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA, PUB. L. NO. 111-5): TITLE V, MEDICAID PROVISIONS 5 (2009).

<sup>605</sup> See *id.*

<sup>606</sup> *Id.* However, exceptions to the FMAP formula have been created for certain states by statute. *Id.*

<sup>607</sup> *Id.* States were provided the opportunity to choose between accepting the FMAP increase with a 15 percent increase in the state’s spending cap or rejecting the FMAP increase and instead receiving a 30 percent increase in its spending cap. *Id.*

<sup>608</sup> *Id.*

## Plain Language of the Statute versus CMS Interpretation

As states prepared budgets in early 2009, inconsistencies between the language of the statute and the interpretation of CMS led to questions being raised as to the intent of Congress in passing the legislation. According to Chris Whatley of the Council of State Governments while advising various state legislatures in the process of drafting budgets, “[t]here’s definitely a lot of confusion in state capitals about what the Recovery Act means.”<sup>609</sup> As discussed in other sections of this report, the Administration has used its regulatory power to reinterpret the legislation enacted by Congress, creating disconnect between the will of the Legislative Branch and the proper execution of the law.<sup>610</sup> According to the language of the American Recovery and Reinvestment Act:

A State is not eligible for an increase in its FMAP... **if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund** of the State.<sup>611</sup>

However, in guidance issued by the Center for Medicaid and State Operations, a division of the Centers for Medicare and Medicaid Services (“CMS”) within the Department of Health and Human Services (“DHHS”) charged with administering Medicaid payments to states, seven specific expenditures are defined as being ineligible for the increased Federal Medical Assistance Percentage (“FMAP”) funding, and the guidance goes on to explain that “[i]n general, CMS has interpreted these exclusions narrowly.”<sup>612</sup> Although the letter purports to provide guidance on “expenditures for which the increased FMAP is available,” it fails to mention the statutory exclusion for use related to a reserve or rainy day fund. As such, it was no surprise to find states considering using the increased FMAP funds to shift the burden of more Medicaid expenditures to the Federal Government, while using state funds originally intended for Medicaid to cover other budget shortfalls.

### “Targeted” Medicaid Funding – Replaces the Soda Tax?

Although stimulus funds were intended to be “targeted” such that they provided an economic stimulus during a time of great financial strain, the American Taxpayer may have instead written a blank check with no assurance of any such stimulus. The Committee conducted oversight of state plans for spending the additional income due to increased income due to the Federal Medical Assistance Percentage, finding that states took vastly different approaches. Rather than shoring up existing Medicaid enrollment and coverage or being used to “help states maintain their Medicaid programs in the face of recession-drive[n] revenue declines and caseload increases,”<sup>613</sup> states

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<sup>609</sup> Alec MacGillis, *Money Stimulates Debate in States Over Plan’s Goals*, WASH. POST, March 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/08/AR2009030802291.html?sid=ST2009030802414>.

<sup>610</sup> For a more thorough discussion of the Committee’s oversight efforts related to the expansion of the Administrative State, see Chapter 8.

<sup>611</sup> American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 5001(f)(3) 123 Stat. 115, 501 (2009).

<sup>612</sup> Letter from Cindy Mann, Director, Center for Medicaid and State Operations, to State Medicaid Directors, SMD #09-005, ARRA #5 (August 19, 2009) available at <http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD081909.pdf>.

<sup>613</sup> Press Release, Chairman Henry Waxman, Committee on Energy and Commerce, Energy and Commerce Passes Economic Recovery Legislation (Jan. 23, 2009).

planned to use the additional funding in a variety of ways that held no promise of stimulating the economy.

### *New York*

Rather than using the additional Medicaid funds to increase net Medicaid expenditures, then-Governor Patterson instead eliminated proposed taxes on sugared soda and music downloads – taxes that were intended to raise revenue in an effort to address New York’s projected budget deficit of \$14 billion during the following fiscal year.<sup>614</sup> The proposed diversion of Medicaid stimulus funds was expected to have a negative impact on job growth. For example, New York City Health and Hospitals Corporation, the city’s public hospital system, announced it would cut jobs and close some children’s mental health programs after the Governor suggested he would not use the Medicaid stimulus funds to offset other health care spending cuts impacting both private and public hospitals.<sup>615</sup>

### *Virginia*

In response to Virginia’s plans for using the stimulus funding, Katie Webb, Senior Vice President of the Virginia Hospital Association, said, “I guess I thought the intent of the Medicaid stimulus was to use the money for Medicaid.”<sup>616</sup> Despite an expected surge in state Medicaid costs in the coming years, Virginia’s governor and legislature intended to use the additional Federal Medical Assistance Percentage (“FMAP”) funds to balance the budget and prevent layoffs in other areas.<sup>617</sup> Rather than increase the state’s capacity to provide Medicaid services, the \$800 million in additional funding received from the Federal Government would produce a situation where “\$800 million in state funds were freed up from [Virginia’s] Medicaid responsibilities to help save jobs in social service, public safety, education, and other programs.”<sup>618</sup> Florida, Nevada, and Kansas, among other states, intended to use funding in the same way.<sup>619</sup>

### *Nevada*

While some states intended to fill budget gaps with the additional Medicaid funding, others saw an opportunity to leverage the influx, using the state funds originally intended for Medicaid expenditures to qualify for even more federal matching grants. In order for the Nevada to access stimulus funds for education, the state’s higher education funding level had to equal 2006 levels – an increase of \$268 million. Although the state had applied for a waiver of that requirement, the state legislature was considering using the “freed up” state Medicaid funds to meet the education

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<sup>614</sup> See Nicholas Confessore, *Patterson Announces Deal on Taxes*, N.Y. TIMES CITY ROOM BLOG (March 11, 2009, 12:32 PM), [http://cityroom.blogs.nytimes.com/2009/03/11/paterson-announces-deal-on-taxes/?\\_php=true&\\_type=blogs&\\_r=0](http://cityroom.blogs.nytimes.com/2009/03/11/paterson-announces-deal-on-taxes/?_php=true&_type=blogs&_r=0).

<sup>615</sup> Anemona Hartocollis, *City’s Public Hospital System to Cut Jobs and Programs*, N.Y. TIMES, March 20, 2009, at A21.

<sup>616</sup> Alec MacGillis, *Money Stimulates Debate in States Over Plan’s Goals*, WASH. POST, March 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/08/AR2009030802291.html?sid=ST2009030802414>.

<sup>617</sup> *Id.*

<sup>618</sup> Nicholas F. Benton, *Obama Stimulus Saves 7,100 State Jobs, Legislators Report*, Falls Church News-Press, Mar. 5, 2009, available at <http://fcnp.com/2009/03/05/obama-stimulus-saves-7100-state-jobs-legislators-report/>.

<sup>619</sup> H. Cmte. on Oversight & Gov’t Reform, *De-Targeting the Stimulus: States Diverting Medicaid Funds Away from Helping the Poor, Protecting Health Care Jobs*, 111th Cong. (2009).

requirement. As with other states, Nevada was also considering using the funds to plug budget gaps in other areas, including other health and human services programs and for the state Commission on Tourism.<sup>620</sup>

### **Conclusion**

Rather than protect state Medicaid services and ensure availability for those falling upon hard times in the wake of the Great Recession, the “de-targeted” nature of stimulus spending left states with billions of dollars that could be used to close budget gaps, to reduce taxes and to qualify for other federal matching grants, such as those related to higher education funding.

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<sup>620</sup> *Lawmakers Support Stimulus Waiver*, ASSOCIATED PRESS, Mar. 20, 2009, available at <http://www.8newsnow.com/story/10045721/lawmakers-support-stimulus-waiver>.

## TARP: WHO NEEDS A BAILOUT?

On Monday October 13, 2008, chief executives from the nine largest banks in the United States entered a meeting with then-Treasury Secretary Henry Paulson, then-Federal Reserve Bank of New York President Timothy Geithner,<sup>621</sup> the then-Federal Reserve Chairman Ben Bernanke, and the then-Chairwoman of the Federal Deposit Insurance Corporation (“FDIC”) Shelia Bair.<sup>622</sup> Just three hours later, the nine chief executives left having signed “Major Financial Institution Participation Commitments,” in which the chief executive of the banks sold the U.S. Government preferred shares and warrants in exchange for \$125 billion. The move by the Federal Government cost the American Taxpayer a sum greater than the Gross Domestic Product of Morocco<sup>623</sup> and marked an opening installment of the Emergency Economic Stabilization Act (“EESA”).<sup>624</sup>

Despite strong opposition,<sup>625</sup> Congress passed the Emergency Economic Stabilization Act in 2008, codifying financial support and authority for the Troubled Asset Relief Program (“TARP”). Through EESA, \$700 billion was appropriated to “restore liquidity and stability to the financial system of the United States.”<sup>626</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010 reduced funding under the program to \$475 billion.<sup>627</sup> As the Federal Government’s primary watchdog, the Committee has worked diligently to oversee the implementation of this “bailout” ultimately offered to financial institutions, mortgage lenders and automakers – a bailout that required an unprecedented investment by the American Taxpayer with little assurance of repayment.

### *THE TROUBLED ASSET RELIEF PROGRAM*

The Troubled Asset Relief Program (“TARP”) was enacted in an effort to save the United States economy in the face of the worst domestic financial crisis since the Great Depression. Enacted as part of the Emergency Economic Stabilization Act, TARP was intended to provide a mechanism whereby the Federal Government could purchase assets with declining or significantly impaired value<sup>628</sup> from systemically important financial institutions<sup>629</sup> with the expectation that the

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<sup>621</sup> Timothy Geithner would later succeed Secretary Paulson as Secretary of the Treasury in early 2009.

<sup>622</sup> Eric Dash & Marc Landler, *Drama Behind a \$250 Billion Banking Deal*, NEW YORK TIMES, (Oct. 14, 2008), *see also* JoAnne Allen, *Paulson gave banks no choice on government stakes: memos*, REUTERS, May 14, 2009.

<sup>623</sup> For context, the estimated GDP of Morocco in 2013 was only \$104.8 billion. *Id.*

<sup>624</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 div. A, 122 Stat. 3765 (2008).

<sup>625</sup> *Bill Isaac Vs. Hank Paulson’s Bailout Machine -- How the FDIC Chairman ALMOST Stopped TARP*, THE DAILY MAIL, (last viewed on Nov. 13, 2014) <http://dailybail.com/home/bill-isaac-vs-hank-paulsons-bailout-machine-how-the-former-f.html>.

<sup>626</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 div. A § 1(1), 122 Stat. 3765 (2008).

<sup>627</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 sec. 1302, § 115(a), 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5225(a)).

<sup>628</sup> “To provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers, to amend the Internal Revenue Code of 1986 to provide incentives for energy production and conservation, to extend certain expiring provisions, to provide individual income tax relief, and for other purposes.” Pub. L. No. 110-343, 122 Stat. 3765. “The Secretary is authorized to establish the Troubled Asset Relief Program (or “TARP”) to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this chapter and the policies and procedures developed and published by the Secretary.” Pub. L. No. 110-343, § 101.

institution, free from the risk of the “troubled asset,” would be more stable, and therefore able to continue participating in the financial markets.<sup>630</sup> TARP funds were originally granted through Emergency Economic Stabilization Act of 2008; \$700 billion was appropriated to “restore liquidity and stability to the financial system of the United States.”<sup>631</sup> With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act the government rethought its initial assessments and reduced this to \$475 billion.<sup>632</sup>

Designed by the then-Secretary of the Treasury Henry Paulson, TARP was originally planned to address what was considered the root cause of the financial crisis – illiquid mortgage assets.<sup>633</sup> Illiquid mortgage assets – mortgages owned by financial institutions that could normally be sold to other institutions but, because they were unlikely to be repaid by the homeowner, were at risk of default and therefore could not be sold – were creating a scenario where banks could not lend anymore money.<sup>634</sup> Since no more money was available to be lent out it created a “freeze” on the credit markets.<sup>635</sup> Within days of EESA’s passage, however, Mr. Paulson abruptly changed course, marginalizing the purchase of toxic assets in favor of the injection of funds directly into banks and other financial institutions through the use of TARP funds to the purchase of equity stakes.<sup>636</sup> Thus began the partial nationalization of the U.S. banking system.

TARP operates through five sub-programs: the Capital Purchase Program (“CPP”), Targeted Investment Program (“TP”), Systematically Significant Failing Institutions Program (“SSFI”), the Asset Guarantee Program (“AGP”) and the Automotive Industry Financing Program. CPP is by far the largest of the five subprograms, having distributed \$194.18 billion to 317 banks.<sup>637</sup> CPP was intended for strong banks and provides them with capital injections in exchange for preferred stock shares and warrants. Participation in the program was voluntary and initiated by application to the bank’s regulator; participants were required to pay a strong interest rate on Treasury injections.

### *OVERSEEING TARP: THE ROLE OF SIGTARP*

The Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”) was originally appointed in 2008 with the mission to protect the interests of those who fund TARP, the American

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<sup>629</sup> See William H. Issac, *A Better Way to Aid Banks*, WASH. POST, Sept. 27, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092602200.html>.

<sup>630</sup> Findings by SIGTARP since the implementation of TARP suggest that rather than helping the systemic failure caused by Too Big to Fail, TARP has only reinforced the practical concerns that banks are too big to fail by shifting markets to the organizations originally feared “too big.”

<sup>631</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 10/3/2008, p. 2, 16.

<sup>632</sup> *Tarp Programs*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/Pages/default.aspx#>.

<sup>633</sup> Politco Staff, *Paulson’s Rescue Plan is Called TARP*, POLITICO (Sept. 19, 2008), available at <http://www.politico.com/news/stories/0908/13609.html>.

<sup>634</sup> See *id.*

<sup>635</sup> *Id.*

<sup>636</sup> Ruthie Ackerman, *Tarp Changes Colors*, FORBES, (Nov. 12, 2008 3:20 p.m.)

[http://www.forbes.com/2008/11/12/treasury-tarp-update-markets-equity-cx\\_ra\\_1112markets28.html](http://www.forbes.com/2008/11/12/treasury-tarp-update-markets-equity-cx_ra_1112markets28.html).

<sup>637</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, INITIAL REPORT TO THE CONGRESS 56 (2009), available at

[http://www.sig tarp.gov/Quarterly%20Reports/SIGTARP Initial Report to the Congress.pdf](http://www.sig tarp.gov/Quarterly%20Reports/SIGTARP%20Initial%20Report%20to%20the%20Congress.pdf).

Taxpayer.<sup>638</sup> As part of this mission the SIGTARP looks to add transparency, oversight and enforcement to the TARP program. Created by Section 121<sup>639</sup> of the Emergency Economic Stabilization Act of 2008, the SIGTARP is required to “conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury,”<sup>640</sup> reflecting Congress’ intent that the primary purpose of TARP would be federally-funded purchases of troubled assets from financial institutions. After it became clear that Treasury’s primary activity under TARP would be equity investments in the institutions themselves, Congress amended Section 121, broadening the SIGTARP’s mandate to include audits and investigations of any action taken by Treasury under TARP.<sup>641</sup>

Since the creation of this position, SIGTARP’s office has served as an authoritative source of information on Troubled Asset Relief Program disbursements, operations, and costs;<sup>642</sup> it has concluded and reported on at least 23 audits and evaluations of subprograms and activities and made at least 151 recommendations;<sup>643</sup> and it has conducted investigations of waste and abuse within the program, many of which have resulted in civil or criminal actions. In addition, for each quarter since the original taxpayer bailout, SIGTARP has produced a report that describes activities and disbursements of the Treasury Department under each subprogram; analysis of financial statements and investments made under the program; and recommendations for improving

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<sup>638</sup> *Special Investigator for TARP Created*, NATIONAL ASSOCIATION FOR ATTORNEY GENERALS, (last visited Nov. 10, 2014) <http://www.naag.org/special-inspector-general-office-for-tarp-created.php>.

<sup>639</sup> §121(c) It shall be the duty of the Special Inspector General to conduct, supervise, and coordinate audits and investigations of the purchase management, and sale of assets by the Secretary of the Treasury under any program established by the Secretary under § 101 and the management of the Secretary under § 102.

<sup>640</sup> Pub. L. 110-343 (Oct. 3, 2008) §121.

<sup>641</sup> Pub. L. 111-15 (April 24, 2009).

<sup>642</sup> The first Special Inspector General for the Troubled Asset Relief Program was Neil Barofsky. During his tenure, Mr. Barofsky’s office issued thirteen audits and nine quarterly reports. In addition, he testified seventeen times before Congress, including three before the House Oversight and Government Reform Committee. Upon his departure, Congressman Issa noted that “[t]he passage of TARP signaled a pivotal moment at a time of great uncertainty and no one has been more dedicated to protecting the American people’s tax-dollars from waste, fraud and abuse than Neil Barofsky.” Press Release, Rep. Darrell Issa, *Issa Praises SIGTARP Barofsky for Public Service*, Feb. 14, 2011, available at <http://issa.house.gov/press-releases/2011/02/issa-praises-sigtarp-barofsky-for-public-service/>. The successor to Mr. Barofsky was his deputy inspector general, Christy Romero. Since her succession in 2011, Ms. Romero has testified twelve times before Congress with four of those before the House Oversight and Government Reform Committee. She has continued Mr. Barofsky’s diligence in maintaining the same stringent standards when dealing with the American Taxpayer’s funds in taking to task ineffective programs like the Home Affordable Modification Program. Gretchen Morgenson, *TARP’s Watchdog: A Tough Act to Follow*, NEW YORK TIMES, Mar. 19, 2011, available at <http://www.nytimes.com/2011/03/20/business/20gret.html>; see also Les Christie, CNN MONEY, *Borrowers in Obama’s housing program defaulting, watchdog says*, July 24, 2013, available at [http://money.cnn.com/2013/07/24/real\\_estate/hamp-default/](http://money.cnn.com/2013/07/24/real_estate/hamp-default/). SIGTARP issued a report in 2012 about the Hardest Hit Fund, part of TARP that was critical to the Administration’s attempt to help people that suffered due to the housing crisis. See Annie Lowrey, *Treasury Faulted in Effort to Relieve Homeowners*, NEW YORK TIMES, Apr. 12, 2012, <http://www.nytimes.com/2012/04/12/business/economy/treasury-department-faulted-in-effort-to-relieve-homeowners.html>.

<sup>643</sup> SIGTARP, QUARTERLY REPORT TO CONGRESS, OCTOBER 29, 2014 65 (2014), available at [http://www.sigtarp.gov/Quarterly%20Reports/October\\_29\\_2014\\_Report\\_to\\_Congress.pdf](http://www.sigtarp.gov/Quarterly%20Reports/October_29_2014_Report_to_Congress.pdf).

transparency and efficiency. The reports often include a focus on one or more specific aspects of the financial crisis.<sup>644</sup>

### *A CHANGE IN FOCUS: THE BAILOUT OF AIG*

When financial giants Bear Stearns and Merrill Lynch were forced to sell themselves to the highest bidder and legendary financial house Lehman Brothers sought relief in bankruptcy in the fall of 2008, the United States financial system looked to be approaching collapse. With American International Group claiming to be days away from defaulting, it seemed that the domino that could knock down all the rest was wobbling. If it fell, financial regulators feared an economic calamity reminiscent of the Great Depression.

In 2007, AIG was “the largest life insurer and the second largest property/casualty insurer” based on premiums written in the United States.<sup>645</sup> Its potential collapse posed a “systemic risk” – because AIG was a “counterparty” to an unknowable number of transactions between the world’s largest financial institutions, its collapse was widely expected to cause the collapse of other institutions, creating a “domino effect” with unforeseeable but certainly disastrous consequences.<sup>646</sup> In an effort to prevent a collapse of the world’s financial markets, the Federal Reserve Board, with the backing of the Treasury Department, authorized the Federal Reserve Bank of New York (“FRBNY”) to lend up to \$85 billion to AIG.<sup>647</sup> Even with this loan, AIG continued to skirt a precipitous edge overlooking bankruptcy. Due to the impact of the financial crisis on other institutions heavily invested in real estate assets, AIG ran the risk of having to make payment on a number of insurance-like agreements referred to as credit default swaps (“CDS”), which the institutions had purchased to protect against the default of collateralized debt obligations (“CDO”). These CDS were forcing AIG to pay out billions to counterparties, creating the risk that AIG would default on future swap agreements. Hence, the risk of a systemic collapse became very real. Such were the stakes as the Federal Reserve Bank of New York President attempted to create a solution that would save AIG from default.

### **FRBNY to the Rescue?**

Collateralized debt obligations are bundled investments that offer a cash flow to whoever holds it. These financial instruments became very popular before the financial crisis because banks could bundle together the various loans and mortgages they held and sell them in pieces, thereby creating an immediate cash infusion. Over time, crafty professionals found this to be a way to hide, for example, bad sub-prime mortgages that might present a serious risk of default. While AIG’s investment branch would bundle asset-backed payment streams into CDOs and then sell interests

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<sup>644</sup> See e.g., SIGTARP REPORT OCTOBER 2009 (discussing credit rating agencies); SIGTARP REPORT JANUARY 2010 (discussing federal support of the residential mortgage market); SIGTARP Report October 2010 (discussing loan servicing); see SIGTARP REPORT OCTOBER 2014 19 available at

[http://www.sigtarp.gov/Quarterly%20Reports/October\\_29\\_2014\\_Report\\_to\\_Congress.pdf](http://www.sigtarp.gov/Quarterly%20Reports/October_29_2014_Report_to_Congress.pdf).

<sup>645</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 2-3 (2009), available at [http://www.sigtarp.gov/Audit%20Reports/Factors\\_Affecting\\_Efforts\\_to\\_Limit\\_Payments\\_to\\_AIG\\_Counterparties.pdf](http://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf).

<sup>646</sup> *Id.* at 1.

<sup>647</sup> *Id.*

in the CDOs to investment firms such as Merrill Lynch and Goldman Sachs,<sup>648</sup> another branch of AIG would sell CDS as insurance against default on the CDOs – sometimes to the same firms. This internal contradiction placed AIG in a precarious position where it would be forced to make payments either way – an illogical position that resulted from branches acting independently and without an understanding of the risks posed.

Leading up to the original bailout on September 16, 2008, AIG suffered from a credit downgrade that in turn caused the CDO's to go down in value.<sup>649</sup> Due to this event, the terms of its counterparty agreements required that AIG make payments to cover the CDO losses.<sup>650</sup> AIG was facing a situation where they did not have enough liquid assets to pay back these collateralized debts and if AIG defaulted, the company would quickly fall into bankruptcy under demands from counterparties. It was at this point that the Federal Reserve, Treasury, and FRBNY stepped in with an \$85 billion loan on September 16, 2008. AIG received another dose of government assistance in light of AIG's continual decline with an extension of \$40 billion from the Troubled Asset Relief Program that was used to purchase preferred stock<sup>651</sup> in AIG.

The most controversial decision by the federal regulators was, however, the “Malden Lane III” program. Despite the monetary assistance from the Federal Government, AIG was still facing potential bankruptcy. The company's situation looked dire as it ran the risk being required to make payment on other collateralized debt obligations, which would cause their credit rating to drop further, which would in turn cause another set of collateral obligations to be owed.<sup>652</sup> As part of Malden Lane III, the FRBNY hoped to purchase the CDOs from the counterparties at a reduced rate – thereby transferring the additional debts that would be owed by AIG from systemically important financial institutions, which should be willing to sell the CDOs for less than they were purchased in order to avoid the risk of AIG's default, to the Federal Government, which, in theory, could be paid back over a longer period of time.<sup>653</sup> However, counterparties were unwilling to take a “haircut” on their investments, forcing the FRBNY to pay full price for the obligations, even though current market conditions had made them essentially worthless.<sup>654</sup> Through its Malden Lane III program, the FRBNY paid out \$27.1 billion to AIG counterparties.<sup>655</sup> This was in addition to the \$35 billion that AIG had already doled out as part of its prior earlier payments.<sup>656</sup>

## Findings

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<sup>648</sup> *Id.* at 20.

<sup>649</sup> *Id.* at 4.

<sup>650</sup> *Id.* at 3

<sup>651</sup> “A class of ownership in a corporation that has a higher claim on the assets and earnings than common stock. Preferred stock generally has a dividend that must be paid out before dividends to common stockholders and the shares usually do not have voting rights.” *Preferred Stock*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/preferredstock.asp>.

<sup>652</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 5 (2009), *available at* [http://www.sig tarp.gov/Audit%20Reports/Factors\\_Affecting\\_Efforts\\_to\\_Limit\\_Payments\\_to\\_AIG\\_Counterparties.pdf](http://www.sig tarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf).

<sup>653</sup> *Id.* at 14.

<sup>654</sup> *See id.* at 15.

<sup>655</sup> *Id.* at 15.

<sup>656</sup> *Id.*

The House Oversight Committee found, supported by the Special Inspector General for the Troubled Asset Relief Program's ("SIGTARP") report, that the FRBNY did not properly engage in negotiations with counterparties to discuss taking potential haircuts and therefore could have cost Taxpayers tens of millions<sup>657</sup> of dollars.<sup>658</sup> Due to the unsuccessful negotiations, the FRBNY paid the counterparties back on par, which ultimately makes it near impossible for the Taxpayer to make their full investment back, as the FRBNY espoused.<sup>659</sup>

### **Par: Good for Golf, Not for Taxpayers**

For two days, November 6 and 7, 2008, the FRBNY entered into "negotiations" with AIG counterparties.<sup>660</sup> However, the SIGTARP report found that the FRBNY entered into the negotiations with the counterparties after stressing that negotiations were voluntary.<sup>661</sup> The report further found that a major bargaining chip, the default or bankruptcy of AIG, was seen to be non-existent because the US government had already guaranteed that AIG would not fail as demonstrated by their initial bailout.<sup>662</sup> Without any force from the FRBNY and an already weak bargaining position the end-negotiations resulted in the counterparties being paid par for their credit default swaps.<sup>663</sup> As a former New York Attorney General stated:

But wait a moment, aren't we in the midst of reopening contracts all over the place to share the burden of this crisis? From raising taxes—income taxes to sales taxes—to properly reopening labor contracts, we are all being asked to pitch in and carry our share of the burden. Workers around the country are being asked to take pay cuts and accept shorter work weeks so that colleagues won't be laid off. Why can't Wall Street royalty shoulder some of the burden? Why did Goldman have to get back 100 cents on the dollar? Didn't we already give Goldman a \$25 billion capital infusion, and aren't they sitting on more than \$100 billion in cash? Haven't we been told recently that they are beginning to come back to fiscal stability? If that is so,

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<sup>657</sup> *Id.* at 15 (disclosing that one counterparty would be willing to take a haircut of 2% if all of the other counterparties agreed to as well, a 2% haircut from \$27 billion would have saved the United States \$54 million).

<sup>658</sup> Minority Staff of H. Cmte. on Oversight & Gov't Reform, *Public Disclosure as a Last Resort: How the Federal Reserve Fought to Cover Up the Details of the AIG Counterparties Bailout from the American People*, 111th Cong. (2010), available at <http://oversight.house.gov/wp-content/uploads/2012/02/20100125aigstaffreportwithcover.pdf>.

<sup>659</sup> *Id.* at 3.

<sup>660</sup> *Id.*

<sup>661</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 15 (2009), available at [http://www.sig tarp.gov/Audit%20Reports/Factors\\_Affecting\\_Efforts\\_to\\_Limit\\_Payments\\_to\\_AIG\\_Counterparties.pdf](http://www.sig tarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf).

<sup>662</sup> *Id.*

<sup>663</sup> *Id.* at 19: (finding that "despite the willingness of at least one counterparty to engage in discussions about a potential haircut, all counterparties were paid effectively par value for the credit default swaps."). See Rick Newman, *What's Good, What's Bad About the AIG Bailout*, U.S. NEWS MONEY BLOG, (Mar. 17, 2009 12:15 PM), <http://money.usnews.com/money/blogs/flowchart/2009/03/17/whats-good-whats-bad-about-the-aig-bailout> (noting that the banks that received the counterparty bailouts got par value for CDO's that's market price was only half their face value).

couldn't they have accepted a discount, and couldn't they have agreed to certain conditions before the AIG dollars—that is, our dollars—flowed?<sup>664</sup>

Instead of offering up explanation and clarification on the reasons for paying these backdoor bailouts for counterparties at par, AIG and FRBNY offered only obstructionist policies of trying not to disclose how much the payments were or to whom they went.<sup>665</sup> In addition to not revealing the recipients and the amounts, the House Committee found examples of AIG and the FRBNY attempting to obfuscate the full depths of the purchase of the underlying CDO. In an email from Alejandro Latorre, an Assistant Vice President, he informed another employee that “As a matter of course, we do not want to disclose that the concession is at par unless absolutely necessary.”<sup>666</sup> In addition, the reports to the SEC, that must meet mandatory report requirements, were doctored to cut out clear lines like “[a]s a result of this transaction, the AIGFP counterparties received 100 percent of the par value of the Multi-Sector CDO sold and the related CDO have been terminated.”<sup>667</sup>

In its bailout of AIG, the FRBNY under Timothy Geithner failed to negotiate better terms for a loan that was coming out of the pockets of the American Taxpayer. Although there were potential necessities that inspired the need for the counterparty bailouts, the further attempts at providing obfuscation rather than transparency only added to the confusion and distrust that surrounded the counterparty backdoor bailouts.

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<sup>664</sup> Eliot Spitzer, *The Real AIG Scandal: It's not the bonuses. It's that AIG's counterparties are getting paid back in full*, SLATE, Mar. 17, 2009, available at

[http://www.slate.com/articles/news\\_and\\_politics/the\\_best\\_policy/2009/03/the\\_real\\_aig\\_scandal.html](http://www.slate.com/articles/news_and_politics/the_best_policy/2009/03/the_real_aig_scandal.html).

<sup>665</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 21 (2009), available at [http://www.sig tarp.gov/Audit%20Reports/Factors\\_Affecting\\_Efforts\\_to\\_Limit\\_Payments\\_to\\_AIG\\_Counterparties.pdf](http://www.sig tarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf).

<sup>666</sup> Email from Alejandro Latorre to Paul Whynott and others, Nov. 11, 2008, BATES #FRBNY-TOWNS-R1-191773.

<sup>667</sup> Minority Staff of H. Cmte. on Oversight & Gov't Reform, *Public Disclosure as a Last Resort: How the Federal Reserve Fought to Cover Up the Details of the AIG Counterparties Bailout from the American People*, 111th Cong. 6 (2010), available at <http://oversight.house.gov/wp-content/uploads/2012/02/20100125aigstaffreportwithcover.pdf>.

### *HOME AFFORDABLE MODIFICATION PROGRAM: A ONE-SIZE-FITS-ALL APPROACH*

One of the main focuses of TARP was to “preserve homeownership.”<sup>668</sup> As part of the Making Homes Affordable program,<sup>669</sup> the Home Affordable Modification Program (“HAMP”) is a \$75 billion taxpayer-funded program that incentivizes mortgage companies to lower mortgage payments and renegotiate rates for homeowners facing foreclosure.<sup>670</sup> In return, The U.S. Department of the Treasury subsidizes the modifications through direct payments to servicers, lenders, and borrowers.<sup>671</sup>

A person can be qualified for HAMP when, “because of a financial hardship, you are struggling to make your mortgage payments; you are delinquent in danger of falling behind in your mortgage; you obtained your mortgage on or before January 1, 2009; your property has not been condemned; you owe up to \$729,750 on your primary residence or one-to-four unit rental property, [and] you have not been convicted within the last 10 years of a crime in connection with a mortgage or real estate transaction.”<sup>672</sup>

Under HAMP, participating mortgage servicers sign contracts with Fannie Mae, Treasury’s designated financial agent, agreeing to grant mortgage modifications to borrowers under prescribed circumstances. In return, Treasury subsidizes the modifications through direct payments to servicers, lenders and borrowers. Treasury initially promised that HAMP would “help up to 3 to 4 million at-risk homeowners avoid foreclosure by reducing monthly mortgage payments.”<sup>673</sup>

Through its administration of HAMP, Treasury established a one-size-fits-all mortgage modification process that obligates participating servicers to grant subsidized modifications to borrowers under certain circumstances:

- For every eligible borrower whose loan passes Treasury’s secret net present value test, payments are reduced to 31 percent of income, regardless of other circumstances. Under HAMP, borrowers apply to their servicers to request modifications.

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<sup>668</sup> Daniele Douglas, *Homeowners Defaulting in Federal Loan Modification, Report Says*, THE WASH. POST, [http://www.washingtonpost.com/business/economy/homeowners-defaulting-in-loan-modification-program-report-says/2013/04/23/0fce3bf8-ac6c-11e2-a198-99893f10d6dd\\_story.html](http://www.washingtonpost.com/business/economy/homeowners-defaulting-in-loan-modification-program-report-says/2013/04/23/0fce3bf8-ac6c-11e2-a198-99893f10d6dd_story.html); 12 U.S.C. § 5201(2)(b) (stating that one of the purposes of TARP is to “preserve homeownership”).

<sup>669</sup> *About MHA*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/about-mha/Pages/default.aspx>.

<sup>670</sup> Minority Staff Report, *Treasury Department’s Mortgage Modification Programs: A Failure Prolonging the Crisis*, (Feb. 25, 2010) available at <http://oversight.house.gov/wp-content/uploads/2012/02/2-25-10Treasury.Report.pdf>.

<sup>671</sup> *Id.*

<sup>672</sup> *Home Affordable Modification Program*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx>.

<sup>673</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Treasury Department’s Mortgage Modification Program: A Failure Prolonging the Crisis*, 111th Cong. (2010) available at <http://oversight.house.gov/wp-content/uploads/2012/02/2-25-10Treasury.Report.pdf>.

- Only first-lien mortgages that were originated before January 1, 2009, that have principal balances beneath prescribed limits, and that are in default or at risk of imminent default are eligible.
- A borrower must demonstrate a monthly mortgage payment that exceeds 31 percent of monthly gross income and that the payment is not affordable due to a financial hardship.
- Servicers are required to use a net present value (“NPV”) test on each mortgage. The test compares the NPV of expected cash flows with and without modification.
- If the NPV is greater under the modification scenario, the servicer must offer to modify the loan.<sup>674</sup>

Treasury has chosen to reduce all monthly payments to 31 percent of the borrower’s gross income. In every HAMP modification, the lender first reduces the payment to 38 percent of income, then Treasury and the lender share the burden of reducing the payment to 31 percent. Treasury will not share the burden of reductions that push the resulting interest rate below 2 percent. If a payment reduced to an interest rate of 2 percent is still above 31 percent of the borrower’s gross monthly income, the servicer must extend the payment term and/or defer a portion of the principal. Servicers may, but are not required to, forgive a portion of the principal.<sup>675</sup>

HAMP modifications begin with a three-month trial period. If the borrower successfully makes all payments during the trial period, and the servicer is able to verify that the borrower’s income and expense information is correct, then the servicer and the borrower execute a permanent modification agreement. Under the modification agreement, the interest rate is fixed for five years, but then rises by a maximum of one percentage point per year until it reaches the market rate at the time of the original modification.<sup>676</sup>

Treasury subsidizes HAMP modifications by (a) sharing the cost of reductions in monthly payments; (b) making direct incentive payments to the servicers of \$1,000 for each loan modification, then \$1,000 annually in a “pay for success” fee for each loan that continues to perform; (c) contributing up to \$1,000 annually to reduce the principal for homeowners who make their payments on time; and (d) providing “bonus incentives” of \$1,500 to the lender/investor and \$500 to the servicer for each modification made while the borrower is still current on payments.

#### *FAILING TO MEET EXPECTATIONS*

As detailed in a joint report released by then-Ranking Members Darrell Issa and Representative Jim Jordan, the Minority staff of the Committee on Oversight and Government Reform outlined a number of problems in the implementation of the Home Affordable Modification Program (“HAMP”). According to the program’s results, HAMP has failed or dramatically under-produced in comparison to the goals and projections of the Treasury Department. Originally, HAMP was expected to help as many as “3-4 million distressed borrowers” but as of March 2013 only 816,000

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<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> *Id.*

permanent modifications were still outstanding.<sup>677</sup> Moreover, according to SIGTARP, redefaults on mortgages modified under HAMP have cost taxpayers \$815 million – amounting to 18 percent of TARP funds spent for all HAMP modifications.<sup>678</sup> Of the people that have modified their mortgage under the program, SIGTARP has found that over 160,000 have again defaulted on payments.<sup>679</sup> In addition, the Committee found that in addition to the approximately 830,000 active modifications, there were an additional 60,000 applications that had started but were cancelled before receiving a permanent modification.<sup>680</sup>

Throughout its implementation there has been one thing that HAMP has provided consistency in: failing to meet expectations. Yet, worse than failing to meet its expectations is the House Committee on Oversight and Government Reform’s findings that HAMP might actually be hurting homeowners that go through its process. A managing member of Watershed Asset Management, Kevin Katari characterized the situation as if the government were, “trying to modify our way out of this, which has the effect of lengthening the crisis. We have simply slowed the foreclosure pipeline, with people staying in houses they are ultimately not going to be able to afford anyway.”<sup>681</sup>

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<sup>677</sup> Keith Jurow, *The Government’s Plan to Save Housing Will Cause People to Default Over and Over Again*, BUSINESS INSIDER, May 30, 2013, available at <http://www.businessinsider.com/new-mortgage-modification-program-cannot-prevent-further-housing-collapse-2013-5>.

<sup>678</sup> SIGTARP, RISING REDEFAULTS OF HAMP MORTGAGE MODIFICATIONS HURT HOMEOWNERS, COMMUNITIES AND TAXPAYERS 3 (2013) available at [http://www.sig tarp.gov/Audit%20Reports/Rising\\_Redefaults\\_of\\_HAMP\\_Mortgage\\_Modifications.pdf](http://www.sig tarp.gov/Audit%20Reports/Rising_Redefaults_of_HAMP_Mortgage_Modifications.pdf).

<sup>679</sup> *Id.*

<sup>680</sup> *See id.*

<sup>681</sup> Peter Goodman, *U.S. Loan Effort is Seen as Adding to Housing Woes*, NEW YORK TIMES, (Jan. 1, 2010), [http://www.nytimes.com/2010/01/02/business/economy/02modify.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/01/02/business/economy/02modify.html?pagewanted=all&_r=0).

## CHAPTER 3. PROTECTING AMERICA: WHO IS CARING FOR OUR HOMELAND, OUR CITIZENS, AND OUR VETERANS?

The security of American citizens – both at home and abroad – is one of the most important concerns of the Federal Government. Under Chairman Darrell Issa, the Committee on Oversight and Government Reform has worked to ensure the government is taking the steps necessary to protect our President, our Military, our Veterans and our country. Where flaws in process exist, the Committee has worked tirelessly to expose those flaws to sunlight so that needed repairs can be made. The work of the Committee has led to reforms within several agencies responsible for protection of the American people – but the work continues. Highlighted below are instances where the Committee on Oversight and Government Reform has worked to ensure the Federal Government is working to protect America.

### OPERATION FAST AND FURIOUS<sup>682</sup>

In 2009, the Department of Justice (“DOJ”) developed a risky new strategy to combat gun trafficking along the Southwest Border. The new strategy directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible, an action known as “interdiction” – and to focus instead on identifying members of trafficking networks. In response, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), a branch within the Department of Justice, implemented the Department’s strategy using a reckless investigative technique called “gunwalking.” ATF allowed suspects to walk away with illegally purchased guns. The purpose was to wait and watch, with the hope that law enforcement could identify other members of a trafficking network and build a large, complex conspiracy case.

After the Justice Department issued its new strategy, ATF’s Phoenix Field Division opened an investigation – later called Operation Fast and Furious – into a suspected firearms straw purchasing ring. A key component of the operation was to allow known straw purchasers to illegally buy firearms and then cease surveillance to see where the firearms reappeared.

Although many line ATF agents objected strongly to gunwalking, ATF leadership prevented them from interdicting the illegally purchased firearms. ATF leadership hoped to establish a connection between the local straw buyers in Arizona and the Mexico-based drug-trafficking organizations. ATF knew that these guns were being placed in the hands of violent criminals. In fact, ATF knew it would often only recover these firearms after they turned up at crime scenes. Tragically, many of these recoveries involved loss of life, including that of U.S. Border of Patrol Agent Brian Terry in December 2010.

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<sup>682</sup> The Committee’s joint investigation with the Senate Committee on Judiciary into Operation Fast and Furious is detailed in two staff reports released as part of a series of three. See Joint Staff of H. Cmte. on Oversight & Gov’t Reform and Minority Staff of S. Cmte. on Judiciary, *Fast and Furious: The Anatomy of a Failed Operation (Part 1 of 3)*, 112th Cong. (2012). Joint Staff of H. Cmte. on Oversight & Gov’t Reform and Minority Staff of S. Cmte. on Judiciary, *Fast and Furious: The Anatomy of a Failed Operation (Part 2 of 3)*, 112th Cong. (2012). Part three of the report can only be prepared after the Department of Justice fulfills its constitutional obligation to cooperate with Congress and produce documents requested pursuant to subpoena.

The Justice Department's leadership allowed ATF to implement this flawed strategy, fully aware of what was taking place on the ground. Through both the U.S. Attorney's Office in Arizona and "Main Justice," headquarters in Washington, D.C., the Department of Justice monitored and supervised ATF's activities. The U.S. Attorney's Office for the District of Arizona encouraged and supported every facet of Fast and Furious. Main Justice provided support and approved various aspects of the Operation, including wiretap applications that would necessarily include painstakingly detailed descriptions of what ATF knew about the straw buyers it was monitoring.

Despite support from Justice Department and ATF leadership and despite months and months of investigative work, ATF never achieved its goal of dismantling a drug cartel. In fact, it never even came close. Fast and Furious resulted only in indictments of 20 straw purchasers. Those indictments only came after the death of Brian Terry. The indictments, filed January 19, 2011, were mostly for "lying and buying" – falsely filling out ATF Form 4473, which is to be completed truthfully in order to legally acquire a firearm. Even worse, ATF knew most of the indicted straw purchasers to be straw purchasers before Fast and Furious even began. In the meantime, ATF allowed hundreds and hundreds of firearms—including AK-47 variants, Barrett .50 caliber sniper rifles, .38 caliber revolvers, and the FN Five-seven—to walk across the border and into the hands of criminals. Many of these firearms have never been recovered.

The Committee on Oversight and Government Reform launched its investigation in February 2011 after brave ATF agents came forward and exposed the dangerous tactics used in Operation Fast and Furious to Members of Congress. The Committee uncovered bad decision making at every level within the Department of Justice and ATF, bad decisions that left both American and Mexican citizens vulnerable.

#### *BREAKDOWNS AT ALL LEVELS OF THE DEPARTMENT OF JUSTICE*

##### **The ATF Phoenix Field Division**

In October 2009, the Office of the Deputy Attorney General ("ODAG") in Washington, D.C. promulgated a new strategy to combat gun trafficking along the Southwest Border. This new strategy directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible – a process known as "interdicting – and to focus instead on identifying members of trafficking networks. The Office of the Deputy Attorney General shared this strategy with the heads of many Department components, including ATF.<sup>683</sup>

Members of the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF's") Phoenix Field Division, led by Special Agent in Charge Bill Newell, became familiar with this new strategy and used it in devising Operation Fast and Furious. In mid-November 2009, just weeks after the strategy was issued, Fast and Furious began. Its objective was to establish a nexus between straw purchasers of firearms in the United States and Mexican drug-trafficking organizations ("DTOs") operating on both sides of the United States-Mexico border. Straw purchasers are individuals who are legally entitled to purchase firearms for themselves, but who unlawfully purchase weapons with the intent to transfer them to someone else, in this case DTOs or other criminals.

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<sup>683</sup> E-mail from [Dep't of Justice] on behalf of Deputy Att'y Gen. David Ogden to Kathryn Ruemmler, et al. (Oct. 26, 2009).

During Fast and Furious, ATF agents used an investigative technique known as “gunwalking” – that is, allowing illegally-purchased weapons to be transferred to third parties without attempting to disrupt or deter the illegal activity. ATF agents abandoned surveillance on known straw purchasers after they illegally purchased weapons that ATF agents knew were destined for Mexican drug cartels. Many of these transactions established probable cause for agents to interdict the weapons or arrest the possessors, something every agent was trained to do. Yet, Fast and Furious aimed instead to allow the transfer of these guns to third parties. In this manner, the guns fell into the hands of DTOs, and many would turn up at crime scenes. ATF then traced these guns to their original straw purchaser, in an attempt to establish a connection between that individual and the DTO.

Federal Firearms Licensees (“FFLs”), who cooperated with ATF, were an integral component of Fast and Furious. Although some FFLs were reluctant to continue selling weapons to suspicious straw purchasers, ATF encouraged them to do so, reassuring the FFLs that ATF was monitoring the buyers and that the weapons would not fall into the wrong hands.<sup>684</sup> ATF worked with FFLs on or about the date of sale to obtain the unique serial number of each firearm sold. Agents entered these serial numbers into ATF’s Suspect Gun Database within days after the purchase. Once these firearms were recovered at crime scenes, the Suspect Gun Database allowed for expedited tracing of the firearms to their original purchasers.

By December 18, 2009, ATF agents assigned to Fast and Furious had already identified fifteen interconnected straw purchasers in the targeted gun trafficking ring. These straw purchasers had already purchased 500 firearms.<sup>685</sup> In a biweekly update to Bill Newell, ATF Group Supervisor David Voth explained that 50 of the 500 firearms purchased by straw buyers had already been recovered in Mexico or near the Mexican border.<sup>686</sup> These guns had time-to-crimes of as little as one day, a strong indication of straw purchasing.<sup>687</sup>

Starting in late 2009, many line agents objected vociferously to some of the techniques used during Fast and Furious, including gunwalking. The use of the tactic continued for another year, however, until shortly after December 15, 2010, when two weapons from Operation Fast and Furious were recovered at the murder scene of U.S. Border Patrol Agent Brian Terry.

Pursuant to the Deputy Attorney General’s strategy, by late January 2010 the ATF Phoenix Field Division applied for Fast and Furious to become an Organized Crime Drug Enforcement Task Force (“OCDETF”) case – a designation that would allow for additional funding and interagency coordination. In preparation for the OCDETF application process, the ATF Phoenix Field Division prepared a briefing paper detailing the investigative strategy employed in Fast and Furious. This document was not initially produced by the Department pursuant to its subpoena, but rather was obtained by a confidential source. The briefing paper stated:

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<sup>684</sup> Transcribed Interview of Special Agent Peter Forcelli, at 53-54 (Apr. 28, 2011).

<sup>685</sup> E-mail from Kevin Simpson, Intelligence Officer, Phoenix FIG, ATF, to David Voth (Dec. 18, 2009).

<sup>686</sup> *Id.*

<sup>687</sup> *Id.*

Currently our strategy is to allow the transfer of firearms to continue to take place, albeit at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators who would continue to operate and illegally traffic firearms to Mexican DTOs which are perpetrating armed violence along the Southwest Border.<sup>688</sup>

Fast and Furious was approved as an OCDETF case, and this designation resulted in new operational funding. Additionally, Fast and Furious became a prosecutor-led OCDETF Strike Force case, meaning that ATF would join with the Federal Bureau of Investigation, Drug Enforcement Administration, Internal Revenue Service and Immigrations and Customs Enforcement under the leadership of the U.S. Attorney's Office for the District of Arizona.

### **The United States Attorney's Office for the District of Arizona**

The U.S. Attorney's Office for the District of Arizona led the Fast and Furious OCDETF Strike Force. Although ATF was the lead law enforcement agency for Fast and Furious, its agents took direction from prosecutors in the U.S. Attorney's Office. The lead federal prosecutor for Fast and Furious was Assistant U.S. Attorney Emory Hurley, who played an integral role in the day-to-day, tactical management of the case.<sup>689</sup>

Many ATF agents working on Operation Fast and Furious came to believe that some of the most basic law enforcement techniques used to interdict weapons required the explicit approval of the U.S. Attorney's Office, and specifically from Hurley. On numerous occasions, Hurley and other federal prosecutors withheld this approval, to the mounting frustration of ATF agents.<sup>690</sup> The U.S. Attorney's Office chose not to use other available investigative tools common in gun trafficking cases, such as civil forfeitures and seizure warrants, during the seminal periods of Fast and Furious.

The U.S. Attorney's Office advised ATF that agents needed to meet unnecessarily strict evidentiary standards in order to speak with suspects, temporarily detain them, or interdict weapons. ATF's reliance on this advice from the U.S. Attorney's Office during Fast and Furious resulted in many lost opportunities to interdict weapons.

In addition to leading the Fast and Furious OCDETF task force, the U.S. Attorney's Office was instrumental in preparing the wiretap applications that were submitted to the Justice Department's Criminal Division. Federal prosecutors in Arizona filed at least six of these applications, each containing immense detail about operational tactics and specific information about straw purchasers, in federal court after Department headquarters authorized them.

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<sup>688</sup> Phoenix Group VII, Phoenix Field Division, ATF, *Briefing Paper* (Jan. 8, 2010).

<sup>689</sup> Transcribed Interview of Special Agent in Charge William Newell, at 32-33 (June 8, 2011).

<sup>690</sup> Transcribed Interview of Special Agent Larry Alt, at 94 (Apr. 27, 2011).

## ATF Headquarters

Fast and Furious first came to the attention of ATF Headquarters on December 8, 2009, just weeks after the case was officially opened in Phoenix. ATF's Office of Strategic Information and Intelligence ("OSII") briefed senior ATF personnel about the case on December 8, 2009, discussing in detail a large recovery of Fast and Furious weapons in Naco, Sonora, Mexico.<sup>691</sup>

The next day, December 9, 2009, the Acting ATF Director first learned about Fast and Furious and the large recovery of weapons that had already occurred.<sup>692</sup> The following week, OSII briefed senior ATF officials about another large cache of Fast and Furious weapons that had been recovered in Mexico.<sup>693</sup>

On January 5, 2010, OSII presented senior ATF officials with a summary of all of the weapons that could be linked to known straw purchasers in Fast and Furious. In just two months, these straw purchasers bought a total of 685 guns. This number raised the ire of several individuals in the room, who expressed concerns about the growing operation.<sup>694</sup>

On March 5, 2010, ATF headquarters hosted a larger, more detailed briefing on Operation Fast and Furious. David Voth, the Group Supervisor overseeing Fast and Furious, traveled from Phoenix to give the presentation. He gave an extremely detailed synopsis of the status of the investigation, including the number of guns purchased, weapons seizures to date, money spent by straw purchasers, and organizational charts of the relationships among straw purchasers and to members of the Sinaloa drug cartel. At that point, the straw purchasers had bought 1,026 weapons, costing nearly \$650,000.<sup>695</sup>

ATF's Phoenix Field Division informed ATF headquarters of large weapons recoveries tracing back to Fast and Furious. The Phoenix Field Division had frequently forwarded these updates directly to Deputy ATF Director Billy Hoover and Acting ATF Director Ken Melson.<sup>696</sup> When Hoover learned about how large Fast and Furious had grown in March 2010, he finally ordered the development of an exit strategy.<sup>697</sup> This exit strategy, something Hoover had never before requested in any other case, was a timeline for ATF to wind down the case.<sup>698</sup>

Though Hoover commissioned the exit strategy in March, he did not receive it until early May. The three-page document outlined a 30-, 60-, and 90-day strategy for winding down Fast and Furious and handing it over to the U.S. Attorney's Office for prosecution.<sup>699</sup>

In July 2010, Acting Director Melson expressed concern about the number of weapons flowing to Mexico,<sup>700</sup> and in October 2010 the Assistant Director for Field Operations, the number three

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<sup>691</sup> Interview with Lorren Leadmon, Intelligence Operations Analyst, Washington, D.C., July 5, 2011.

<sup>692</sup> *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (May 4, 2011) (questions for the Record of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.).

<sup>693</sup> Interview with Lorren Leadmon, Intelligence Operations Analyst, Washington, D.C., July 5, 2011

<sup>694</sup> Transcribed Interview of Deputy Ass't Dir. Steve Martin, ATF, at 36 (July 6, 2011).

<sup>695</sup> See generally "Operation the Fast and the Furious" Presentation, Mar. 5, 2010.

<sup>696</sup> E-mail from Mark Chait to Kenneth Melson and William Hoover (Feb. 24, 2010) [HOCR 001426].

<sup>697</sup> Transcribed Interview of William Hoover, ATF Deputy Director, at 9 (July 21, 2011).

<sup>698</sup> *Id.* at 72.

<sup>699</sup> E-mail from Douglas Palmer, Supervisor Group V, ATF, to William Newell, ATF (Apr. 27, 2010).

official in ATF, expressed concern that ATF had not yet halted the straw purchasing activity in Fast and Furious.<sup>701</sup> Despite these concerns, however, the U.S. Attorney's Office continued to delay the indictments, and no one at ATF headquarters ordered the Phoenix Field Division to simply arrest the straw purchasers in order to take them off the street. The members of the firearms trafficking ring were not arrested until two weapons from Fast and Furious were found at the murder scene of Border Patrol Agent Brian Terry.

ATF never achieved the goal of dismantling a drug cartel. After months and months of investigative work, Operation Fast and Furious resulted only in indictments of 20 straw purchasers – only after the death of Brian Terry. The indictments focus mainly on what is known as “lying and buying.” ATF knew most of the indicted straw purchasers to be straw purchasers before Fast and Furious even began. The investigation has discovered that some of the main Fast and Furious suspects were paid FBI informants. Had the FBI shared this information with ATF, Fast and Furious could have been shut down many months, if not a year, earlier than it was.

### **The DOJ's Criminal Division's Coordination with ATF**

In early September 2009, according to Department e-mails, ATF and the Department of Justice's Criminal Division began discussions “to talk about ways CRM [Criminal Division] and ATF can coordinate on gun trafficking and gang-related initiatives.”<sup>702</sup> Early on in these discussions, Lanny Breuer, Assistant Attorney General for the Criminal Division, sent an attorney to help the U.S. Attorney's Office in Arizona prosecute ATF cases. The first case chosen for prosecution was Operation Wide Receiver, a year-long ATF Phoenix Field Division investigation initiated in 2006, which involved several hundred guns being walked. The U.S. Attorney's Office in Arizona, objecting to the tactics used in Wide Receiver, had previously refused to prosecute the case.

According to James Trusty, a senior official in the Criminal Division's Gang Unit, in September 2009 Assistant Attorney General Breuer was “VERY interested in the Arizona gun trafficking case [Wide Receiver], and he is traveling out [to Arizona] around 9/21. Consequently, he asked us for a 'briefing' on that case before the 21<sup>st</sup> rolls around.”<sup>703</sup> The next day, according to Trusty, Breuer's chief of staff “mentioned the case again, so there is clearly great attention/interest from the front office.”<sup>704</sup>

When the Criminal Division prosecutor arrived in Arizona, she gave Trusty her impressions of the case. Her e-mail stated:

Case involves 300 to 500 guns . . . . It is my understanding that a lot of these guns “walked”. Whether some or all of that was intentional is not known.<sup>705</sup>

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<sup>700</sup> E-mail from Kenneth Melson to Mark Chait, et. al., (July 14, 2010) [HOCR 002084].

<sup>701</sup> E-mail from Mark Chait to William Newell (Oct. 29, 2010) [HOCR 001890].

<sup>702</sup> E-mail from Jason Weinstein to Lanny Breuer (Sept. 10, 2009) [HOCR 003378].

<sup>703</sup> E-mail from James Trusty to Laura Gwinn (Sept. 2, 2009) [HOCR 003375].

<sup>704</sup> E-mail from James Trusty to Laura Gwinn (Sept. 3, 2009) [HOCR 003376].

<sup>705</sup> E-mail from Laura Gwinn to James Trusty (Sept. 3, 2009) [HOCR 003377].

Discussions between ATF and the Criminal Division regarding inter-departmental coordination continued over the next few months. On December 3, 2009, the Acting ATF Director e-mailed Breuer about this cooperation. He stated:

Lanny: We have decided to take a little different approach with regard to seizures of multiple weapons in Mexico. Assuming the guns are traced, instead of working each trace almost independently of the other traces from the seizure, I want to coordinate and monitor the work on all of them collectively as if the seizure was one case.<sup>706</sup>

Breuer responded:

We think this is a terrific idea and a great way to approach the investigations of these seizures. Our Gang Unit will be assigning an attorney to help you coordinate this effort.<sup>707</sup>

Kevin Carwile, Chief of the Gang Unit, assigned an attorney, Joe Cooley, to assist ATF, and Operation Fast and Furious was selected as a recipient of this assistance. Shortly after his assignment, Cooley had to rearrange his holiday plans to attend a significant briefing on Fast and Furious.<sup>708</sup>

Cooley was assigned to Fast and Furious for the next three months. He advised the lead federal prosecutor, Emory Hurley, and received detailed briefings on operational details. Cooley, though, was not the only Criminal Division attorney involved with Fast and Furious during this time period. The head of the division, Lanny Breuer, met with ATF officials about the case, including Deputy Director Billy Hoover and Assistant Director for Field Operations Mark Chait.<sup>709</sup>

Given the initial involvement of the Criminal Division with Fast and Furious in the early stages of the investigation, senior officials in Criminal Division should have been greatly alarmed about what they learned about the case. These officials should have halted the program, especially given their prior knowledge of gunwalking in Wide Receiver, which was run by the same leadership in the same ATF field division.

On March 5, 2010, Cooley attended a briefing about Fast and Furious. The detailed briefing highlighted the large number of weapons the gun trafficking ring had purchased and discussed recoveries of those weapons in Mexico. According to Steve Martin, Deputy Assistant Director in ATF's Office of Strategic Intelligence and Information, everyone in the room knew the weapons from Fast and Furious were being linked to a Mexican cartel.<sup>710</sup> Two weeks later, in mid-March 2010, Carwile pulled Cooley off Fast and Furious, when the U.S. Attorney's Office informed him that it had the case under control.<sup>711</sup>

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<sup>706</sup> E-mail from Kenneth Melson to Lanny Breuer (Dec. 3, 2009) [HOCR 003403].

<sup>707</sup> E-mail from Lanny Breuer to Kenneth Melson (Dec. 4, 2009) [HOCR 003403].

<sup>708</sup> E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010) [HOCR 002832].

<sup>709</sup> Meeting on "Weapons Seizures in Mexico w/ Lanny Breuer" at Robert F. Kennedy Building, Room 2107, Jan. 5, 2010, 10:00 AM [HOCR 001987].

<sup>710</sup> Transcribed Interview of Deputy Ass't Dir. Steve Martin, ATF, at 100 (July 6, 2011).

<sup>711</sup> E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010, 9:00 a.m.) [HOCR DOJ 2382].

At about the same time, senior lawyers in the Criminal Division authorized wiretap applications for Fast and Furious to be submitted to a federal judge. Fast and Furious involved the use of seven wiretaps between March and July of 2010.

In a letter to Chairman Issa, the Deputy Attorney General acknowledged that the Office of Enforcement Operations (“OEO”), part of the Justice Department’s Criminal Division, is “primarily responsible for the Department’s statutory wiretap authorizations.”<sup>712</sup> According to the letter, lawyers in OEO review these wiretap packages to ensure that they “meet statutory requirements and DOJ policies.”<sup>713</sup> When OEO completes its review of a wiretap package, federal law provides that the Attorney General or his designee – in practice, a Deputy Assistant Attorney General in the Criminal Division – reviews and authorizes it.<sup>714</sup> Each wiretap package includes an affidavit which details the factual basis upon which the authorization is sought. Each application for Fast and Furious included a memorandum from Assistant Attorney General Breuer to Paul O’Brien, Director of OEO, authorizing the interception application.<sup>715</sup>

The Criminal Division’s approval of the wiretap applications in Fast and Furious violated Department of Justice policy. The core mission of the Bureau of Alcohol, Tobacco, Firearms, and Explosives is to “protect[] our communities from . . . the illegal use and trafficking of firearms.”<sup>716</sup>

The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious. These applications were constructed from raw data contained in hundreds of Reports of Investigation (“ROI”); the Department of Justice failed to produce any of these ROI in response to the Committee’s subpoena. The Criminal Division authorized Fast and Furious wiretap applications on March 10, 2010; April 15, 2010; May 6, 2010; May 14, 2010; June 1, 2010; and July 1, 2010. Deputy Assistant Attorney General Jason Weinstein, Deputy Assistant Attorney General Kenneth Blanco, and Deputy Assistant Attorney General John Keeney signed these applications on behalf of Assistant Attorney General Lanny Breuer.

### **The Office of the Deputy Attorney General**

The Office of the Deputy Attorney General (“ODAG”) maintained close involvement in Operation Fast and Furious. In the Justice Department, ATF reports to the Deputy Attorney General (“DAG”).<sup>717</sup> In practice, an official in the Office of the Deputy Attorney General is responsible for managing the ATF portfolio. This official monitors the operations of ATF, and raises potential ATF

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<sup>712</sup> Letter from Dep Att’y Gen. James M. Cole Chairman Darrell Issa et al., at 6 (Jan. 27, 2012).

<sup>713</sup> *Id.*

<sup>714</sup> See 18 U.S.C. § 2516(1).

<sup>715</sup> See, e.g., Memorandum from Lanny A. Breuer, Ass’t Att’y Gen., Criminal Division to Paul M. O’Brien, Director, Office of Enforcement Operations, Criminal Division, Authorization for Interception Order Application, Mar. 10, 2010.

<sup>716</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives, “ATF’s Mission,” <http://www.atf.gov/about/mission> (last visited May 1, 2012).

<sup>717</sup> USDOJ: About Department of Justice Agencies, *available at* <http://www.justice.gov/agencies/index-org.html> (last visited May. 1, 2012).

issues to the attention of the DAG.<sup>718</sup> During the pendency of Fast and Furious, this official was Associate Deputy Attorney General Edward Siskel.

Officials in ODAG became familiar with Fast and Furious as early as March 2010. On March 12, 2010, Siskel and then-Acting DAG Gary Grindler received an extensive briefing on Fast and Furious during a monthly meeting with the ATF's Acting Director and Deputy Director. This briefing presented Grindler with overwhelming evidence of illegal straw purchasing during Fast and Furious. The presentation included a chart of the names of the straw purchasers, 31 in all, and the number of weapons they had acquired to date, 1,026.<sup>719</sup> Three of these straw purchasers had already purchased over 100 weapons each, with one straw purchaser having already acquired over 300 weapons. During this briefing, Grindler learned that buyers had paid cash for every single gun.<sup>720</sup>

A map of Mexico detailed locations of recoveries of weapons purchased through Fast and Furious, including some at crime scenes.<sup>721</sup> The briefing also covered the use of stash houses where weapons bought during Fast and Furious were stored before being transported to Mexico. Grindler learned of some of the unique investigative techniques ATF was using during Fast and Furious.<sup>722</sup> Despite receiving all of this information, then-Deputy Attorney General Gary Grindler did not order Fast and Furious to be shut down, nor did he follow-up with ATF or his staff about the investigation.

Throughout the summer of 2010, ATF officials remained in close contact with their ODAG supervisors regarding Fast and Furious. Fast and Furious was a topic in each of the monthly meetings between ATF and the DAG. ATF apprised Ed Siskel of significant recoveries of Fast and Furious weapons, as well as of notable progress in the investigation, and Siskel indicated to ATF that he was monitoring it.<sup>723</sup> In mid-December 2010, after Fast and Furious had been ongoing for over a year, Grindler received more details about the program. On December 15, 2010, Border Patrol Agent Brian Terry was killed. Two Fast and Furious weapons were recovered at the scene of his murder. Two days later, Associate Deputy Attorney General Brad Smith sent Grindler and four ODAG officials an e-mail detailing the circumstances of Terry's murder and its connection to Fast and Furious.<sup>724</sup> Smith attached a four-page summary of the Fast and Furious investigation.

### *THE COMMITTEE'S INVESTIGATION*

In the pursuit of information that would expose the flawed decision-making that led to Operation Fast and Furious and the steps taken to investigate the operation by the Department of Justice – oversight that is the constitutional responsibility of the Committee on Oversight and Government Reform to conduct – the Committee on Oversight and Government Reform was unable to obtain necessary information from the Department of Justice despite repeated attempts, ultimately leading

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<sup>718</sup> Transcribed Interview of Acting Dir. Kenneth Melson, at 25 (July 4, 2011).

<sup>719</sup> “Operation the Fast and the Furious,” March 12, 2010 [HOGR 002820 – HOGR 002823].

<sup>720</sup> *Id.*

<sup>721</sup> *Id.*

<sup>722</sup> *Id.*

<sup>723</sup> E-mail from Edward N. Siskel to Mark R. Chait (July 14, 2010) [HOGR 002847].

<sup>724</sup> E-mail from Assoc. Deputy Att’y Gen. Brad Smith to Deputy Att’y Gen. Gary Grindler, et al. (Dec. 17, 2010) [HOGR 002875-002881].

to Attorney General Eric Holder being held in contempt of Congress for failing to produce documents under a congressional subpoena. Prior to instituting such dramatic proceedings, the Committee Members and staff conducted numerous meetings and phone conversations in an effort to clarify and highlight priorities with respect to the subpoenas; were flexible in scheduling dates for transcribed interviews; agreed to review certain sensitive documents *in camera* to protect the confidentiality of information and integrity of on-going investigations; extended production deadlines; and narrowed the scope of documents. Despite repeated concessions, the Department has refused to produce certain relevant documents to the Committee to aid in its investigation – representing on a number of occasions that it would not produce broad categories of documents.

The obstruction by the Department of Justice led the House of Representatives to vote to hold the Attorney General in contempt of Congress; as such, Eric Holder became “the first sitting Cabinet official ever to face a contempt citation from Congress.”<sup>725</sup> On the same day, President Obama asserted executive privilege over the subpoenaed documents – opening the door to over two years of litigation that will help define the scope of executive privilege and the extent to which the President may protect documents within an executive agency from disclosure to the Legislative Branch.<sup>726</sup>

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<sup>725</sup> Stephen Dinan, *Holder heading out, but contempt lives on: Opponent says timing of resignation no coincidence*, WASH. TIMES, Sept. 25, 2014, available at <http://www.washingtontimes.com/news/2014/sep/25/contempt-congress-case-will-proceed-without-holder/?page=all>.

<sup>726</sup> See Jordy Yager, *Obama court appointee likely to decide contempt battle between Issa, Holder*, HILL, (Mar. 19, 2013, 9:00 AM), available at <http://thehill.com/homenews/administration/288895-obama-court-appointee-likely-to-decide-contempt-battle-between-issa-holder>.

## AN ATTACK ON AMERICA ABROAD: BENGHAZI, LIBYA

The attacks on U.S. facilities in Benghazi, Libya, which claimed the lives of four Americans—Ambassador J. Christopher Stevens, Sean Smith, Glen Doherty, and Tyrone Woods—highlight the need for significant security enhancements at overseas facilities to ensure Americans serving abroad are protected. Decisions made by senior officials in the State Department, over the span of nearly a year leading up to the attacks, contributed to a deteriorating security situation for American personnel in Benghazi. These decisions and the U.S. response to this tragedy offer important lessons for our country’s approach to diplomatic security abroad, and a full accounting is required for Congress to perform its legislative responsibility to set policy and appropriate funds. The story of the Benghazi attacks and their aftermath is one of unheeded warnings, tragic heroism, and a lack of accountability.

### *THE ESCALATION*

In early 2011, a popular uprising in the eastern city of Benghazi, Libya sparked a national revolution against long-time dictator Muammar Gaddafi. The escalation in violence prompted the U.S. Embassy in Tripoli to suspend operations and evacuate all personnel in February 2011. To reestablish a presence in the country and demonstrate support for the uprising, the State Department sent J. Christopher Stevens, a career diplomat, to Benghazi as a Special Representative to the Libyan Transitional National Council (“TNC”), the fledgling opposition government. Accompanied by a cadre of armed agents from the Bureau of Diplomatic Security (“DS”), Stevens initially operated out of a hotel in Benghazi until security threats forced him to move to a more secure U.S. facility. Starting in June 2011, the State Department leased three adjacent properties to establish the Special Mission Compound (“SMC”) in Benghazi. Stevens remained in Benghazi as Envoy until November 2011.

The U.S. government formally recognized the TNC as the legitimate government of Libya in July of 2011. As the Gaddafi regime’s hold on the capital of Tripoli began to crumble, the TNC transferred its operations from Benghazi to Tripoli in August 2011. The State Department subsequently reopened the U.S. Embassy in Tripoli on September 22, 2011. As the focal point of U.S. diplomatic activity shifted once again back to Tripoli, the future of the Benghazi special mission compound, which had never enjoyed official U.S. diplomatic facility status, was in doubt. The property lease for the Benghazi mission was due to expire in early February 2012.

After months of deliberation within the State Department, in December 2011, then-Assistant Secretary for Near Eastern Affairs Jeffrey Feltman sent an Action Memorandum to Under Secretary for Management Patrick Kennedy requesting that Kennedy “approve a continued U.S. presence in Benghazi through the end of calendar year 2012.”<sup>727</sup> The memo cited ongoing U.S. policy interests in maintaining a State Department footprint in Benghazi, including the need to maintain political, economic, and public diplomacy, and commercial reporting in eastern Libya, a historically marginalized but politically and economically important part of the country.

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<sup>727</sup> Memo from Jeffrey Feltman, Assistant Secretary for Near Eastern Affairs, Dept. of State to Patrick Kennedy, Under Secretary for Management, Dept. of State (Dec. 27, 2011).

According to the memo:

[m]any Libyans have said the U.S. presence in Benghazi has a salutary, calming effect on easterners who are fearful that the new focus on Tripoli could once again lead to their neglect and exclusion from reconstruction and wealth distribution and strongly favor a permanent U.S. presence in the form of a full consulate.<sup>728</sup>

Kennedy approved the memo, extending the Benghazi special mission compound for one year, through the end of December 2012. Rather than the “full consulate” envisioned by the Libyans, however, the Benghazi compound was a smaller “temporary, residential facility, not officially notified to the host government, even though it was also a full time office facility.”<sup>729</sup> The Department consolidated its footprint onto two of the three compounds and reduced the number of staff assigned to post. According to the action memorandum signed by Kennedy, DS would provide a “full complement of five Special Agents” to protect two NEA diplomats and a communications officer at the Benghazi mission.<sup>730</sup>

Diplomatic Security, however, struggled to provide security resources to protect the Benghazi compound. Due to the temporary status of the SMC as approved by Ambassador Kennedy, DS was unable to assign agents from its regular pool of candidates. Instead, the U.S. mission in Benghazi had to rely on a recruitment system that asked volunteers to agree to short, temporary duty (“TDY”) deployments to Benghazi. This voluntary system was not designed to fully staff an overseas post like the SMC, leading to perennial shortfalls in security personnel. According to the ARB, the Benghazi special mission had its full complement of five DS agents for only 23 days between January 1 and September 9, 2012.<sup>731</sup>

Officials at Embassy Tripoli, including Eric Nordstrom, the Regional Security Officer (“RSO”), U.S. Ambassador Gene Cretz, and his successor, J. Christopher Stevens, repeatedly sought additional support from Washington to address security staffing shortfalls. Nordstrom believed that, despite the written policy approved by Under Secretary Kennedy, an “unwritten policy” dictated that the SMC would receive no more than three agents.<sup>732</sup>

On March 28, 2012, Ambassador Cretz sent a cable to Washington requesting, among other things, the full complement of five DS agents for Benghazi. The cable stated, “this number is required to ensure that we have an appropriate...presence” to carry out the SMC’s mission.<sup>733</sup> On April 19, 2012, the Department responded to the Ambassador’s request by recommending a “joint re-assessment of the number of DS agents requested for Benghazi.”<sup>734</sup> The response prompted one

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<sup>728</sup> *Id.*

<sup>729</sup> Accountability Review Board, U.S. Dep’t of State (Dec. 18, 2012), at 30, *available at* <http://www.state.gov/documents/organization/202446.pdf>.

<sup>730</sup> Memo from Jeffrey Feltman, Assistant Secretary for Near Eastern Affairs, Dept. of State to Patrick Kennedy, Under Secretary for Management, Dept. of State (Dec. 27, 2011).

<sup>731</sup> Accountability Review Board, U.S. Dep’t of State (Dec. 18, 2012), at 31, *available at* <http://www.state.gov/documents/organization/202446.pdf>.

<sup>732</sup> H. Comm. on Oversight & Gov’t Reform, Meeting with Eric Nordstrom (Oct. 1, 2012).

<sup>733</sup> 12 TRIPOLI 130, Mar. 28, 2012.

<sup>734</sup> 12 STATE 38989, Apr. 19, 2012.

frustrated diplomat in Benghazi to remark to her colleagues that it “look[ed] like no movement on the full complement of [5 DS] personnel for Benghazi, but rather a reassessment to bring numbers lower.”<sup>735</sup>

Extremists bombed the SMC on June 6, 2012, using an IED to blow a hole in the perimeter wall. Following this incident, the RSO in Tripoli renewed the request for the full complement of five DS agents to be stationed in Benghazi. Although at least two DS officials in Washington – the Regional Director for Near Eastern Affairs as well as the Libya desk officer – supported this request, senior State Department officials ultimately denied it.<sup>736</sup>

The June 6, 2012, attack on the SMC came amidst a sharp deterioration in the overall security environment in Benghazi. On June 11, RPG-wielding assailants attacked the British Ambassador’s convoy. As a result, the British withdrew their diplomatic presence in Benghazi. The United Nations and International Committee of the Red Cross also withdrew their personnel from Benghazi after armed assailants directed attacks against them as well. These developments caused Lieutenant Colonel Andrew Wood, the leader of a team of U.S. Special Forces soldiers under the direction of the Ambassador, to recommend that the State Department consider pulling out of Benghazi altogether. Wood explained that after these other organizations withdrew, “it was apparent to me that we were the last [Western] flag flying in Benghazi. We were the last thing on their target list to remove from Benghazi.”<sup>737</sup>

In addition to the understaffed DS detail, local, unarmed contract guards, as well as four members of the February 17 Martyrs Brigade—a revolutionary militia—protected the Benghazi facility. Numerous reports document the brigade’s extremist connections, and its likely involvement in the kidnapping of American citizens and making threats against the U.S. military. In the days leading up to the September 11 attacks, February 17 Brigade officials informed Department personnel that the brigade would no longer provide security to American diplomats in Benghazi traveling off compound.

On September 10, 2012, Ambassador Stevens arrived in Benghazi with two Assistant Regional Security Officers, bringing the total number of on-compound DS agents to five, and the total number of Americans at the SMC to seven. Ambassador Stevens joined Sean Smith, an Information Management Officer (“IMO”) at the SMC.

On September 11-12, 2012, terrorist attacks on U.S. diplomatic facilities in Benghazi, Libya, claimed the lives of four Americans—Ambassador Stevens, Sean Smith, Glen Doherty, and Tyrone Woods. On September 20, 2012, just one week after the September 11-12, 2012 terrorist attacks on the U.S. mission in Benghazi, Libya, Congressman Jason Chaffetz, Chairman of the Subcommittee on National Security, sent a letter to the Secretary of State asking for documents related to the events

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<sup>735</sup> E-mail from Jennifer A. Larson, Principal Officer, Dep’t of State, to Eric Nordstrom, Regional Security Officer, Dep’t of State, Ambassador Gene Cretz, et al. (Apr. 21, 2012, 1:57 P.M.).

<sup>736</sup> STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., REPORT: BENGHAZI ATTACKS: INVESTIGATIVE UPDATE, INTERIM REPORT ON THE ACCOUNTABILITY REVIEW BOARD (Sept. 16, 2013), at 56-57.

<sup>737</sup> *The Security Failures of Benghazi: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (Oct. 10, 2012) (Testimony of Lt. Col. Andrew Wood).

leading up to the Benghazi attacks.<sup>738</sup> Committee Chairman Darrell Issa joined Subcommittee Chairman Chaffetz in writing to the Secretary of State again on October 2, 2012, asking for additional documents.<sup>739</sup>

### *PUBLIC STATEMENTS SURROUNDING THE ATTACKS*

In the days and weeks following the attacks, the Administration's public statements produced conflicting accounts of what transpired in Benghazi. The resulting confusion and public outrage came to a head on Sunday, September 16, 2012 when the U.S. Ambassador to the United Nations, Susan Rice, appeared on five Sunday morning talk shows to share what was said to be the U.S. Government's best assessment at that time of how the attacks unfolded, namely that a demonstration in Benghazi over a video on the Internet deemed offensive to Muslims evolved into a military assault.<sup>740</sup> This assessment was ultimately proven to be completely false.

Much of the public outcry over the Administration's misleading narrative focused on the actions of Ambassador Rice and personnel at the State Department. During the course of the Committee on Oversight and Government Reform's investigation into the events before, during and after the attacks in Benghazi, the Committee examined the role of the State Department in the development of the now-infamous talking points used by Ambassador Rice on September 16, 2012. As has been previously highlighted by documents released to the press by the White House, hearing testimony and public statements, these talking points were drafted by officials of the Central Intelligence Agency ("CIA"), and reflected an assessment of the Intelligence Community ("IC") and national security interagency process.

### *RESPONSE TO THE ATTACKS*

Much of the criticism following the tragic events in Benghazi surrounded the lack of response by the State Department to support those in desperate need, specifically the Department's role in not instructing Department of Defense ("DOD") assets to assist those at the hands of aggressors. In the months following the attacks, Committee hearings examined whether the State Department could have done more to help those in need by ordering DOD assets to render much-needed assistance.

During a Committee hearing on May 1, 2014, Robert Lovell, a retired U.S. Air Force brigadier general serving as the Deputy Director of Intelligence and Knowledge Development at U.S. Africa Command ("AFRICOM") headquarters in Germany the night of the attacks, testified that commanders that night discussed "what we should do" as they waited for a request for assistance from the State Department.<sup>741</sup> The Department, however, never requested DOD assets to assist the Americans in Benghazi, although assets were mobilized to respond to events in the region or to a hostage crisis involving the Ambassador. He testified to the Committee that DOD assets should

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<sup>738</sup> Letter from Hon. Jason Chaffetz, Chairman, H. Subcomm. on Nat'l Security, to Hon. Hillary Clinton, Sec'y, U.S. Dep't of State (Sept. 20, 2012).

<sup>739</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, & Hon. Jason Chaffetz, Chairman, Subcomm. on Nat'l Security, to Hon. Hillary Clinton, Sec'y, U.S. Dep't of State (Oct. 2, 2012).

<sup>740</sup> See, e.g., *Ambassador Susan Rice: Libya Attack Not Premeditated*, ABC NEWS (Sept. 16, 2012).

<sup>741</sup> *Benghazi, Instability, and a New Government: Successes and Failures of U.S. Intervention in Libya: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (May 1, 2014) (Testimony of Ret. USAF Brigadier Gen. Robert Lovell).

have tried to save those under attack in Benghazi.<sup>742</sup> He stated: “There are accounts of time, space and capability, discussions of the question, ‘could we have gotten there in time to make a difference?’”<sup>743</sup> He further explained: “The discussion is not could or could not of time, space and capability. The point is we should have tried.”<sup>744</sup>

#### *SECRETARY CLINTON CONVENES AN ACCOUNTABILITY REVIEW BOARD*

Pursuant to statutory requirement under the Omnibus Diplomatic Security and Terrorism Act of 1986, Secretary of State Hillary Clinton convened an Accountability Review Board (“ARB”) shortly after the attacks to address these questions. The five-member Board comprised distinguished public servants, including Chairman Thomas Pickering, former U.S. Ambassador to six countries and the United Nations, and Vice Chairman Michael Mullen, former Chairman of the Joint Chiefs of Staff.

The ARB operated under significant time pressure, completing its work and issuing a final report in just over two months. The State Department widely supported the ARB’s recommendations, and sought to implement them without hesitation. For some, including the Department itself, this report represented the final word on the internal failures that contributed to the tragedy in Benghazi. For others, however, the report overvalued certain facts, overlooked others, and failed to address systemic issues that have long plagued the State Department.

In order to address these concerns, the Committee held a hearing on May 8, 2013, entitled, *Benghazi: Exposing Failure and Recognizing Courage*. Not only did the testimony of three State Department officials—Mark Thompson, Eric Nordstrom, and Gregory Hicks— provide important information to Committee Members about the fateful attacks, it raised additional questions about the attacks as well as the ARB’s work. In light of these questions, the Committee initiated a comprehensive investigation of the ARB procedures, findings and recommendations. Understanding how the ARB reached its conclusions informs the Committee’s interest in ensuring that this process remains efficient and effective, and that U.S. diplomats are able to avoid situations that compromise their safety or their mission.

Witnesses interviewed by the Committee raised a number of significant concerns with the ARB process, findings, and recommendations. Most notably, numerous witnesses questioned the ARB’s findings regarding the four Department employees held “accountable” for Benghazi. In some cases the ARB appeared to hold individuals accountable for actions which had nothing to do with security in Benghazi. In other cases, the ARB correctly identified poor individual decisions while apparently failing to take into account decisions made by more senior Department officials which played an equal if not greater role in the vulnerability of the U.S. diplomatic mission in Benghazi. In particular, the decision by Department leadership to operate the Benghazi mission as a temporary and particularly ill-defended outpost of what it calls “expeditionary diplomacy” was not adequately addressed by the ARB, nor did the ARB hold any individuals accountable for that decision.

The State Department’s response to the ARB’s findings on accountability is also troubling. Secretary Clinton immediately relieved the four employees identified by the ARB of their duties and

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<sup>742</sup> *Id.*

<sup>743</sup> *Id.*

<sup>744</sup> *Id.*

subsequently placed them on administrative leave—an ambiguous status akin to bureaucratic limbo. The Department misled these employees about what administrative leave entailed, did not allow the employees to challenge this decision, and further prohibited them accessing the classified ARB Report, which contained the evidence against them. Moreover, the ARB failed to question these employees on the very topics for which they were held accountable. Further, after eight months of paid administrative leave, Secretary of State John Kerry reinstated these four employees to Department service. Therefore, over two years after the Benghazi attacks, no one at the State Department has been fired for their role leading up to the attacks and it appears increasingly likely the Department’s primary objective was to create the public appearance accountability while avoiding substantive reforms which may make U.S. diplomats overseas safer.

#### *DETAILS OF THE COMMITTEE’S INVESTIGATION*

During the Committee’s investigation into the attacks on U.S. facilities in Benghazi, the Committee pursued numerous fact-finding measures, such as conducting transcribed interviews, depositions, and hearings. The Committee conducted:

- 27 Transcribed Interviews
- Two Depositions
- Four Hearings

In addition, Committee investigators reviewed approximately 65,000 pages of documents and prepared a staff report titled, *Benghazi Attacks: Investigative Update Interim Report on the Accountability Review Board*, released on September 16, 2013.

Throughout the Committee’s investigation into the terrorist attacks on U.S. facilities in Benghazi, the Department refused to work with Congress and produce requested documents and information related to the attacks. Although Congressman Jason Chaffetz initially wrote to the Secretary of State on the matter just one week after the attacks and was later joined by Chairman Issa in writing to the Secretary of State on October 2, 2012, the Department did not make any documents available to Committee majority Members and staff until the morning of October 10, 2012<sup>745</sup>, when the Committee held its first hearing on Benghazi, entitled, *The Security Failures of Benghazi*.<sup>746</sup>

Over the course of the next several months, the Department made additional documents of its choosing available to the Committee. The Department refused, however, to produce the documents requested by the Committee. The Department required an arrangement whereby materials—including unclassified documents—were only made available to the Committee for *in camera* review. This forced Committee staff to adhere to the Department’s schedule, and—in the presence of Department personnel—to perform their work.

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<sup>745</sup> E-mail from Hon. David S. Adams, Assistant Sec’y, Legis. Affairs, U.S. Dep’t of State, to H. Comm. on Oversight & Gov’t Reform Majority Staff (Oct. 10, 2012, 5:52 a.m.).

<sup>746</sup> *The Security Failures of Benghazi: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (Oct. 10, 2012).

The Committee issued a subpoena to the Secretary of State on August 1, 2013 for documents previously made available to the Committee for *in camera* review.<sup>747</sup> The Department began producing these materials on August 16, 2013; however, the Department refused to produce the documents as required by the Committee's subpoena.

The Committee issued a separate subpoena to the Secretary of State for documents related to the Accountability Review Board on August 1, 2013.<sup>748</sup> Although the Committee had already requested these documents in a letter to the Secretary on January 28, 2013, the Department did not provide any documents pursuant to this subpoena until October 22, 2013, over two months after the subpoena return date. In addition, the Department informed the Committee that it would not produce all documents responsive to the subpoena.

Throughout the investigation, the Committee made numerous attempts to accommodate the interests of the Department of State. Committee staff spent over a year reviewing documents *in camera*, only accessing the documents as allowed by the Department and under the watchful eye of Department personnel; granted extensions of production deadlines; agreed to the Department's strict conditions for the use of documents during transcribed interviews; allowed the Department to take lock bags containing key documents identified by Committee staff back to the Department; permitted rolling document productions; and withdrew subpoenas for witness testimony when individuals agreed to appear voluntarily. Despite the Committee's numerous attempts at accommodation throughout the investigation, the State Department flatly refused to produce certain documents to the Committee.

#### *CONTINUED INVESTIGATION*

The September 11, 2012 terrorist attacks on the U.S. diplomatic facilities in Benghazi, Libya resulted in a tragic and unnecessary loss of American life. The attacks also raise a number of important and substantive questions about U.S. foreign policy, with which policymakers will have to grapple for some time. A key area for further discussion and analysis is the balance between the U.S. Department of State's perceived policy imperative of operating diplomatic outposts abroad with the security realities of doing so in dangerous and unstable environments such as Libya.

Following the Committee's hearing on May 1, 2014, Speaker John Boehner announced his intention for the House to vote on the formation of a select committee to investigate the events surrounding the attacks in Benghazi. On May 8, 2014, the House voted to establish the Select Committee on Events Surrounding the 2012 Terrorist Attack in Benghazi. The select committee, chaired by Representative Trey Gowdy, continues to investigate the events before, during, and after the attacks.

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<sup>747</sup> Subpoena from H. Comm. on Oversight & Gov't Reform to Hon. John F. Kerry, Sec'y, U.S. Dep't of State (Aug. 1, 2013).

<sup>748</sup> *Id.*

## SAFETY AT HOME: DOMESTIC SECURITY CONCERNS

### *TRANSPORTATION SECURITY ADMINISTRATION: TROUBLE WITH SCREENING TECHNOLOGIES*

The terrorist attacks of September 11, 2001, led to dramatic reforms in how the Federal Government protects the traveling public and the Nation's transportation sector. Securing commercial aviation became a top priority for Congress and resulted in the development and passage of the Aviation and Transportation Security Act of 2001 ("ATSA"). ATSA created the Transportation Security Administration ("TSA") and directed the agency to secure travelers through improved passenger and baggage screening operations. To successfully carry out its mission, TSA utilizes many layers of security, including screening technology.

During the last decade, TSA has struggled to cost-effectively utilize taxpayer funding to procure and deploy security equipment at the Nation's 463 airports where TSA provides screening operations. The Committee's oversight work highlighted serious inefficiencies in TSA's management and deployment of screening technology, and provided recommendations for the improvement of TSA's role in securing the U.S. transportation system. In conjunction with the House Transportation and Infrastructure Committee majority, the House Oversight and Government Reform Committee made recommendations emphasizing TSA's need to more effectively develop its deployment strategy prior to the procurement of screening technologies.<sup>749</sup> The TSA must look for ways to reduce significant shipping costs for the thousands of pieces of equipment it deploys annually.

Effective transportation security equipment is essential to TSA's ability to successfully protect the Nation's civil aviation system while allowing for the free flow of travelers and commerce. Since 2001, TSA has obligated more than \$8 billion for the enhancement of passenger and checked-baggage screening. In 2011, TSA had approximately 16,000 pieces of screening equipment deployed to 463 airports nationwide.<sup>750</sup>

In order to manage the procurement and deployment of tens of thousands of pieces of screening equipment, TSA created the Transportation Logistics Center in 2005. The Transportation Logistics Center is the equipment clearinghouse that TSA uses to receive and ship screening equipment to and from manufacturers and deployment locations. It is also used to store equipment awaiting repair or redeployment.<sup>751</sup> The TLC is located in Dallas, Texas, and is comprised of three warehouses totaling nearly 700,000 square feet of space.<sup>752</sup>

Annual costs for leasing and managing the TLC are more than \$3.5 million.<sup>753</sup> This includes \$1.7 million per year for operations at the three warehouses, which are managed by contractors<sup>754</sup> and

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<sup>749</sup> Staff of H. Comm. on Oversight and Gov't Reform and Majority Staff of H. Comm. on Transportation and Infrastructure, *Airport Insecurity: TSA's Failure to Cost-Effectively Procure, Deploy and Warehouse its Screening Technologies*, 112th Cong. (2012).

<sup>750</sup> TSA, briefing document, *Acquisition and disposition of TSA Equipment*, Aug. 9, 2011.

<sup>751</sup> DEPT. OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, MANAGEMENT OF THE TRANSPORTATION SECURITY ADMINISTRATION'S LOGISTICS CENTER, OIG 10-14, 2 (2009).

<sup>752</sup> Briefing with TSA Officials and TLC Warehouse Manager and H. Comm. on Oversight and Gov't Reform and H. Comm. on Transportation and Infrastructure Staff, Transportation Logistics Center, Dallas, Texas, Feb. 15, 2012.

<sup>753</sup> *Id.*

<sup>754</sup> TSA, briefing document, *Acquisition and disposition of TSA Equipment*, Aug. 9, 2011.

approximately \$1.8 million per year for leasing the three warehouses.<sup>755</sup> In 2009, Department of Homeland Security Office of Inspector General (“DHS OIG”) cited TSA’s inefficient management of its security equipment as a contributing factor for TSA’s addition of the third warehouse to the TLC at a cost of \$2 million.<sup>756</sup>

Since the U.S. Department of Homeland Security (“DHS” or “Department”) was created on November 25, 2002, the Government Accountability Office (“GAO”) has designated the Department of Homeland Security and its programs as “high risk” partially due to its continuing challenges in efficiently procuring security technologies. Despite longstanding concerns, DHS, and particularly TSA, have struggled to implement sound and well-planned acquisition policies.

In addition to these struggles, TSA’s failure to implement a risk-based approach in the procurement and deployment of its screening technologies has resulted in hundreds of millions of dollars of wasted taxpayer investment. Throughout the past decade, TSA’s failure to efficiently manage its screening technology acquisition process has led to the deployment of operationally ineffective technologies, also resulting in the accumulation of thousands of pieces of screening equipment in storage for excessive amounts of time.

### **Explosive Trace Detection Portals (“Puffers”)**

From 2004 to 2006, TSA spent more than \$30 million to procure and deploy Explosive Trace Detection Portals, known as “puffers,” as part of its passenger screening operations. While TSA procured 207 puffers, the agency deployed only 101 – less than 50 percent of procured puffers – nationwide because TSA belatedly discovered the puffers were unable to detect explosives in an operational environment.<sup>757</sup> TSA rushed this untested product to deployment, ignoring internal procedures designed to prevent this type of waste. After the decision was made to remove and dispose of the puffers, TSA stored this ineffective technology for upwards of four years at taxpayer expense prior to disposition in 2009 and 2010.

### **Advanced Imaging Technology Devices (“AIT”)**

In response to the Christmas Day Underwear Bomber Attack, “TSA revised the AIT procurement and deployment strategy, increasing the planned deployment of AITs . . . and using AITs as a primary—instead of a secondary—screening measure where feasible.”<sup>758</sup> According to GAO, however, “it remains unclear whether the AIT would have been able to detect the weapon Mr.

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<sup>755</sup> *Id.*

<sup>756</sup> DEPT. OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, MANAGEMENT OF THE TRANSPORTATION SECURITY ADMINISTRATION’S LOGISTICS CENTER, OIG 10-14, 2 (2009).

<sup>757</sup> See, <http://homelandsecuritynewswire.com/tsa-puffer-machines-pulled-service>. (last visited Nov. 24, 2014).

<sup>758</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA IS INCREASING PROCUREMENT AND DEPLOYMENT OF THE ADVANCED IMAGING TECHNOLOGY, BUT CHALLENGES TO THIS EFFORT AND OTHER AREAS OF AVIATION SECURITY REMAIN, GAO-10-484T, (2010).

Abdulmutallab used in his attempted attack based on the preliminary TSA information we have received.”<sup>759</sup>

Failing to learn from its failed procurement of “puffers,” and in the wake of the Christmas Day Bomber, TSA rushed to install 500 Advanced Imaging Technology devices, without clear evidence of effectiveness, at a cost of more than \$122 million.<sup>760</sup> Despite lingering passenger health concerns and uncertainty that AIT would have detected the weapon used in the December 2009 Underwear Bomber incident, TSA planned to increase its deployment of AITs from 878 to 1,800 by the end of FY 2014.<sup>761</sup> GAO has estimated increases in staffing costs alone, due to doubling the number of AITs that TSA plans to deploy, could add up to \$2.4 billion over the expected service life of the AITs.<sup>762</sup>

Despite already spending hundreds of millions of dollars on the procurement of ineffective Advanced Imaging Technology machines, TSA is also ineffectively deploying the screening technology. On March 26, 2012, at a joint hearing conducted by the Committee on Oversight and Government Reform and Committee on Transportation and Infrastructure, Stephen Lord, GAO’s Director of Homeland Security, testified that: “some of the deployed AIT units were used on less than 5 percent of the days they were available since their deployment . . . some units were used on less than 30 percent of the days available since their installation.”<sup>763</sup> As such, the ineffective deployment of AIT diminished any “potential security benefits” of the technology and highlights the import of effective deployment.<sup>764</sup>

### **In-Line Explosive Detection Systems (“EDS”)**

TSA also failed to deploy in-line Explosive Detection Systems in a cost-effective and risk-based manner. In 2011, less than half of the nation’s 35 largest airports, which handled 75 percent of all commercial passengers,<sup>765</sup> screened all checked baggage through in-line systems. TSA estimated that in-line explosive detection systems for checked baggage could reduce the number of required TSA baggage screeners by as much as 78 percent.<sup>766</sup> However, despite the potential security and economic benefits of in-line baggage screening, GAO found that TSA struggled to upgrade its deployed fleet of checked baggage-screening machines and that some of TSA’s deployed machines

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<sup>759</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA IS INCREASING PROCUREMENT AND DEPLOYMENT OF THE ADVANCED IMAGING TECHNOLOGY, BUT CHALLENGES TO THIS EFFORT AND OTHER AREAS OF AVIATION SECURITY REMAIN, GAO-10-484T, (2010).

<sup>760</sup> E-mail from TSA Legislative Affairs to House Oversight and Gov’t Reform Comm. (Mar. 3, 2011, 2:00 P.M.).

<sup>761</sup> *Id.*

<sup>762</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA IS INCREASING PROCUREMENT AND DEPLOYMENT OF THE ADVANCED IMAGING TECHNOLOGY, BUT CHALLENGES TO THIS EFFORT AND OTHER AREAS OF AVIATION SECURITY REMAIN, GAO-10-484T, (2010).

<sup>763</sup> *TSA Oversight Part III: Effective Security or Security Theater?: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (2012).

<sup>764</sup> *Id.*

<sup>765</sup> FEDERAL AVIATION ADMINISTRATION, FAA AEROSPACE FORECAST: FISCAL YEARS 2011-2031, 26 (2010), available at [https://www.faa.gov/about/office\\_org/headquarters\\_offices/apl/aviation\\_forecasts/aerospace\\_forecasts/2011-2031/media/2011%20Forecast%20Doc.pdf](https://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_forecasts/aerospace_forecasts/2011-2031/media/2011%20Forecast%20Doc.pdf).

<sup>766</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA HAS ENHANCED ITS EXPLOSIVES DETECTION REQUIREMENTS FOR CHECKED BAGGAGE, BUT ADDITIONAL SCREENING ACTIONS ARE NEEDED GAO-11-740, (2011).

are detecting explosives at standards promulgated in 1998.<sup>767</sup> GAO recommended that TSA develop a plan to upgrade and deploy EDS that meet current explosive detection standards.

As previously noted, TSA's inability to follow its own procurement guidance has led to the deployment of hundreds of millions of dollars of ineffective technologies. The importance of conducting a cost-benefit analysis to guide the procurement and deployment needs of the agency cannot be overstated.

### *BORDER SECURITY: EFFECTIVELY IDENTIFYING AND RESPONDING TO THREATS?*

On November 25, 2002, President Bush signed into law the Homeland Security Act of 2002, which created the U.S. Department of Homeland Security and eventually incorporated Customs and Border Protection, Immigration and Customs Enforcement, and Customs and Immigration Services into the Department.<sup>768</sup> In keeping with the House Oversight and Government Reform Committee's pivotal role in shaping the Department's mission and goals, the Act delegated its responsibility for conducting broad oversight of the Department and its agencies.<sup>769</sup>

The Committee on Oversight and Government Reform has conducted extensive oversight of U.S. border security policies and programs. The Committee has examined border technology procurement, the potential for spillover violence from Mexico, Port of Entry infrastructure ("POE"), visa issuances, the proliferation of tunnels along the southwest border, information sharing among agencies, intelligence collection at the El Paso Intelligence Center, existing environmental regulations impeding border patrol operations, and border security metrics, including CBP's reporting practices of apprehensions, "got-aways" and "turn back south."

On April 2, 2013, Members and staff of the House Oversight and Government Reform Committee traveled to Yuma and Nogales, Arizona, to assess the Federal Government's most recent efforts to secure the border. The Committee's oversight addressed challenges in identifying and understanding various threats to maintain a secure border. These matters are of paramount importance to our homeland defense and national security.

### **Secure Fence Act of 2006 ("SFA")**

The Secure Fence Act of 2006,<sup>770</sup> intended "[t]o establish operational control over the international land and maritime borders of the United States," authorizes the Secretary of the Department of Homeland Security to take "necessary and appropriate" actions to secure U.S. borders.<sup>771</sup> This authorization grants the Secretary discretion in the use of electronic surveillance equipment, construction of new fencing structures, and establishes the requirement to achieve situational control in border operations. These efforts were undertaken to obtain "operational control" of the

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<sup>767</sup> *See id.*

<sup>768</sup> Homeland Security Act of 2002, Pub. L. No. 107-296.

<sup>769</sup> *Hearings Conducted by the U.S. House Committee on Oversight and Government Reform: Homeland Security. See, <http://www.access.gpo.gov/congress/house/house07ch107.html> (last visited June 17, 2013).*

<sup>770</sup> Secure Fence Act of 2006, Pub. L. No. 109-367.

<sup>771</sup> *Id.*

border, which was defined in the SFA as “the prevention of all unlawful entries into the United States.”<sup>772</sup>

From 2006 to 2012, the security measures implemented to help achieve “operational control” of the U.S. borders have cost the U.S. taxpayer approximately \$75 billion.<sup>773</sup> The Federal Government has spent this money mostly on CBP and ICE operations to secure POEs, between POEs, and for Border Security Fencing, Infrastructure, and Technology.<sup>774</sup>

In the meantime, the Federal Government continues to identify emerging challenges, including Drug Trafficking Organizations’ use semi-submersibles vessels and ultra-light aircrafts, the construction of underground tunnels, and the influx of Other Than Mexicans (“OTMs”). The myriad evolving challenges to securing the southwest border require innovative responses. Some of the solutions have included the use of unmanned aerial vehicles, advanced technology, and an increase of border patrol agents.

### *KEEPING OUR PRESIDENT SAFE: IS THE U.S. SECRET SERVICE PREPARED?*

The United States Secret Service has two missions: criminal investigations and protection of national and visiting foreign leaders. Most notably, the Secret Service ensures the safety of the President, First Family and others who occupy the White House. As such, the Secret Service plays an essential role in protecting the President against foreign and domestic security threats.

However, recently, grave lapses in security and scandals involving United States Secret Service agents and Uniformed Division officers have plagued the prestigious agency and have imperiled the security of those the agency protects—and, by extension, United States national security. Moreover, Secret Service leadership failed to disclose these scandals in a forthright way. The failure of the Secret Service to adequately respond to national security threats and to subject itself to full and independent oversight compromises the agency’s ability to protect the President of the United States. The series of security lapses and scandals were brought to the American public’s attention when a fence-jumper scaled the White House fence and breached multiple levels of security before actually making it inside the White House.

### **Lack of Accountability**

The breach by Omar Gonzalez on September 19, 2014 not only constituted an unacceptable security breach of the White House, but also exposed agency-wide lapses in judgment that revealed a larger cultural decline within the Secret Service. The Committee on Oversight and Government Reform investigated various scandals involving behavioral problems at the Secret Service which have undoubtedly have had a detrimental effect on Secret Service operational integrity. These scandals have undoubtedly compromised the Secret Service’s ability to successfully protect the President.

On Tuesday, September 30, 2014, the Committee on Oversight and Government Reform held a hearing titled, *White House Perimeter Breach: New Concerns about the Secret Service*. The hearing

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<sup>772</sup> *Id.*

<sup>773</sup> Congressional Research Service, Reports, R42644, R41982, R41189, 40642, RL34482, RL34004, RL33428 (on file with author).

<sup>774</sup> *Id.*

focused on the September 19 incident in light of prior USSS scandals, including the Cartagena prostitution scandal and the “Operation Moonlight” scandal. As a result of the hearing, Director Pierson’s leadership at the agency was heavily scrutinized, and she ultimately resigned her post on October 1.

### *Prostitutes in Cartagena, Columbia*

The Committee investigated the alleged impropriety of Secret Service agents and White House staff<sup>775</sup> during a trip to Cartagena, Columbia.<sup>776</sup> In April 2012, off-duty Secret Service agents in Cartagena, Colombia, reportedly brought strippers back to their hotel rooms while on a presidential trip to the Summit of the Americas. The incident revealed the alarming lack of judgment of the agents and officers of the Secret Service displayed. Such failures put the safety of the President, Vice-President and other foreign leaders at risk.

The risqué incident raised questions about the culture at the Secret Service, showing Secret Service agents and officers making a series of poor decisions, such as excessive drinking, engaging with prostitutes, possibly allowing foreign nationals to be in proximity with sensitive security information, and exposing themselves to blackmail and other forms of potential compromise. At least 11 agents and officers reportedly had a role in the incident. Former Director Mark Sullivan took steps to investigate the matter in order to prevent future occurrences. His actions included bringing the agents home immediately, interviewing them, and revoking their clearances. Such action was critical to determine the extent of the potential threat to national security.

In May 2013, a senior Secret Service supervisor, Ignacio Zamora Jr., attempted to forcibly enter the hotel room of a woman at the Hay-Adams hotel in Washington, D.C. to retrieve a bullet from his service weapon that he left in the room earlier that night.<sup>777</sup> A follow-up investigation into the incident found that Zamora and another supervisor, Timothy Barraclough, had sent “sexually suggestive emails” to a female subordinate at the Secret Service.<sup>778</sup> The agency removed Zamora from his position and transferred Barraclough to a “separate part of the division” the following month.<sup>779</sup> Zamora’s behavior was particularly disconcerting, as he allegedly took part in the agency’s investigation in the aftermath of agents’ gross misconduct in Cartagena.<sup>780</sup>

### *“Operation Moonlight”*

The Committee also investigated allegations that Secret Service personnel were ordered from their official posts to provide personal protection to a friend of former Secret Service Director Mark

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<sup>775</sup> Letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform, to Hon. Kathryn Ruemmler, Counsel to the President (Oct. 11, 2012).

<sup>776</sup> Letter from Hon. Darrell Issa, Chairman, & Hon. Elijah Cummings, Ranking Member, on Comm. on Oversight & Gov’t Reform, to Hon. Mark J. Sullivan, Director, U.S. Secret Service (April 18, 2012).

<sup>777</sup> Carol Leonnig & David Nakamura, *Two Secret Service agents cut from Obama’s detail after alleged misconduct*, WASH. POST, Nov. 13, 2013, available at [http://www.washingtonpost.com/politics/two-secret-service-supervisors-cut-from-obamas-detail-after-alleged-misconduct/2013/11/13/c736638c-48a8-11e3-a196-3544a03c2351\\_story.html](http://www.washingtonpost.com/politics/two-secret-service-supervisors-cut-from-obamas-detail-after-alleged-misconduct/2013/11/13/c736638c-48a8-11e3-a196-3544a03c2351_story.html).

<sup>778</sup> *Id.*

<sup>779</sup> *Id.*

<sup>780</sup> Letter from Hon. Jason Chaffetz, Chairman, Subcomm. on Nat’l Security, Comm. on Oversight & Gov’t Reform, U.S. House of Rep., & Hon. Ron Johnson, Ranking Member, Subcomm. on Financial & Contracting Oversight, Comm. on Homeland Security & Gov’t Affairs, U.S. Senate, to Charles Edwards, Deputy Inspector General, U.S. Dep’t of Homeland Security (Nov. 14, 2013).

Sullivan.<sup>781</sup> On May 10, 2014, the *Washington Post* reported, “Top Secret Service officials ordered members of a special unit responsible for patrolling the White House perimeter to abandon their posts over at least two months in 2011 in order to protect a personal friend of the agency’s director.”<sup>782</sup> According to the *Post*, these Secret Service employees were sent to the home of an assistant to then-Director Mark Sullivan as often as twice a day from June 2011 to August 2011 – an activity known internally as “Operation Moonlight” – because Sullivan “was concerned that his assistant was being harassed by her neighbor.”<sup>783</sup>

According to a Secret Service spokesman, these employees were simply directed to check on the safety of Sullivan’s assistant, a standard agency response to potential threats to an employee.<sup>784</sup> The *Post* report, however, states that Secret Service employees essentially staked out the assistant’s neighborhood for several months and did not coordinate their activities with local law enforcement.<sup>785</sup> In addition, it was unclear if it was appropriate for a federal law enforcement agency to involve itself in a matter under the jurisdiction of local law enforcement. After conducting an investigation, DHS Inspector General John Roth found that the Secret Service “erred in diverting members of a special White House unit” to protect Sullivan’s permanent friend.<sup>786</sup> Roth finds that there was “no legal justification” for the activity. He concluded that the diversion of manpower was a “serious lapse in judgment.”<sup>787</sup> Ultimately, this course of action detrimentally impacted the President’s security by detailing employees normally assigned to protect the White House.

### *Compromised Secret Service Oversight*

Unfortunately, pressures from within further compromised congressional oversight of the USSS. Problems at USSS not only permeated throughout the agency, but also within the hierarchy of the Department of Homeland Security (“DHS”) tasked with oversight of USSS. The DHS Inspector General (“IG”) is charged with independent oversight of DHS. However, on April 24, 2014, the Senate Committee on Homeland Security and Governmental Affairs issued a report documenting that former Acting Inspector General Charles Edwards “jeopardized the independence of the OIG.”<sup>788</sup> The Senate report further stated that during Edwards’ tenure, which coincided with the events of “Operation Moonlight,” certain information deemed “derogatory” was removed from an

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<sup>781</sup> Letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform, and Hon. Jason Chaffetz, Chairman, Subcomm. on Nat’l Security, Comm. on Oversight & Gov’t Reform, to Hon. Julia Pierson, Director, United States Secret Service (May 20, 2014).

<sup>782</sup> Carol D. Leonnig, *Secret Service agents pulled off White House patrol to help protect a top official’s aide*, WASH. POST, May 10, 2014, available at [http://www.washingtonpost.com/politics/secret-service-agents-pulled-off-white-house-patrol-to-help-protect-a-top-officials-friend/2014/05/10/8bd962bc-d453-11e3-aae8-c2d44bd79778\\_story.html](http://www.washingtonpost.com/politics/secret-service-agents-pulled-off-white-house-patrol-to-help-protect-a-top-officials-friend/2014/05/10/8bd962bc-d453-11e3-aae8-c2d44bd79778_story.html).

<sup>783</sup> *Id.*

<sup>784</sup> *Id.*

<sup>785</sup> *Id.*

<sup>786</sup> Susan Crabtree, *Watchdog: ‘No justification’ for Operation Moonlight*, WASH. EXAMINER, Oct. 22, 2014, available at <http://www.washingtonexaminer.com/watchdog-no-justification-for-operation-moonlight/article/2555121>.

<sup>787</sup> *Id.*

<sup>788</sup> Staff of Senate Subcomm. on Financial & Contracting Oversight, Senate Comm. on Homeland Security & Governmental Affairs, *Investigation into Allegations of Misconduct by the Former Acting and Deputy Inspector General of the Department of Homeland Security*, 113th Cong. 2 (2014).

OIG report on Secret Service misconduct in Cartagena, Colombia.<sup>789</sup> Although Secret Service employees reported their concerns about “Operation Moonlight to” the OIG, no one investigated those concerns.<sup>790</sup> In light of this, in May 2014 Chairman Issa and Subcommittee Chairman Chaffetz sought an independent congressional review of information related to “Operation Moonlight.”<sup>791</sup>

### **The Resignation of USSS Director Julia Pierson**

The Cartagena prostitution and “Operation Moonlight” scandals fueled congressional oversight that culminated in Secret Service Director Julia Pierson’s resignation when, on September 19, 2014, Omar Jose Gonzalez, 42, formerly of Copperas Cove, Texas, scaled the North Fence of the executive mansion, sprinted approximately 70 yards, and entered the North Portico entrance of the White House. Gonzalez breached five rings of security before he was finally stopped by a plainclothes agent within the White House.<sup>792</sup> At the time of the intrusion, Gonzalez was carrying a Spyderco VG-10 folding knife with a 3-and-a-half inch serrated blade in his pants pocket.<sup>793</sup> Luckily, no one was hurt.

Director Pierson’s apparent lack of candor with the White House greatly troubled the Committee, and brought into question her fitness as the Secret Service Director. Of serious concern to the Committee was initial reporting that Gonzalez was apprehended immediately upon entry into the White House. These reports were proven false when Director Pierson confirmed reports<sup>794</sup> that Gonzalez made it into the East Room adjacent to the Green Room. He passed by a staircase leading up to the First Family living quarters, before finally being subdued.

On the day of the Committee hearing, the *Washington Post* reported an additional egregious breakdown in Presidential security three days prior to the Gonzalez incident. On September 16, 2014, during a visit to the CDC in Atlanta, Georgia, the Secret Service allowed a contractor with an arrest record and a firearm to ride on an elevator with president Obama.<sup>795</sup> “Under Secret Service protocols, people with weapons, arrests, or convictions for assault and related offenses or any history of mental illness are typically barred from having any access to the president. But it appears that this man, possessing a gun, came within inches of the president after undergoing no

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<sup>789</sup> *Id.*.

<sup>790</sup> Carol D. Leonnig, *Secret Service agents pulled off White House patrol to help protect a top official’s aide*, WASH. POST, May 10, 2014, available at [http://www.washingtonpost.com/politics/secret-service-agents-pulled-off-white-house-patrol-to-help-protect-a-top-officials-friend/2014/05/10/8bd962bc-d453-11e3-aae8-c2d44bd79778\\_story.html](http://www.washingtonpost.com/politics/secret-service-agents-pulled-off-white-house-patrol-to-help-protect-a-top-officials-friend/2014/05/10/8bd962bc-d453-11e3-aae8-c2d44bd79778_story.html).

<sup>791</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, & Hon. Jason Chaffetz, Chairman, Subcomm. on Nat’l Security, to Hon. Julia Pierson, Dir. U.S. Secret Serv. (May 20, 2014).

<sup>792</sup> Carol D. Leonnig & David A. Fahrenthold, *New Details in Fence-jumping Reveal Failures in Security Rings Around White House*, WASH. POST, Sept. 23, 2014, available at [http://www.washingtonpost.com/politics/new-details-in-fence-jumping-reveal-failures-in-security-rings-around-white-house/2014/09/23/043518ea-434a-11e4-b47c-f5889e061e5f\\_story.html](http://www.washingtonpost.com/politics/new-details-in-fence-jumping-reveal-failures-in-security-rings-around-white-house/2014/09/23/043518ea-434a-11e4-b47c-f5889e061e5f_story.html).

<sup>793</sup> Ralph Ellis, et al, *A knife, a reported prior attempt in White House security incidents*, CNN, Sept. 21, 2014, available at [http://www.cnn.com/2014/09/20/us/white-house-security-incident/index.html?hpt=hp\\_t1](http://www.cnn.com/2014/09/20/us/white-house-security-incident/index.html?hpt=hp_t1).

<sup>794</sup> Carol D. Leonnig, *White House Fence Jumper Made It Far Deeper into Building than Previously Known*, WASH. POST, Sept. 29, 2014, available at [http://www.washingtonpost.com/politics/white-house-fence-jumper-made-it-far-deeper-into-building-than-previously-known/2014/09/29/02efd53e-47ea-11e4-a046-120a8a855cca\\_story.html](http://www.washingtonpost.com/politics/white-house-fence-jumper-made-it-far-deeper-into-building-than-previously-known/2014/09/29/02efd53e-47ea-11e4-a046-120a8a855cca_story.html).

<sup>795</sup> Carol D. Leonnig, *Armed Contractor with Arrest Record Was on Elevator with Obama in Atlanta*, WASH. POST, available at Sept. 30, 2014, available at [http://www.washingtonpost.com/politics/armed-former-convict-was-on-elevator-with-obama-in-atlanta/2014/09/30/76d7da24-48e3-11e4-891d-713f052086a0\\_story.html](http://www.washingtonpost.com/politics/armed-former-convict-was-on-elevator-with-obama-in-atlanta/2014/09/30/76d7da24-48e3-11e4-891d-713f052086a0_story.html).

such screening.” Despite the peculiar nature of the event, Director Pierson testified that she did not inform President Obama about the incident.

Another security threat, coming on the heels of the September 19, 2014, intrusion by Omar Gonzalez, only came to light through investigative reporting at the *Washington Post*. The *Post* reported that the Secret Service mishandled a November 11, 2011, shooting by Oscar Ortega-Hernandez.<sup>796</sup> On November 11, a gunman fired shots at the White House, striking the façade seven times. The Secret Service fumbled the response in the aftermath of the shooting. Secret Service officers and agents were given the order to “stand down” and that “no shots had been fired,” and supervisors deferred to other agencies for the investigation.<sup>797</sup> Such action was taken despite information showing the gunshots were likely a direct assault on the White House.<sup>798</sup>

According to the Secret Service, five minutes after the first Secret Service uniformed officer reported hearing gunshots, at “2057 hrs – A suspect vehicle, described as a black Honda Accord, Idaho tag [redacted], was located by USSS/UD and US Park Police unoccupied at 23rd Street and Constitution Ave with a loaded assault rifle on the front passenger seat.”<sup>799</sup> Contrary to that evidence and the reports of officers who heard gunfire and smelled gunpowder, the Secret Service believed there was “no indication of an attack on the White House” on the night of the shooting.<sup>800</sup> An early theory was the gunshots were fired between vehicles, in what may have been gang activity – a highly unlikely scenario considering the timing and location of the activities.<sup>801</sup>

The Secret Service did not launch an investigation, and did not reach the conclusion that the gunman had been shooting at the White House until four days after the incident.<sup>802</sup> The delay was in direct contrast to the observations of officers on duty at the time, who heard gunfire, smelled gunpowder, and heard falling debris from the bullets.<sup>803</sup> Apparently, the Secret Service did not appreciate the gravity of situation from the beginning. In the hours and days immediately following the shooting, the Secret Service coordinated with and assisted the U.S. Park Police and local law enforcement without knowing that Ortega-Hernandez’s bullets had struck the White House.<sup>804</sup> Indeed, it was not until November 15, 2011, when the White House Executive Usher discovered a

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<sup>796</sup> Carol D. Leonnig, *Secret Service fumbled response in after gunman hit White House residence in 2011*, WASH. POST, Sept. 27, 2014, available at [www.washingtonpost.com/politics/secret-service-stumbled-after-gunman-hit-white-house-residence-in-2011/2014/09/27/d176b6ac-442a-11e4-b437-1a7368204804\\_story.html](http://www.washingtonpost.com/politics/secret-service-stumbled-after-gunman-hit-white-house-residence-in-2011/2014/09/27/d176b6ac-442a-11e4-b437-1a7368204804_story.html).

<sup>797</sup> *Id.*

<sup>798</sup> *Id.*

<sup>799</sup> U.S. Secret Service, Protective Intelligence & Assessment Division, Risk Management Branch, Spot Report, *Oscar Ramiro Ortega-Hernandez* (September 11, 2014) (Spot Report #11-21).

<sup>800</sup> Letter from Julia Pierson, Director, U.S. Secret Service, to Jason Chaffetz, Chairman, Subcomm. on National Security, H. Comm. on Oversight & Gov’t Reform (Sept. 12, 2014).

<sup>801</sup> Carol D. Leonnig, *Secret Service fumbled response in after gunman hit White House residence in 2011*, WASH. POST, Sept. 27, 2014, available at [www.washingtonpost.com/politics/secret-service-stumbled-after-gunman-hit-white-house-residence-in-2011/2014/09/27/d176b6ac-442a-11e4-b437-1a7368204804\\_story.html](http://www.washingtonpost.com/politics/secret-service-stumbled-after-gunman-hit-white-house-residence-in-2011/2014/09/27/d176b6ac-442a-11e4-b437-1a7368204804_story.html).

<sup>802</sup> *Id.*

<sup>803</sup> *Id.*

<sup>804</sup> *Id.*

hole in the window of the Yellow Oval Room and other evidence of gunshots, that the Secret Service realized the gravity of the incident.<sup>805</sup>

In light of the multitude of Secret Service scandals and fumbled security responses, as well as the lack of effective oversight and transparency within the agency, Director Pierson came under intense scrutiny. Within 24 hours of the Committee's hearing Ms. Pierson resigned as the 23rd Director of the United States Secret Service. White House press secretary Josh Earnest said that Ms. Pierson's delay in telling the President about the Atlanta elevator security lapse was indicative of "recent and accumulating reports about the performance of the agency" that informed Obama's decision to seek new leadership.<sup>806</sup>

### **A New Beginning for the Secret Service**

On October 3, 2014, Chairman Issa and Ranking Member Cummings wrote to Department of Homeland Security ("DHS") Secretary Jeh Johnson expressing their support for an independent panel of experts tasked with examining the September 19 White House intrusion and related issues at the Secret Service.<sup>807</sup> A complete review of the Secret Service was deemed necessary to implement recommended reforms and restore its reputation. The frequency and gravity of recent security breaches and culture failures exposed significant flaws within the Secret Service. The internal review must identify internal management weaknesses and offer significant recommendations in order to reform the agency's culture. By doing so, the Secret Service can maintain its prestigious reputation and vindicate the hard work of dedicated agents and officers. These fundamental steps are essential to rebuilding the Secret Service's credibility, which is of paramount importance.

### *EBOLA: IS AMERICA PREPARED FOR A MULTI-AGENCY RESPONSE?*

In response to concerns about the Administration's preparedness for Ebola domestically, the Committee on Oversight and Government Reform held a hearing titled, *The Ebola Crisis: Coordination of a Multi-Agency Response*. The hearing focused on America's ability to respond to the crisis from several angles: the risks related to the Administration's choice of a political operative over a qualified medical expert in coordinating the United States' Ebola response; the degree to which the Federal Government could maintain day-to-day operations in the face of a pandemic; the Defense Department's strategy regarding preventative measures to keep American troops from infection, and, in the event of an infection, the quality of care troops will receive; and the pervading feeling of uncertainty created by changing Ebola-related policies, including quarantine protocols.

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<sup>805</sup> U.S. Secret Service, Protective Intelligence & Assessment Division, Risk Management Branch, Spot Report, *Oscar Ramiro Ortega-Hernandez* (Sept. 11, 2014) (Spot Report #11-21).

<sup>806</sup> Michael D. Shear & Michael S. Schmidt, *Julia Pierson, Secret Service Director, Resigns Under Pressure About Breaches*, N.Y. TIMES, Oct. 1, 2014, available at [http://www.nytimes.com/2014/10/02/us/julia-pierson-secret-service.html?\\_r=0](http://www.nytimes.com/2014/10/02/us/julia-pierson-secret-service.html?_r=0).

<sup>807</sup> Letter from Hon. Darrell Issa, Chairman, & Hon. Elijah E. Cummings, Ranking Member, Comm. on Oversight & Gov't Reform, to Hon. Jeh Johnson Charles Edwards, Secretary, U.S. Dep't of Homeland Security (Oct. 3, 2014).

## Ebola in the United States

Ebola is a hemorrhagic fever virus, which causes fluid to leak from blood vessels, resulting in a dangerously low drop in blood pressure and organ failure.<sup>808</sup> Ebola is transmitted between humans via direct contact—through broken skin or mucous membranes—with the blood, secretions, organs, or other bodily fluids of infected people, and with surfaces and materials, such as bedding and clothing, contaminated with these fluids. Symptoms of Ebola include a high fever, severe headache, muscle pain, weakness, diarrhea, vomiting, abdominal pain, and unexplained hemorrhaging.<sup>809</sup> After a person contracts Ebola, there is a 2-21 day incubation period, during which time the subject is not contagious and shows no symptoms.<sup>810</sup> Fatality rates generally exceed 50 percent. Fatality rates in the current outbreak in West Africa are even higher: Guinea has a 70.7 percent fatality rate, Liberia a 72.3 percent fatality rate, and Sierra Leone a 69 percent fatality rate.<sup>811</sup>

Thomas Eric Duncan, a Liberian national, was the first person diagnosed with Ebola in the United States. Duncan likely contracted the disease in Liberia when he carried a pregnant woman, sick with Ebola, into her house after no clinic would admit her.<sup>812</sup> Mr. Duncan arrived in Dallas, Texas, from Liberia on September 20, 2014, after layovers in Brussels and Washington, D.C. Although medical staff at Texas Presbyterian Hospital dismissed Mr. Duncan when he initially sought treatment, he was eventually admitted at Texas Presbyterian Hospital, where he was diagnosed with Ebola and treated with brincidofovir, an experimental broad-spectrum antiviral drug.<sup>813</sup> There are no FDA-approved vaccines or medicines for the treatment of Ebola.<sup>814</sup>

Mr. Duncan died on the morning of October 8, 2014.<sup>815</sup> Since his death, two nurses who worked at Texas Presbyterian have been infected with Ebola. One received treatment at the National Institutes of Health in Bethesda, Maryland, and the other at Emory University Hospital in Atlanta, Georgia. Dr. Craig Spencer, who had returned to the United States from treating Ebola patients in Guinea, was diagnosed with Ebola at Bellevue hospital in New York City on October 24, 2014.<sup>816</sup> The *New York Times* reported that upon his arrival in New York, Dr. Spencer had traveled on the

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<sup>808</sup> Maggie Fox, *Why Are Americans so Scared of Ebola?*, NBC NEWS, Aug. 26, 2014, available at <http://www.nbcnews.com/storyline/ebola-virus-outbreak/why-are-americans-so-scared-ebola-n188806>.

<sup>809</sup> SARAH A. LISTER, CONG. RESEARCH SERV., R43750, EBOLA: BASICS ABOUT THE DISEASE 2 (2014) (on file with author).

<sup>810</sup> *Id.*

<sup>811</sup> *Id.*

<sup>812</sup> Jason Beaubien, *Fond Memories of Ebola Victim Eric Duncan, Anger Over His Death*, NPR, Oct. 9, 2014, available at <http://www.npr.org/blogs/goatsandsoda/2014/10/09/354645983/fond-memories-of-ebola-victim-eric-duncan-anger-over-his-death>.

<sup>813</sup> Dough Stanglin & Liz Szabo, *Dallas Ebola Patient Getting Experimental Drug*, USA TODAY, Oct. 7, 2014, available at <http://www.usatoday.com/story/news/nation/2014/10/06/thomas-eric-duncan-ebola-patient-dallas-hospital/16798391/>.

<sup>814</sup> *Ebola (Ebola Virus Disease) Treatment*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vhf/ebola/treatment/> (last updated Oct. 3, 2013).

<sup>815</sup> See Mark Berman & DeNeen L. Brown, *Thomas Duncan, the Texas Ebola Patient, Has Died*, WASH. POST, Oct. 8, 2014, available at <http://www.washingtonpost.com/news/post-nation/wp/2014/10/08/texas-ebola-patient-has-died-from-ebola/>.

<sup>816</sup> Mark Santora, *Doctor in New York City is Sick with Ebola*, N.Y. TIMES, Oct. 23, 2014, available at <http://www.nytimes.com/2014/10/24/nyregion/craig-spencer-is-tested-for-ebola-virus-at-bellevue-hospital-in-new-york-city.html>.

subway, visited a bowling alley in Williamsburg, and then took a taxi back to Manhattan.<sup>817</sup> These reports raised questions about the appropriateness of existing voluntary quarantine measures and prompted additional criticisms about the Administration's preparedness for the possibility of an Ebola outbreak in the United States.

### **Unprepared to Protect Essential Operations**

The Committee found through the Honorable John Roth, Inspector General at the Department of Homeland Security ("DHS"), that DHS was woefully unprepared to maintain operations in the face of a pandemic, such as an emerging influenza virus. On August 26, 2014, the Inspector General Roth's office released a report concluding that – despite a congressional appropriation of \$47 million in supplemental funding to plan, train and prepare for a potential pandemic – DHS "has no assurance it has sufficient personal protective equipment and antiviral medical countermeasures for a pandemic response."<sup>818</sup>

DHS failed to adequately assess its needs and plan its acquisition of supplies, and then subsequently failed to manage the supplies. Among the mismanagement, DHS's Office of Health Affairs ("OHA") sent more than 1,500 courses of antiviral drugs to Secret Service headquarters, but did not have records of the drugs because OHA did not maintain shipment documentation.<sup>819</sup> Additionally, DHS's stockpile included 350,000 white coverall suits, although DHS could not justify this quantity or type of protection suit as necessary for a pandemic response.<sup>820</sup> The Transportation Security Administration ("TSA") planned to sample its stock of pandemic protective equipment, including about 200,000 respirators that were beyond their 5-year manufacture-guaranteed usability period, to see if they could be used being the expiration date.<sup>821</sup> DHS also stockpiled 4,184 bottles of expired hand sanitizer.<sup>822</sup> Inspector General Roth's findings confirmed the Committee's suspicion that the Federal Government was not fully prepared to adequately respond to a potential Ebola pandemic within the United States.

### **Placing Soldiers at Risk**

To address the Committee's concerns about soldier health and safety, as well as to describe the United States' military response in West Africa at large, the Committee invited Mr. Michael Lumpkin, Assistant Secretary of Defense at the Defense Department, as well as Major General James M. Lariviere, Joint Staff Deputy Director, Political-Military Affairs (Africa), J5, at the Defense Department to testify at its hearing on October 24, 2014.<sup>823</sup> Of prominent concern was the Defense

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<sup>817</sup> *Id.*

<sup>818</sup> DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-12-129, DHS HAS NOT EFFECTIVELY MANAGED PANDEMIC PERSONAL PROTECTIVE EQUIPMENT AND ANTIVIRAL MEDICAL COUNTERMEASURES 1 (Aug. 2014) [hereinafter DHS IG Report].

<sup>819</sup> *Id.*

<sup>820</sup> *Id.*

<sup>821</sup> DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-12-129, DHS HAS NOT EFFECTIVELY MANAGED PANDEMIC PERSONAL PROTECTIVE EQUIPMENT AND ANTIVIRAL MEDICAL COUNTERMEASURES 2 (Aug. 2014).

<sup>822</sup> *Id.*

<sup>823</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 100 (2014) [hereinafter Ebola Inter-agency Response Hearing].

Department's plan of action in the event that a soldier contracted Ebola. Maj. Gen. Lariviere was unable to clearly delineate the military's response in the event of troop infection, instead repeatedly stressing that troops would not be in direct contact with individuals at risk for Ebola because their stated mission was merely to build the various Ebola treatment centers and provide training for local healthcare workers.

The Committee continued to express concern that troops, in the course of daily operations, may come into contact with individuals at risk of being infected with Ebola. When pressed on the treatment an infected soldier would receive, Maj. Gen. Lariviere testified that the soldier would be initially cared for at facilities in either Liberia or Senegal, and would then be evacuated to the United States.<sup>824</sup> However, Maj. Gen. Lariviere admitted that the United States government, through a contract between the State Department and Phoenix Air Group (a company providing charter airline services), could only transfer a single symptomatic Ebola patient at a time and could only perform four evacuations per week.<sup>825</sup> When the Committee pressed Maj. Gen. Lariviere on whether the best treatments, including ZMapp,<sup>826</sup> would be available to soldiers evacuated with Ebola, he replied that whatever treatments a physician prescribes would be available—even though he could not make assurances that ZMapp, which is currently out of supply,<sup>827</sup> would be available to an infected soldier.<sup>828</sup>

### **To Quarantine or Not: Evolving Protocols**

The Committee also probed hearing witnesses on the status of proper quarantine protocols. As of the hearing, both the CDC and New York Governor Andrew Cuomo's administration were considering the possibility of imposing quarantines. Governor Cuomo later implemented mandatory quarantines for returning health care workers, along with the states of New Jersey and Illinois.<sup>829</sup>

The hearing also revealed a set of evolving quarantine protocols within the Department of Defense. Under protocols in place at the time of the hearing, all troops would be monitored in-region and their temperatures taken before departure. Maj. Gen. Lariviere defended these protocols, characterizing them as "exceed[ing]" CDC standards in place at the time.<sup>830</sup> Those soldiers exposed to additional risk would possibly be subject to quarantine for 10 days in-country before departure. Upon arrival in the United States, troops would be monitored for 21 days, although their movements would not be restricted. The Committee recommended that the Defense Department

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<sup>824</sup> *Id.* at 128-29.

<sup>825</sup> *Id.* at 68-69.

<sup>826</sup> ZMapp is an experimental drug that has been used to treat Ebola patients, even though its effectiveness is not completely clear. ZMapp FAQ, Mapp Biopharmaceutical, <http://www.mappbio.com/zmappfaq.pdf>.

<sup>827</sup> Peter Loftus, *Maker of Experimental 'ZMapp' Ebola Virus Drug Says Supply Is Exhausted*, WALL ST. J., Aug. 13, 2014, available at <http://online.wsj.com/articles/maker-of-experimental-zmapp-ebola-drug-says-its-supply-is-exhausted-1407799150>.

<sup>828</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 128-29 (2014).

<sup>829</sup> Ellen Wulforst & David Morgan, *Two U.S. States to Quarantine Health Workers Returning from Ebola Zones*, REUTERS, Oct. 24, 2014, available at <http://www.reuters.com/article/2014/10/24/us-health-ebola-newyork-idUSKCN0IC2CU20141024>.

<sup>830</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 134 (2014).

use its own expertise and judgment in establishing quarantine protocols, and the Committee urged the Department not to merely defer to CDC guidance.

Following the hearing, on October 29, 2014, Secretary of Defense Chuck Hagel ordered all troops deployed to assist in the United States' Ebola response "be put in quarantine-like monitoring for 21 days" upon the recommendation of the Joint Chiefs of Staff.<sup>831</sup> The "controlled monitoring" at a U.S. Army base in Italy included "no physical contact with the outside world," as well as "eating separately from the other service members" stationed at the base.<sup>832</sup> Pentagon press secretary Rear Adm. John Kirby stated, "[t]he Secretary believes these initial steps are prudent given the large number of military personnel transiting from their home base and West Africa and the unique logistical demands and impact this deployment has on the force."<sup>833</sup> Secretary Hagel ordered a detailed regimen in implementing the plan, as well an assessment of the monitoring regimen after 45 days.<sup>834</sup>

The International Medical Corps took another approach. Rabih Torbay, senior vice president for international operations of International Medical Corps, testified that his organization followed different protocols to quarantine at-risk individuals. Mr. Torbay said that the Corps prohibited at-risk healthcare workers from traveling on commercial airlines for 21 days, although he noted that more extreme quarantine protocols for returning healthcare workers could pose further obstacles for aid organizations seeking to recruit healthcare workers to travel to West Africa.<sup>835</sup>

The National Nurses Union emphasized to the Committee that CDC protocols are insufficient to protect front-line healthcare workers and also advocated for greater oversight. In light of Dr. Craig Spencer self-monitoring and subsequently testing positive for Ebola, Nurse Deborah Burger also argued in favor of at-risk individuals, including healthcare workers, being monitored by a third party team of professionals, rather than deferring to individual's own professional judgment: "I think it is unrealistic to expect that any healthcare professional that is working under extremely stressful situations" can effectively monitor themselves; "you have to remember that they are humans. You can't expect them to use their common sense at that point because they're patients."<sup>836</sup> Moreover, a *Wall Street Journal* article revealed that only 5.7 percent of travelers from the affected countries who arrived in the United States between October 11 and October 25 were healthcare workers.<sup>837</sup> The remaining majority of travelers from the affected countries would not have the medical expertise that Dr. Spencer had in self-monitoring and diagnosing symptoms.

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<sup>831</sup> Dan Lamothe, *Pentagon Adopts Quarantine-like Monitoring for All U.S. Troops on Ebola Mission*, WASH. POST, Oct. 29, 2014, available at <http://www.washingtonpost.com/news/checkpoint/wp/2014/10/29/pentagon-adopts-quarantine-like-monitoring-for-all-u-s-troops-on-ebola-mission/>.

<sup>832</sup> *Id.*

<sup>833</sup> *Id.*

<sup>834</sup> *Id.*

<sup>835</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 48 (2014).

<sup>836</sup> *Id.* at 86.

<sup>837</sup> Betsy McKay, et. al, *CDC Rejects Mandatory Ebola Quarantines*, WALL ST. J., Oct. 27, 2014, available at [http://online.wsj.com/articles/federal-ebola-quarantine-guidelines-released-by-cdc-1414443143?mod=WSJ\\_hppMIDDLENexttoWhatsNewsSecond](http://online.wsj.com/articles/federal-ebola-quarantine-guidelines-released-by-cdc-1414443143?mod=WSJ_hppMIDDLENexttoWhatsNewsSecond).

On October 27, three days after the hearing, the Obama Administration laid out new guidelines calling for voluntary isolation and monitoring of travelers deemed at-risk of Ebola.<sup>838</sup> The new guidelines recommended that individuals at high-risk of Ebola infection voluntarily isolate themselves for 21 days, while refraining from public transportation (including flying) and avoiding “congregate settings.”<sup>839</sup> A public health worker would take the individual’s temperature twice daily and monitor possible symptoms.<sup>840</sup>

### **A Leader Without Expertise?**

Over the past decade, emerging national security threats have revealed deficiencies in the Federal Government’s public health preparedness and response. For example, the September 11 terrorist attacks left New York City first-responders with respiratory illnesses that were “linked to inadequate use of personal protective equipment.”<sup>841</sup> Anthrax attacks further exposed deficiencies in local, state and federal responses, and made public health a new subject of security discussions.<sup>842</sup> To better respond to myriad emerging public health threats, in 2006 President George W. Bush signed the Pandemic and All-Hazards Preparedness Act (“PAHPA”) into law. PAHPA focuses on health security, but broadens its focus from bio-terrorism to “a more comprehensive, all-hazards approach” that includes “reemerging infectious diseases and natural disasters, in addition to international threats from chemical, nuclear, or radiological incidents.”<sup>843</sup>

PAHPA established the office of the Assistant Secretary for Preparedness and Response (“ASPR”) within the Department of Health and Human Services (“HHS”). The ASPR is statutorily required to “[s]erve as the principal advisor to the Secretary on all matters related to Federal public health and medical preparedness and response for public health emergencies,” “[o]verse advanced research, development, and procurement of qualified countermeasures [and] ... security countermeasures...” and “[c]oordinate” with federal and state officials “to ensure integration of federal preparedness and response activities for public health emergencies.”<sup>844</sup>

To provide insight into the Federal Government’s inter-agency coordination of a response to the most recent Ebola outbreak in West Africa, the Committee on Oversight and Government Reform invited Dr. Nicole Lurie, the Obama Administration’s ASPR, to testify. As an expert confirmed by the Senate, Dr. Lurie’s office was expressly created by Congress to handle health crises like the spread of the highly-contagious Ebola virus.<sup>845</sup> Under the terms of PAHPA, Dr. Lurie should have been at the forefront of the Obama Administration’s inter-agency Ebola response.

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<sup>838</sup> *Id.*

<sup>839</sup> *Id.*

<sup>840</sup> *Id.*

<sup>841</sup> ALI S. KHAN, CDC OFFICE OF PUBLIC HEALTH PREPAREDNESS AND RESPONSE, PUBLIC HEALTH PREPAREDNESS AND RESPONSE IN THE USA SINCE 9/11: A NATIONAL HEALTH SECURITY IMPERATIVE 1 (2011), *available at* [http://www.cdc.gov/phpr/documents/lancet\\_article\\_sept2011.pdf](http://www.cdc.gov/phpr/documents/lancet_article_sept2011.pdf).

<sup>842</sup> *Id.*

<sup>843</sup> *Id.*

<sup>844</sup> Pandemic and All-Hazards Preparedness Act of 2006, 42 U.S.C. § 300hh-10(a), (b)(1), (b)(3). (b)(4)(A), (b)(4)(b).

<sup>845</sup> *See generally* Pandemic and All-Hazards Preparedness Act of 2006, 42 U.S.C. § 300hh.

However, Dr. Lurie denied responsibility for overseeing the inter-agency response as delegated to her in PAHPA, instead pointing to Ron Klain as a coordinator of “all the different aspects... to make sure that all the parties are working together on a day-to-day basis.”<sup>846</sup> For her part, Dr. Lurie reported only to her boss, Sylvia Mathews Burwell, Secretary of HHS.<sup>847</sup> Ms. Burwell, in turn, attended high-level White House meetings. In practice, then, despite a specific congressionally granted toolbox of duties and powers to use during times of crisis, Dr. Lurie was simply another HHS bureaucrat who did not fulfill her leadership role in response to the emergence of Ebola.

Instead of choosing a healthcare professional with “vast and varied” expertise in public health, such as Dr. Lurie, to lead the Federal Government’s Ebola response, on October 17, 2014 President Obama chose Ron Klain, a partisan political operative, to serve as the Administration’s “Ebola czar” beginning October 22.<sup>848</sup> Mr. Klain, a lawyer with no medical expertise, served as chief of staff to Vice Presidents Biden and Gore, and it is unclear whether he will be able to understand the complex issues attendant to the Ebola threat. To assuage this concern and ensure a multi-agency response to the Ebola outbreak had been properly coordinated, the Committee held a hearing titled, *The Ebola Crisis: Coordination of a Multi-Agency Response*.<sup>849</sup> The Committee invited Mr. Klain to testify at the hearing, but the White House declined.

### **Is the Government Prepared?**

The hearing raised a number of concerns regarding the Federal Government’s inter-agency response to the Ebola threat – concerns that have been addressed through adoption of enhanced protocols in several instances. The Assistant Secretary for Preparedness and Response failed to fulfill her statutorily mandated obligations; instead, the Obama Administration chose a political operative to lead the Federal Government’s Ebola response coordinated effort. Lacking medical expertise, Mr. Klain’s appointment seems to be politically motivated, made more to assuage the public’s concerns about Ebola than to actually address the government’s response to the threat itself.

If the troubling DHS IG report is any indication, the Federal Government is inadequately prepared to even maintain its own operations during a potential pandemic, much less respond effectively to contain the pandemic and protect the American people. Further, evolving CDC protocols, including quarantine procedures, create confusion and discord between and among federal agencies and departments. The lack of continuity in response to the Ebola threat is alarming because it reveals the Federal Government’s failures in adequately preparing for and addressing a potential infectious disease outbreak. Finally, the safety of American troops deployed to the front lines of the Ebola epidemic in West Africa is paramount. The Defense Department’s testimony left many questions

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<sup>846</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 153 (2014).

<sup>847</sup> *Id.* at 152.

<sup>848</sup> *Id.* at 100; Juliet Eilperin & David Nakamura, *Obama Taps Ron Klain as Ebola Czar*, WASH. POST, Oct. 17, 2014, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/10/17/obama-taps-ron-klain-as-ebola-czar/>.

<sup>849</sup> H. Comm. on Oversight & Government Reform, *The Ebola Crisis: Coordination of a Multi-Agency Response: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 100 (2014).

regarding protocols for prevention, quarantine, and treatment capable of fully protecting American soldiers, although monitoring regimens implemented after the hearing is a positive step.

### *FLAWS IN THE FEDERAL SECURITY CLEARANCE PROCESS: THE D.C. NAVY YARD SHOOTING*

Efficient and effective background checks conducted as part of the federal security clearance process are integral to ensuring the United States is protected against both domestic and international threats. Security clearance processes must be as rigorous as the government's resources will allow in order to vet security clearance applicants thoroughly. Cracks in the rigor of the security clearance process can lead to devastating consequences, as the United States learned when Aaron Alexis, despite having a criminal record and evidence of mental health issues in his history, gained access to the Navy Yard using his security clearance and opened fire, killing twelve people and injuring four more.

### **Slipping Through the Cracks**

Aaron Alexis exposed federal security clearance procedural flaws on September 16, 2013, when he walked into Building 197 of the Washington Navy Yard and murdered twelve people<sup>850</sup> and injured four others.<sup>851</sup> The tragedy prompted the Committee on Oversight and Government Reform to thoroughly investigate of the security clearance process, culminating in a hearing entitled, *D.C. Navy Yard Shooting: Fixing the Security Clearance Process*.<sup>852</sup> Before being killed by police during his murderous rampage, Mr. Alexis was one of roughly 4.9 million Americans – over 1.5 percent of our country's population – that hold security clearances, granting them access to some of our nation's most confidential secrets and most secure facilities. Despite a criminal past, Mr. Alexis was granted access to the Navy Yard because he worked for a small private company that subcontracted with the Navy to update computer hardware at Navy facilities around the world. At the time, Mr. Alexis had worked for the company for a total of seven months. He was hired in large part because he held a "Secret" level security clearance, an intermediate-level clearance, requiring a more rigorous scrutiny process than "Confidential" but less so than "Top Secret."

The Committee's investigation found that highly relevant information about Mr. Alexis' criminal past was never obtained by investigators, and thus not considered in granting Mr. Alexis' security clearance.<sup>853</sup> In 2004, Mr. Alexis was arrested for malicious mischief in Seattle for shooting the tires out of a car, claiming that he had a "black-out" fueled by anger. Three years later, when Mr. Alexis applied for a security clearance, the Office of Personnel Management ("OPM") did not include this information in the background investigative file that went to the Navy, which ultimately granted Mr. Alexis his clearance.

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<sup>850</sup> H. Comm. on Oversight & Gov't Reform, *Staff Report: Slipping Through the Cracks: How the D.C. Navy Yard Shooting Exposes Flaws in the Federal Security Clearance Process*, 113th Cong. (Feb. 11, 2014) [hereinafter *Security Clearance Staff Report*].

<sup>851</sup> *Id.*

<sup>852</sup> *Id.*; D.C. Navy Yard Shooting: Fixing the Security Clearance Process: Hearing Before the H. Comm. on Oversight & Gov't Reform, 113th Cong. (H. Rept. 113-105).

<sup>853</sup> *Security Clearance Staff Report* at 4-12.

The Committee's investigation also found that, after receiving his clearance, Mr. Alexis continued to engage in behavior that should have raised red flags.<sup>854</sup> For example: Mr. Alexis fired a gun into his ceiling and through the apartment above; he fired a bullet through the wall of his room; and he complained that individuals were using a microwave machine to send vibrations into his body. None of this information was ever given to an adjudicator who had the ability to pull Mr. Alexis' Secret level clearance, which he maintained until September 16, 2013.

### **Improving the Security Clearance Process**

The Office of Personnel Management ("OPM") oversees background investigations for security clearances for non-intelligence community personnel. When an agency wants to sponsor an individual for a security clearance, it relies primarily on OPM to conduct the background check on the individual. OPM then transmits its findings to the agency, which adjudicates the individual's clearance. In 2012, OPM prepared over 2.3 million investigative background checks for federal agencies. Approximately 30 percent of this work was conducted by OPM employees, with the other 70 percent being outsourced to three companies who hold contracts with OPM.

Today, the Federal Investigative Services ("FIS") branch of OPM, responsible for conducting these background investigations, uses largely automated processes to screen security clearance applicants.<sup>855</sup> Although time-efficient, the automated nature of the screening processes leaves room for error, and leading up to the Navy Yard shooting, a number of flawed policies within OPM prevented troubling information on security clearance applicants from reaching agency adjudicators.<sup>856</sup> As a result, individuals such as Mr. Alexis have occasionally been granted clearances that, had the adjudicator been aware of all the pertinent information, likely should have been denied. In fact, the U.S. Government Accountability Office ("GAO"), an independent federal investigative agency, has found that 87 percent of OPM's background investigation files are "incomplete."<sup>857</sup> Incomplete background investigations compromise the Nation's national security, and OPM must change its policies to ensure a more thorough security clearance process.

During the course of its investigation, the Committee identified four specific procedural flaws that not only wasted government resources, but also compromised the safety and security of what should be the Nation's most secure information and facilities:

1. OPM investigators were not permitted to use the Internet or social media in security clearance investigations.
2. Adjudicators who make clearance determinations did not interact in any way with the investigators who performed the background checks.
3. Many local law enforcement agencies did not cooperate with OPM investigators even though federal law requires them to do so, and many agencies refused to provide arrest

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<sup>854</sup> *Id.*

<sup>855</sup> *Id.* at 12-32.

<sup>856</sup> *Id.*

<sup>857</sup> GOV'T ACCOUNTABILITY OFFICE, GAO-09-400, DOD PERSONNEL CLEARANCES: COMPREHENSIVE TIMELINESS REPORTING, COMPLETE CLEARANCE DOCUMENTATION, AND QUALITY MEASURES ARE NEEDED TO FURTHER IMPROVE THE CLEARANCE PROCESS (May 2009).

records or other police reports that contain detailed information about an applicant that is undiscoverable elsewhere. Specifically, at the time of the Committee's hearing, OPM did not enjoy the support of some 450 law enforcement agencies, including those in Los Angeles, New York City, Baltimore, and Washington, D.C.

4. Current reinvestigation requirements did not allow for the ongoing capture and review of relevant information about security clearance holders.

In response to these findings, the Committee has proposed four measures to tighten up the security clearance process:

1. In furtherance of a more rigorous security clearance process, individuals approved for clearances should undergo continuous evaluation. The notion of a continuous evaluation is something that, though frequently discussed, has not yet come to fruition as OPM policy. OPM must implement a continuous evaluation system to ensure that questionable conduct, such as Mr. Alexis', will be reported to adjudicating authorities in near real-time.
2. OPM's investigative practices must comport with twenty-first century technologies by allowing investigators to use the Internet and social media sources.
3. OPM must be equipped with the resources needed to evaluate the mental health information of those holding security clearances.
4. Local law enforcement offices across the country must cooperate with OPM investigators by providing specific information to security clearance investigators when they seek legal information on applicants. Though these offices are required under current federal law to cooperate with OPM, over 450 of these offices do not, and OPM has not taken the necessary steps to obtain better cooperation.

### **The Need for Continued Coordination**

Since the tragic shooting that occurred at the Washington Navy Yard on September 16, 2013, multiple federal agencies have released reports supporting the Committee's findings. Over a month after the Committee's investigative report on the flaws in the security clearance process was released, the Department of Defense and OMB have also released reports reviewing the security clearance investigation process.<sup>858</sup> These reports affirmed the Committee's troubling findings - however, substantial reform has yet to be made. OMB's inter-agency working group tasked with updating, modernizing the investigation process, and improving inter-agency cooperation on security clearances has accomplished little in more than a year since the shooting.<sup>859</sup> Congress,

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<sup>858</sup> See Office of Mgmt & Budget, *Suitability and Security Processes Review: Report to the President* (Feb. 2014) (released Mar. 18, 2014); Dep't of Defense, *Internal Review of the Washington Navy Yard Shooting* (Nov. 20, 2013) (released Mar. 18, 2014); Dep't of Defense, *Security from Within: Independent Review of the Washington Navy Yard Shooting* (Nov. 2013) [released Mar. 18, 2014]; Dep't of the Navy, *Investigation into the fatal shooting incident at the Washington Navy Yard (WNY) on 16 September 2013 and associated security, personnel, and contracting policies and practices* (Nov. 8, 2013) [released Mar. 18, 2014].

<sup>859</sup> Office of Mgmt & Budget, *Suitability and Security Processes Review: Report to the President* (Feb. 2014) at 21 (released Mar. 18, 2014).

OPM, the Department of Defense and other federal agencies must work together to tighten this process and ensure that fewer individuals like Mr. Alexis slip through the cracks in the future.

## LIFE AFTER WAR: OUR VETERANS DESERVE BETTER

Dating back to 2007, a series of articles published in the Washington Post highlighted facilities and patient treatment problems at Walter Reed Army Medical Center in Washington, D.C.<sup>860</sup> The accounts of mistreatment indicated systemic problems existed in the wounded service member care system. As former Chairman Tom Davis stated in 2007, “[This system is a] Byzantine, stove-piped, paper-choked process that was never intended to deal with so many for so long.”<sup>861</sup> The population served by the Veterans Affairs system continues to grow: the battlefield injury survival rate has increased to 98 percent,<sup>862</sup> and over 63,000 medical evacuations were conducted in Operation Iraqi Freedom (“OIF”) and Operation Enduring Freedom (“OEF”) over a ten year span,<sup>863</sup> Unfortunately – and tragically in some cases – this also means that the rate of injured service members frustrated by the overly complex systems continue to grow.

Upon their return to the United States, injured service members are taken to a medical treatment facility for examination purposes. After the examinations, an injured service member is designated for treatment as either an inpatient or outpatient until recovery. If the he or she is still not medically qualified to continue military service, the service member will go through a lengthy process of evaluation for separation or medical retirement. Although much time has passed since the veteran returned home to the United States, this marks only the beginning of his or her often long journey to transition into care in the Veterans Affairs (“VA”) system.

In response to congressional scrutiny, the Department of Defense (“DoD”) and the VA began planning programs to help injured service members receive care in a timelier manner following discharge. GAO has also submitted numerous reports to Congress outlining significant challenges.<sup>864</sup> A recurring theme among the recommendations was the need for a seamless transition process for injured combat veterans and their families as they move through the DoD health care and benefits programs to the VA system. Among the specific recommendations were the Disability Evaluation System (“DES”), the need for a common electronic health records system, and actual implementation of these programs by the DoD and the VA.<sup>865</sup>

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<sup>860</sup> Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army’s Top Medical Facility*, WASH. POST, Feb. 18, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021701172.html>.

<sup>861</sup> Statement of Rep. Tom Davis, Ranking Member, *Is This Any Way to Treat Our Troops: The Care and Condition of Wounded Soldiers at Walter Reed – Part I: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007).

<sup>862</sup> Statement of Lieutenant General Herbert J. Carlisle, Deputy Chief of Staff for Operations, Plans and Requirements, U.S. Air Force, *Are We Ready? The President’s Fiscal Year 2012 Budget Request and Global Challenges to Readiness: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, 112th Cong. (2011).

<sup>863</sup> Hannah Fischer, *U.S. Military Casualty Statistics: Operation New Dawn, Operation Iraqi Freedom, and Operation Enduring Freedom*, CONGRESSIONAL RESEARCH SERVICE, 7-8 (Sept. 28, 2010). (Medical reasons for evacuations include being wounded in action, non-hostile injuries and other disease or medical concerns.)

<sup>864</sup> See, e.g., *Increased Information System Sharing Could Improve Service, Reduce Costs*, GOVERNMENT ACCOUNTABILITY OFFICE, (Jun. 29, 1993); *Military and Veterans Disability System: Pilot Has Achieved Some Goals, but Further Planning and Monitoring Needed*, GOVERNMENT ACCOUNTABILITY OFFICE, (Dec. 6, 2010).

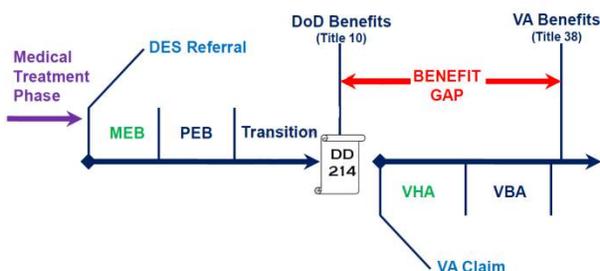
<sup>865</sup> *Id.*

## DISABILITY EVALUATION SYSTEM (“DES”)

Under the legacy process, each DoD branch of service provides its own DES. See inset graphic below provided by the Department of Defense to Committee staff on March 31, 2011.

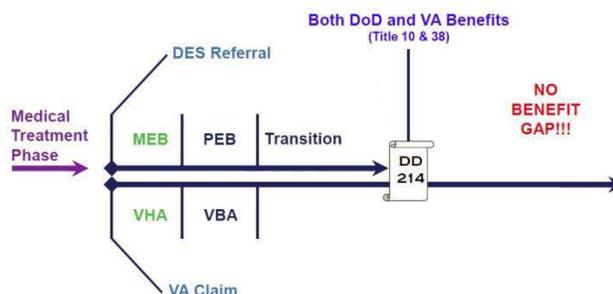
After a provider develops a case and writes a narrative summary, the service member is referred to a Medical Evaluation Board (“MEB”) at a local Military Treatment Facility (“MTF”). The MEB then provides a recommendation on the service member’s fitness for retention. If the fitness for retention is questionable, the MEB forwards the case to the Physical Evaluation Board (“PEB”). The PEB then again determines if the service member is fit for continued service. Upon determination that the service member is unfit for continued service, the member then transitions to either separation or retirement based on the disability rating assigned by the PEB. After retirement or discharge, the service member is now considered a “veteran” and applies for VA benefits. However, the veteran must now undergo another disability rating, which often differs from the DoD rating to finally receive due benefits. The average period of time from the DoD MEB process until the veteran actually receives VA benefits is approximately 540 days.<sup>866</sup>

### The Legacy Process



As a result of the 2007 Washington Post articles on conditions at Walter Reed, a Senior Oversight Committee (“SOC”) comprised of senior DoD and VA officials was established. The SOC, now co-chaired by Deputy Secretary William J. Lynn and Deputy Secretary W. Scott Gould, approved the launch of a DES Pilot program in November 2007 to simplify the process for the service member and improve the member’s transition from DoD to VA care. See inset graphic on right provided by the Department of Defense to Committee staff on March 31, 2011.

### DES Pilot/IDES



The DES Pilot, also known as the Integrated Disability Evaluation System (“IDES”), took the two separate evaluation systems and integrated them into one process. Ideally, the DoD and the VA MEB/PEB processes are conducted simultaneously. The target timeline under the IDES spans 295 days from the commencement of the MEB process until the service member receives VA benefits. However, the actual average time period is 335 days.<sup>867</sup> Both departments recognize that information technology shortfalls are major challenges in creating a more efficient transition

<sup>866</sup> Staff briefing provided by Department of Defense, Office of Wounded Warrior Care & Transition Policy (Mar. 31, 2011).

<sup>867</sup> *Id.*

process for service members.<sup>868</sup> On March 17, 2011, Secretaries Gates and Shinseki therefore agreed to examine ways to reduce DES time to 75-150 days.<sup>869</sup>

### *COMMON ELECTRONIC HEALTH RECORDS*

With approximately 12,000 service members currently going through the IDES system,<sup>870</sup> the need for a common electronic health records system is as great as ever. The Secretaries of Defense and Veterans Affairs also agreed on March 17, 2011, to develop an interagency DoD-VA Electronic Health Record (“iEHR”).<sup>871</sup> As part of this effort, the secretaries agreed to a common architecture, data and services, data centers, interface/exchange standards and presentation layer.<sup>872</sup> Further, as a result of the March 17 agreement, the secretaries “tasked their respective teams to develop a joint implementation plan.”<sup>873</sup> However, by February 2013, after years of development and significant investment, DoD and VA halted plans to develop the \$4 billion iEHR. By July 2013, DoD and VA both acknowledged that plans for a single iEHR have been scrapped in favor of maintaining two separate systems among the departments.

### *ACTUAL IMPLEMENTATION*

Many of the recommendations made by recent reports are not new. For example, President Bush established the President’s Commission on Care for America’s Returning Wounded Warriors, co-chaired by former Senator Bob Dole and former Secretary of Health and Human Services Donna Shalala in March 2007. The Commission published a report entitled, *Serve, Support, and Simplify* in July 2007. Among the Commission’s numerous recommendations was the need for rapid transfer capability of patient information between the DoD and the VA.<sup>874</sup> As part of this recommendation, the Commission recognized the need for an interactive “My eBenefits” website that provides a single information source for service members.<sup>875</sup> The website is operational under the Veterans Benefits Administration. Similar to “My eBenefits,” the Veterans Health Administration launched “My HealtheVet” in November 11, 2003. Yet full implementation has been slow and veterans service organizations continue to express frustration at a perceived lack of significant progress in these matters.<sup>876</sup> These frustrations from veterans service organizations highlight the drastic need for the Federal Government to immediately implement programs that work for our wounded veterans.

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<sup>868</sup> *Id.*

<sup>869</sup> SECDEF/SECVA Meeting Minutes (Mar. 17, 2011).

<sup>870</sup> Staff briefing provided by Department of Defense, Office of Wounded Warrior Care & Transition Policy (Mar. 31, 2011).

<sup>871</sup> Letter from Eric Shinseki, Secretary of Veterans Affairs to Darrell Issa, Chairman, U.S. House Committee on Oversight and Government Reform (Apr. 1, 2011).

<sup>872</sup> Staff briefing provided by Department of Defense, Office of Wounded Warrior Care & Transition Policy (Mar. 31, 2011).

<sup>873</sup> Letter from Eric Shinseki, Secretary of Veterans Affairs to Darrell Issa, Chairman, U.S. House Committee on Oversight and Government Reform (Apr. 1, 2011).

<sup>874</sup> President’s Commission on Care For America’s Returning Wounded Warriors, *Serve, Support, Simplify* (July 30, 2007).

<sup>875</sup> *Id.*

<sup>876</sup> Committee staff meeting with Tom Tarantino, Senior Legislative Associate, and Tim Embree, Legislative Associate, Iraq and Afghanistan Veterans of America (IAVA) (Apr. 20, 2011); *See also* telephone conversation with Disabled American Veterans (DAV) (Apr. 26, 2011).

Ultimately, the Federal Government must ensure proper treatment of our troops with the care and consideration they deserve. In order to provide such treatment, a seamless transition from DoD to VA care is imperative.

### *DISABILITY CLAIMS BACKLOG*

By June 23, 2012, the VA reported over 915,000 pending disability benefits claims.<sup>877</sup> In 2011, the VA took an average of 188 days to complete a disability claim.<sup>878</sup> In that same year, veterans who sought to appeal the VA's rating determination faced an average of 883 days from the date of filing an appeal to the date of the Boards of Veterans Appeals adjudication.<sup>879</sup> Since 2009, the average number of days to complete a disability rating continually grew. In 2009, the average time was almost four weeks shorter at 161 days.<sup>880</sup> The average claims processing time in 2011 was 188 days, meaning that the average benefits claimant was waiting more than half a year to receive a determination on their claim from the VA.<sup>881</sup>

Meanwhile accuracy in processing disability claims also became a major issue. For example, James Wear of the Veterans of Foreign Wars mentioned that although the average error rate remained stationary at 16% for several preceding months in 2012, at the time, the Baltimore Regional Office had the worst claims error rate in the country at 29%.<sup>882</sup> A 2012 audit by the VA Inspector General of the VA Regional Office ("VARO") Oakland, California indicated in a sample audit that 83% of Gulf War veterans' claims to receive treatment for mental disorders were improperly decided by VARO staff.<sup>883</sup>

By August 5, 2010, the VA obligated \$150 million of Stimulus dollars to "hire, train, and equip new employees to improve claims processing and speed the delivery of benefits to veterans. The VA had hired approximately 2,700 temporary and permanent employees to assist with processing veterans' claims for VA benefits."<sup>884</sup> These employees were mainly trained to process paper-based claims. In efforts to move toward "automated processing to directly improve the accuracy and timeliness of veterans benefits, particularly disability compensation and the new Post-9/11 GI Bill benefit,"<sup>885</sup> President Obama's 2011 budget allocated \$200 million. A significant portion of this money was aimed toward developing the Veterans Benefit Management System ("VBMS"). The VA touted the VBMS as a major solution to the paper-based system and growing backlog concerns.

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<sup>877</sup> 2012 Monday Morning Workload Reports, Veterans Affairs Department (June 25, 2012) *available at* <http://www.vba.va.gov/REPORTS/mmwr/index.asp>.

<sup>878</sup> Department of Veteran Affairs, Part II - Performance and Accountability Report, II-125, [http://www.va.gov/budget/docs/report/PartII/2011-VAPAR\\_Part\\_II.pdf](http://www.va.gov/budget/docs/report/PartII/2011-VAPAR_Part_II.pdf).

<sup>879</sup> Department of Veterans' Affairs, Board of Veterans' Appeals Report to the Chairman Fiscal Year 2011, 18, [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2011AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf).

<sup>880</sup> *Id.*

<sup>881</sup> *Id.*

<sup>882</sup> Bob Brewin, *VA's Disability Claims Backlog Pushes 900,000*, NATIONAL JOURNAL, Apr. 23, 2012, <http://www.nationaljournal.com/congress/va-s-disability-claims-backlog-pushes-900-000-20120419>.

<sup>883</sup> Department of Veterans Affairs Office of Inspector General, *Inspection of the VA Regional Office, Oakland, California*, 5, May 10, 2012, *available at* <http://www.va.gov/oig/pubs/VAOIG-12-00247-175.pdf>.

<sup>884</sup> Press Release, Department of Veterans Affairs, VA Obligates Last of its Recovery Act Funds to Help Veterans (Aug. 5, 2010) *available at* <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1934>.

<sup>885</sup> Office of Management and Budget, Budget of the U.S. Government Fiscal Year 2011, 118, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/budget.pdf>.

However, VBMS could not directly alleviate the current inventory of backlogged claims, which were overwhelmingly in paper form. After costing more than \$490 million, VBMS users at the VA reported that they experienced inconvenient shut downs of the system roughly on a weekly basis.<sup>886</sup>

Today, the backlog of claims has considerably decreased. As of November 10, 2014, the VA reported over 526,000 pending claims, with over 240,000 of these claims pending over 125 days.<sup>887</sup> The care of the nation's veterans is of paramount importance. The hundreds of thousands of veterans waiting for so long to receive their due benefits demonstrate the technological shortcomings and bureaucratic problems in the Federal Government. The Committee's ongoing oversight of the VA reveals that the Department's ability to implement innovative and effective solutions to properly address our veterans' needs is a matter of life and death for some.

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<sup>886</sup> Bob Brewin, *AFGE Rep: VA Paperless Claims System Shuts Down on a Weekly Basis*, Feb. 6, 2014, <http://www.nextgov.com/defense/whats-brewin/2014/02/afge-rep-va-paperless-claims-system-shuts-down-weekly-basis/78386/?oref=ng-flyin>.

<sup>887</sup> 2014 Monday Morning Workload Reports, Veterans Affairs Department (Nov. 10, 2014) *available at* <http://www.vba.va.gov/REPORTS/mmwr/index.asp>.

## CHAPTER 4. CRONY CAPITALISM: PICKING WINNERS AND LOSERS

Waste, abuse and crony capitalism – in that escalating order – are the inevitable problems of big, unchecked government. Government must wade carefully into private markets, taking care not to disrupt delicate balances in favor of promoting partisan agendas. As demonstrated by the crash of the housing market in 2008, the policies of the Federal Government under both Republican and Democrat Administrations may be grounded in laudable ambitions yet, if not carefully monitored, lead to devastating outcomes. Under Chairman Darrell Issa, the Committee on Oversight and Government Reform has exposed instances where the Federal Government has picked winners and losers, resulting in negative consequences for the American Taxpayer. Highlights of these oversight efforts are discussed below.

### COUNTRYWIDE FINANCIAL AND THE AFFORDABLE HOUSING MISSION

In July, 2012, Chairman Issa announced the conclusion of the Committee’s three-year investigation of Countrywide Financial Corporation (“Countrywide”).<sup>888</sup> The Committee’s final report documenting the investigation’s findings recounted years of political influence peddling by Countrywide and its mortgage-industry allies. While the “affordable housing mission” of the 1990s and 2000s encouraged taxpayer-subsidized Fannie Mae and Freddie Mac to develop “flexible underwriting criteria” in order to expand home ownership to more Americans, it also created an incentive for otherwise risk-adverse lenders to reduce credit standards. These circumstances encouraged the development of a mutually beneficial, and very profitable, relationship between original lenders (such as Countrywide) and Fannie Mae and Freddie Mac – a relationship that would ultimately inure to the detriment of the American taxpayer.

The Committee initially began investigating the ties between Fannie Mae and Freddie Mac – so-called “government sponsored enterprises” or “GSEs” because of the backing provided by the Federal Government – and the financial crisis under the leadership of then-Chairman Henry Waxman in 2008.<sup>889</sup> The issue initially received little attention from the Democrat majority in the 111th Congress, but then-Ranking Member Issa drove the Committee to continue investigating; in early 2009, the Minority staff issued a report focused on Countrywide’s efforts to block reform of the GSEs in the years leading to the financial crisis.<sup>890</sup> Another report from the Republican Minority was issued in July of that same year focusing on the role that the affordable housing mission had played in creating the financial crisis;<sup>891</sup> this report was updated in May, 2010.

When the Committee came under Republican leadership in the 112th Congress, Chairman Issa continued to investigate the issue. In the fall of 2011, amid reports that taxpayer assistance

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<sup>888</sup> Countrywide Financial Corporation was purchased by Bank of America through a government-forced sale that concluded in July 2008.

<sup>889</sup> *The Role of Fannie Mae and Freddie Mac in the Financial Crisis: Hearing Before the Comm. on Oversight & Gov’t Reform*, 110th Cong. (2008).

<sup>890</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Friends of Angelo: Countrywide’s Systematic and Successful Effort to Buy Influence and Block Reform*, 111th Cong. (2009).

<sup>891</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008*, 111th Cong. (2009).

provided to Fannie and Freddie could reach \$311 billion by 2014, the Committee held a hearing to investigate the compensation received by the companies' executives<sup>892</sup> and issued a detailed report explaining the conflict between the successes of the companies and the lavish compensation received by their executives.<sup>893</sup> With the close of the Committee's investigation in July, 2012, the Committee issued a final staff report describing the unethical yet intentional actions taken by Countrywide to influence Members of Congress and other leaders.<sup>894</sup>

Now, as 2014 comes to a close, the burst of the housing bubble is still a painful reality. The intervention of the government into housing policy created a perverse incentive – rather than profiting from payments by homeowners on performing mortgages, lending institutions instead profited from writing loans and turning a blind eye to credit risk. Traditional notions of credit worthiness have yet to reclaim their rightful place at the center of mortgage financing – a failure that continues to hold back the American dream. After guiding the country through the worst economic recession since the Great Depression, even prior Federal Reserve Chairman Ben Bernanke continues to document the hardships imposed by such overt Crony Capitalism as that demonstrated by the relationship between Countrywide Financial and the federal housing regulators – in October 2014, former Federal Reserve Chairman Ben Bernanke explained at a conference that even he had recently been unsuccessful in refinancing his mortgage. When the audience laughed, he responded, "I'm not making that up." He then confessed: "The housing area is one area where regulation has not yet got it right."<sup>895</sup>

#### *GOVERNMENT INTERVENTION IN THE HOUSING MARKET*

The government's foray into housing policy has its roots in the New Deal, when the Federal National Mortgage Association ("Fannie Mae") was created as a government sponsored enterprise ("GSE").<sup>896</sup> Established in response to the Great Depression, Fannie Mae's goal was to increase the amount of money available for mortgage lending by purchasing home mortgages from original lenders, thereby providing those lenders with additional cash for the purpose of making additional loans.<sup>897</sup> In order to raise the necessary investment capital, Fannie Mae was authorized "to borrow money... through the issuance of notes, bonds, debentures, or other such obligations."<sup>898</sup> In 1965,

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<sup>892</sup> *Pay for Performance: Should Fannie and Freddie Executives Be Receiving Millions in Bonuses?: Hearing before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011).

<sup>893</sup> *Id.*

<sup>894</sup> Staff of H. Cmte. on Oversight & Gov't Reform, *How Countrywide Used its VIP Loan Program to Influence Washington Policymakers*, 112th Cong. (2012).

<sup>895</sup> Elizabeth Campbell & Lorraine Woellert, *You Know It's a Tough Market When Bernanke Can't Refinance*, BLOOMBERG (Oct. 3, 2014, 10:59 AM), <http://www.bloomberg.com/news/2014-10-02/you-know-it-s-a-tough-market-when-ben-bernanke-can-t-refinance.html>; see also Jon Hilsenrath, *Hilsenrath's Take: New York Fed Declares Household Deleveraging Over*, WALL ST. J. REAL TIME ECONOMICS BLOG (Nov. 26, 2014, 7:16 A.M.), <http://blogs.wsj.com/economics/2014/11/26/grand-central-new-york-fed-declares-household-deleveraging-over/#1> (total household debt is down \$1 trillion since the beginning of the Great Recession in late 2008.).

<sup>896</sup> National Housing Act, ch. 847, § 301(a)(2).

<sup>897</sup> See Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J.L. & PUB. POL'Y 407 (2010) and sources cited therein; see also Krishna Guha, et al, *Saviours of the Suburbs*, FINANCIAL TIMES BLOG (June 4, 2008, 3:00 P.M.), <http://www.ft.com/cms/s/0/c658585c-31d0-11dd-b77c-0000779fd2ac.html#axzz3N8wbCRFX>.

<sup>898</sup> National Housing Act, ch. 847, § 301, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. § 1701 (2012)).

the Department of Housing and Urban Development was created, and Fannie Mae was placed under its authority and oversight.<sup>899</sup>

Fannie Mae existed as a government institution until 1968, when President Lyndon Johnson partially privatized it as the federal debt grew in the wake of the Vietnam War.<sup>900</sup> The new Fannie Mae continued to operate with the public purpose of “increasing the availability and affordability of homeownership for low-, moderate-, and middle-income Americans,”<sup>901</sup> but with reduced capital costs associated with private ownership; thus, it began serving a dual purpose – increasing the availability of homeownership for more Americans while, at the same time, increasing returns for shareholders. In 1970, a second GSE, the Federal Home Loan Mortgage Corporation (“Freddie Mac”), was created to provide competition for Fannie Mae.<sup>902</sup> It, too, was soon privatized – Freddie Mac was re-chartered in 1989 and allowed to trade its shares on the public market.<sup>903</sup>

Together, Fannie Mae and Freddie Mac exercised a near monopoly in the secondary mortgage market, as no other entities could compete with the advantages guaranteed by their relationships with the Federal Government.<sup>904</sup> The two GSEs enjoyed a \$2.25 billion line of credit from the U.S. Treasury, which encouraged the market to view them as extensions of the U.S. government. This implicit backing from the Federal Government enabled the GSEs to borrow money at rates not much higher than the “risk-free” rate private banks charged the U.S. government.<sup>905</sup> As an added bonus, once private the GSEs were allowed to continue operating in a tax-free environment, and although their shares were publicly traded, they were exempt from the oversight of the Securities and Exchange Commission (“SEC”), the Federal Government’s primary watchdog for the securities markets.<sup>906</sup> Instead, all GSE securities carry an implicit “AAA” rating.<sup>907</sup> Moreover, the GSEs were only required to hold 2.5 percent capital against their on-balance sheet mortgages, far less than the amount required for most banks.<sup>908</sup> For mortgages the GSEs guaranteed, they needed only to maintain 0.45 percent capital.<sup>909</sup> As significant portions of the GSEs’ loan portfolios defaulted in the mortgage crisis, these lax capital requirements left the companies with insufficient capital to cover even a portion of their losses.

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<sup>899</sup> Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 5(a), 79 Stat 667, 669 (1965) (

<sup>900</sup> Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar Commitment: The Destruction of Fannie Mae and Freddie Mac*, AEI FIN. SERVICES OUTLOOK 2 (Sept. 2008), available at [http://www.aei.org/docLib/20080930\\_Binder1.pdf](http://www.aei.org/docLib/20080930_Binder1.pdf).

<sup>901</sup> Federal National Mortgage Association Charter Act (Title III of National Housing Act), 12 U.S.C. § 1716 *et seq.*

<sup>902</sup> See Emergency Home Financing Act of 1970 §§ 301-10, Pub. L. No. 91-351, 84 Stat. 450 (1970) (codified as amended at 12 U.S.C. §§ 1451-59 (2012)).

<sup>903</sup> Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar Commitment: The Destruction of Fannie Mae and Freddie Mac*, AEI FIN. SERVICES OUTLOOK 2 (Sept. 2008), available at [http://www.aei.org/docLib/20080930\\_Binder1.pdf](http://www.aei.org/docLib/20080930_Binder1.pdf).

<sup>904</sup> See Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J.L. & PUB. POL’Y 407 (2010).

<sup>905</sup> *Id.*

<sup>906</sup> The GSE’s finally agreed to make “voluntary” filings after a series of scandals in 2003 and 2004. *Id.* at 409-10.

<sup>907</sup> As the quality of the mortgages the GSEs were willing to buy declined, this exemption from SEC oversight became increasingly dangerous to taxpayers.

<sup>908</sup> See Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, § 1362 (1992).

<sup>909</sup> See *id.*

### *THE AFFORDABLE HOUSING MISSION AND THE POLITICIZATION OF MORTGAGE LENDING*

In the early 1990s, Fannie and Freddie began to come under considerable pressure to lower their underwriting standards, particularly with regards to the size of down payments and the credit quality of borrowers. A deeply flawed study published in 1992 purported to show that minorities faced discrimination in mortgage lending. Although the study has since been shown to have been based on inaccurate data, which failed to support the study's model,<sup>910</sup> the damage had been done. Congress seized on the study as part of a major legislative reorganization of the GSEs' function.

The "affordable housing mission," initiated by President Clinton and nurtured by President George W. Bush, created a nexus of vested interests – politicians, lenders<sup>911</sup> and lobbyists – that profited either financially or politically (or both) from this arrangement and subsequently worked to kill proposed reforms. This mission was codified in 1992 as part of the Federal Housing Enterprises Financial Safety and Soundness Act (the "1992 Act").<sup>912</sup> The 1992 Act also established the Office of Federal Housing Enterprise Oversight ("OFHEO") within Housing and Urban Development ("HUD") to regulate the GSEs.<sup>913</sup> The 1992 Act directed the HUD to establish, by regulations which ultimately took the form of quotas, three specific affordable housing goals for the GSEs.<sup>914</sup> The first of these quotas was related to the purchase of mortgages on housing for "low- and moderate-income families;"<sup>915</sup> the second related to mortgages on housing for "low-income families in low-income areas and very low-income families;"<sup>916</sup> finally, the third goal related to the purchase of mortgages on housing located "in central cities, rural areas, and other underserved areas."<sup>917</sup>

Congress granted HUD the authority to adjust these three affordable housing quotas for the GSEs over time, allowing both Democratic and Republican Administrations to consistently make campaign promises to boost home ownership through government intervention in the market. Consequently, under both the Clinton and Bush Administrations, HUD dramatically increased these quotas. They reached their zenith under the Bush Administration – of the mortgages purchased by

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<sup>910</sup> See STAN J. LIEBOWITZ, INDEPENDENT POLICY REPORT, ANATOMY OF A TRAIN WRECK: CAUSES OF THE MORTGAGE MELTDOWN (2008), available at [http://www.independent.org/pdf/policy\\_reports/2008-10-03-trainwreck.pdf](http://www.independent.org/pdf/policy_reports/2008-10-03-trainwreck.pdf).

<sup>911</sup> One of the primary lenders benefiting from the affordable housing mission was Countrywide Financial Corporation, a mortgage lending institution. Countrywide attempted to purchase influence with politicians and lobbyists by offering beneficial loan terms not available to the general public, creating allies that later opposed and ensured the defeat of reform. Countrywide's "VIP" and "Friends of Angelo" programs are discussed in more detail below.

<sup>912</sup> Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, Title XIII (1992).

<sup>913</sup> *Id.* Neither HUD nor the new OFHEO had any previous regulatory experience and OFHEO was granted only limited regulatory power. See Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar commitment: The Destruction of Fannie Mae and Freddie Mac*, AEI FIN. SERVICES OUTLOOK, 2 (Sept. 2008), available at [http://www.aei.org/docLib/20080930\\_Binder1.pdf](http://www.aei.org/docLib/20080930_Binder1.pdf). Of the few powers granted to OFHEO were the "approval of payments of capital distributions" and "prohibiting the payment of excessive compensation... to any executive officer." Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1313(b)(6), (8) (1992).

<sup>914</sup> See Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, Title XIII § 1331 (1992).

<sup>915</sup> *Id.*

<sup>916</sup> *Id.*

<sup>917</sup> *Id.*

the GSEs, 56 percent were required to be on housing for “low-and moderate-income families”, 27 percent were required to be on housing for “low-income families in low-income areas and very low-income families,” and 39 percent were required to be on housing located “in central cities, rural areas, and other served areas.”<sup>918</sup>

HUD’s affordable housing quotas represented major departures from the GSEs’ prior commitment to underwriting only sustainable mortgages. Fannie Mae’s original congressional charter acknowledged the risks associated with low down payment loans because it only allowed Fannie to purchase “such mortgages not to exceed 80 per centum of the appraised value of the property.”<sup>919</sup>

Fannie Mae CEO Jim Johnson announced the company’s first large affordable housing initiative, the \$1 trillion “Opening the Doors to Affordable Housing” program in 1994. Johnson, a long-time friend of both President Clinton and Treasury Secretary Robert Rubin, took the helm of Fannie in 1991 after a stint at Lehman Brothers. By introducing “qualifying flexibility” for borrowers, the program would allow low-income borrowers to reduce their down payments to as little as three percent. An article lauding the program’s potential cited “pressure from President Clinton’s administration” as the impetus for greater lending to inner-city residents and low- to moderate-income home buyers.<sup>920</sup>

That same year, Fannie Mae also began a campaign to ingratiate itself with Members of Congress by establishing “partnership offices” in specific congressional districts and states with ties to relevant Members of Congress. These offices would issue “thousands of press releases” featuring Members of Congress assisting Fannie Mae with affordable housing initiatives.<sup>921</sup> This political strategy allowed politicians to claim credit for earmark-like affordable housing initiatives in their districts without having to appropriate the money in Congress. The offices also had a reputation for hiring relatives of Members as employees,<sup>922</sup> strengthening the ties between the GSE and its overseers.

Government intervention in the housing market continued to grow in 1995, when the Clinton Administration implemented a major regulatory reform of the Community Reinvestment Act (“CRA”) that would force regulators to rate banks based on the volume of their lending rather than on their efforts to lend to customers using fair procedures. By emphasizing “performance-based evaluation,” the major impact of this reform was to mark “a shift of emphasis from procedural equity to equity in outcome.” Furthermore, the “lending test” component of the regulatory review process, which was the “most heavily weighted component of CRA examination,” included criteria for the use of “innovative or flexible lending practices.” As demonstrated time and again by congressional advocates of affordable lending, “innovative and flexible” means reduced down

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<sup>918</sup> See Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008*, 111th Cong. (2010).

<sup>919</sup> See National Housing Act, ch. 847, § 301(a)(1), 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. § 1701 (2012)).

<sup>920</sup> See Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008*, 111th Cong. (2010).

<sup>921</sup> See Bethany McLean, *Fannie Mae’s Last Stand*, VANITY FAIR, (Feb. 2009).

<sup>922</sup> See Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar Commitment: The Destruction of Fannie Mae and Freddie Mac*, AEI FIN. SERVICES OUTLOOK 2 (Sept. 2008), available at [http://www.aei.org/docLib/20080930\\_Binder1.pdf](http://www.aei.org/docLib/20080930_Binder1.pdf).

payments and riskier, unsustainable lending.<sup>923</sup> The endorsement of “innovative and flexible” lending in conjunction with performance-based rating criteria logically resulted in banks originating riskier loans to purchasers of modest means, and more of them.

Another important event in 1995 was the release of the Clinton Administration’s *National Homeownership Strategy*, which cited President Clinton’s goal of raising “America’s homeownership rate to an all-time high by the end of the century.”<sup>924</sup> The Strategy enumerated steps that could be taken to achieve this goal, including “Action 35: Home Mortgage Loan-to-Value Flexibility.” This item provided that:

Lending institutions, secondary market investors, mortgage insurers, and other members of the partnership should work collaboratively to reduce homebuyer downpayment requirements. Mortgage financing with high loan-to-value ratios should generally be associated with enhanced homebuyer counseling and, where available, supplemental sources of downpayment assistance.

The Strategy thereafter favorably noted “Fannie Mae recently announced a 97-percent first mortgage requiring only a 3-percent downpayment.”<sup>925</sup> However, it only made a passing acknowledgement of the risks associated with reducing borrowers’ equity in their mortgages, explaining:

The amount of borrower equity is an important factor in assessing mortgage loan quality. However, many low-income families do not have access to sufficient funds for a down payment. While members of the partnership have already made significant strides in reducing this barrier to home purchase, more must be done. In 1989 only 7 percent of home mortgages were made with less than 10 percent down payment. By August 1994, low down payment mortgage loans had increased to 29 percent.<sup>926</sup>

Another successful vehicle for currying favor for Fannie Mae was the Fannie Mae Foundation, created in 1979 as the GSE’s charitable giving arm. In 1995, then-Fannie Mae Chairman Jim Johnson contributed \$350 million in Fannie Mae stock to the Foundation,<sup>927</sup> beginning a series of irregular contributions that would grow to more than \$660 million in stock and cash by the time the Foundation was dissolved and its operations absorbed by Fannie in 2007.<sup>928</sup> The company used the Foundation to spread millions of dollars around to politically-connected organizations like the Congressional Hispanic Caucus Institute,<sup>929</sup> and over time it became a “lightning rod for criticism that the company was using tax-exempt contributions to advance corporate interests.”<sup>930</sup>

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<sup>923</sup> See Peter J. Wallison, American Enterprise Institute, *Cause and Effect: Government Policies and the Financial Crisis* (2009), available at <http://www.aei.org/publication/cause-and-effect/>.

<sup>924</sup> U.S. Department of Housing and Urban Development, *The National Homeownership Strategy: Partners in the American Dream*, (May 1995), 2.

<sup>925</sup> *Id.* at 61-62.

<sup>926</sup> *Id.* at 62.

<sup>927</sup> See Bethany McLean, *Fannie Mae’s Last Stand*, VANITY FAIR, (Feb. 2009).

<sup>928</sup> David S. Hilzenrath and Amy Joyce, *Fannie Mae Shuts Down Foundation*, WASH. POST, Feb. 24, 2007.

<sup>929</sup> See Bethany McLean, *Fannie Mae’s Last Stand*, VANITY FAIR, (Feb. 2009). Maria Meier, whom served as Executive Director of the Congressional Hispanic Caucus Institute, would later receive “VIP” treatment from

By 1999, Fannie Mae was the largest investor in every congressional district in America, and the total federal subsidy to Fannie Mae and Freddie Mac was valued at more than \$6 billion a year.<sup>931</sup>

Aside from charitable contributions, the Fannie Mae Foundation also worked to lend credibility to the operations and forecasts of the GSEs by commissioning scholarly commentary. A 2002 paper entitled *Implications of the New Fannie Mae and Freddie Mac Risk-based Capital Standard*, co-authored by a Nobel Prize winner in economics, a former Special Assistant to the President for Economic Policy, and a former Assistant to the Secretary of Commerce at the request of Fannie Mae, concludes that “the probability of default by the GSEs is extremely small. Given this, the expected monetary costs of exposure to GSE insolvency are relatively small.”<sup>932</sup>

Under continuing political and economic pressure, the trend toward lowering mortgage lending standards continued apace throughout the 1990s and early 2000s. GSEs altered their automated mortgage underwriting standards<sup>933</sup> to encourage banks and non-bank mortgage lenders to make loans to borrowers with damaged credit.

### *THE POLITICIZATION OF MORTGAGE LENDING*

As publicly traded corporations, the GSEs faced the obligation of all corporations – to maximize the value of shareholders’ equity. This meant seeking out profitable opportunities to invest in housing and, to the maximum extent possible, pushing the envelope of innovation in mortgage finance to compete for market share. However, unlike any other publicly traded corporation, Fannie Mae and Freddie Mac also answered in a very direct way to the Federal Government and elected officials in a manner reminiscent of the “crony capitalism” of countries such as Russia or China, which preserve a large state-owned enterprise sector.

Between 2000 and 2008, together Fannie Mae and Freddie Mac donated more than \$14.6 million to the campaigns of Members of Congress, many of them with committee placements relevant to the GSEs’ operations.<sup>934</sup> Fannie Mae alone spent \$79.5 million on lobbying fees between 1998 and 2008 – often hiring a lobbyist only to create a conflict that would prevent the lobbyist for working for

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Countrywide Financial Corporation due to a referral from Countrywide’s lobbyist. Under her direction, the Institute launched a housing initiative called “Hogar” which would benefit from the backing of Fannie Mae. See Susan Schmidt & Maurice Tamman, *Housing Push for Hispanics Spawns Wave of Foreclosures*, WALL ST. J. REAL ESTATE BLOG (Jan. 5, 2009, 11:59 P.M.), <http://www.wsj.com/articles/SB123111072368352309>.

<sup>930</sup> David S. Hilzenrath & Amy Joyce, *Fannie Mae Shuts Down Foundation*, WASH. POST, Feb. 24, 2007.

<sup>931</sup> See Rep. Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J.L. & PUB. POL’Y 407 (2010).

<sup>932</sup> Joseph E. Stiglitz, et al., *Implications of the New Fannie Mae and Freddie Mac Risk-based Capital Standard*, FANNIE MAE PAPERS, 2 (March 2002).

<sup>933</sup> “Underwriting standards” are “[g]uidelines established to ensure that safe and secure loans are issued and maintained. Underwriting Standards, Investopedia, [www.investopedia.com/terms/u/underwriting-standards.asp](http://www.investopedia.com/terms/u/underwriting-standards.asp). By lowering the standards for the automated review of home mortgages, the total number of mortgages the GSEs could guarantee or purchase without additional review increased. The result was to enable to GSEs to underwrite riskier loans with reduced oversight and without additional assurance of payment.

<sup>934</sup> Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar Commitment: The Destruction of Fannie Mae and Freddie Mac*, AEI FIN. SERVICES OUTLOOK 3 (Sept. 2008), available at [http://www.aei.org/docLib/20080930\\_Binder1.pdf](http://www.aei.org/docLib/20080930_Binder1.pdf).

Fannie's opposition.<sup>935</sup> As the mortgage crisis loomed on the horizon, Fannie Mae reported lobbying expenditures of more than \$10,160,000 in 2006 alone.<sup>936</sup>

In fact, many Fannie Mae employees had close ties to government officials:

- James Johnson, Fannie Mae's CEO between 1991 and 1998, was a close adviser to former Vice President Walter Mondale and alleged to have close ties to the Clinton Administration.
- Franklin Raines, Fannie Mae's vice president between 1991 and 1996 and then CEO from 1999 until 2004, was Director of the Office of Management and Budget under President Clinton.
- Jamie Gorelick, Fannie Mae's vice chairman between 1997 and 2003, served as Deputy Attorney General of the United States during the Clinton Administration.<sup>937</sup>

#### *FANNIE MAE AND COUNTRYWIDE FINANCIAL*

By issuing mortgages with unusually beneficial terms (often to borrowers with questionable credit), Countrywide garnered favor and influence with Washington policy figures ranging from low-level government employees to high-ranking Members of Congress and Administration officials. This initiative – termed the “Friends of Angelo” or “VIP” program – created a cast of potential supporters that could be called upon whenever Countrywide or its government-sponsored partners, faced criticism or possible industry reform. In the years leading up to the mortgage crisis, at least 31 bills were proposed in the House and Senate that would have limited the abuse of “innovative and flexible” lending practices that led to the creation of this cartel. Unfortunately for taxpayers, these reform efforts were consistently opposed by those politically and financially invested in the affordable housing mission.

In 1999, Fannie Mae entered an agreement with Countrywide Financial Corporation whereby Countrywide agreed to sell, and Fannie Mae agreed to buy, millions of dollars in mortgages; in return for the volume of loans offered by Countrywide to Fannie, Fannie would charge Countrywide reduced guarantee rates.

Fannie Mae needed to purchase mortgages that would meet the quotas imposed by HUD according to the Administration's affordable housing mission. In order to make more loans and increase its profits, Countrywide needed to sell loans it originated so it could make future loans. The relationship was a win-win for everyone, except the American taxpayer.

HUD also reviewed and ultimately approved Fannie's plan for executive compensation. Not surprisingly, the compensation of Fannie's CEO and top executives, as approved year after year, depended heavily on whether the HUD quotas had been met; if Fannie ensured liquidity to enough low- and moderate-income families, especially in under-served areas, Fannie executives would make more money.

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<sup>935</sup> *Id.*

<sup>936</sup> CENTER FOR RESPONSIVE POLITICS, *Fannie Mae, Client Profile, Summary, 2006, available at <http://www.opensecrets.org/lobby/clientsum.php?id=D000000205&year=2006>* (last accessed September 3, 2014).

<sup>937</sup> See Owen Ullmann, *Crony Capitalism: American Style*, INT'L ECON. (July/August 1999).

### *THE COST OF INFLUENCE*

In 1994, Fannie Mae CEO Jim Johnson announced the company's intent to invest \$1 trillion into the affordable housing mission through its "Opening the Doors to Affordable Housing" program. The program was praised because it would introduce "qualifying flexibility," for low-income borrowers, allowing them to reduce their down payments to as little as 3 percent.<sup>938</sup> The following year, Johnson provided the Fannie Mae Foundation with \$350 million of Fannie stock. The company used this foundation to spread millions of dollars around to politically-connected organizations like the Congressional Hispanic Caucus Institute.<sup>939</sup>

Between 2007 and 2010 the City of Baltimore saw more than 18,000 foreclosures. At the request of Ranking Member Cummings, the Committee held a field hearing at the University of Maryland School of Law<sup>940</sup> where it heard testimony from Maryland officials and considered a report on Baltimore foreclosures prepared by researchers at Johns Hopkins University.<sup>941</sup> The researchers found that, in contradiction of the goals of the affordable housing mission, Baltimore families in middle and working class neighborhoods were more likely to lose their homes than any other group.<sup>942</sup> Although the recent recession cannot be tied to any single cause, the impact of the affordable housing mission is clear: while favored interests were selected to be winners, American Taxpayers were selected to be losers.

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<sup>938</sup> Minority Staff of H. Cmte. on Oversight & Gov't Reform, *The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008*, 111th Cong. 7 (2010).

<sup>939</sup> See Bethany McLean, *Fannie Mae's Last Stand*, VANITY FAIR, (Feb. 2009).

<sup>940</sup> *The Foreclosure Crisis: Field Hearing before the Committee on Oversight and Gov't Reform*, 112th Cong. (2011).

<sup>941</sup> See Peter Rosenblatt & Katherine Newman, *THE IMPACT OF FORECLOSURE WAVES ON THE CITY OF BALTIMORE* (2011) (report prepared for Rep. Elijah Cummings in preparation for Full House Committee on Oversight and Government Reform field hearing *The Foreclosure Crisis*, March 8, 2011).

<sup>942</sup> *Id.* at 2.

## SOLAR POWER FAVORITES... AND FAILURES

On his way into office during the worst recession America has experienced since the Great Depression, President Barack Obama championed green jobs as a means to achieve economic recovery – promising that America would create five million green jobs within ten years.<sup>943</sup> As the President asserted in his inaugural address, “we will act not only to create new jobs but to lay a new foundation for growth.”<sup>944</sup> He continued, “We will harness the sun and the winds and the soil to fuel our cars and run our factories.”<sup>945</sup> According to the President, green energy was the current generation’s equivalent of the Apollo missions, which sent a man to the moon in 1969.<sup>946</sup> However, the entire thirteen year Apollo Program (between 1960 and 1973) cost \$102.8 billion, adjusted for inflation. In contrast, by the end of just the second quarter following the implementation of the American Recovery and Reinvestment Act, \$90 billion had already been poured into in green energy investments.<sup>947</sup>

The Department of Energy (“DOE”) was the key vessel for implementing the Obama Administration’s green agenda and was one of the largest recipients of American Recovery and Reinvestment Act (“ARRA” or the “Recovery Act”) funds. As the DOE Inspector General pointed out, the \$35 billion in Recovery Act funding the Department received exceeded its annual budget of about \$28 billion.<sup>948</sup> The DOE’s flagship program for green energy promotion was the Loan Guarantee Program, which provided large government-sponsored loans to many risky energy companies – many with close ties to the Obama Administration. In 2011, the Committee on Oversight and Government Reform (“Committee”) began a multi-year investigation into the loan programs which uncovered pervasive waste, fraud and malfeasance at the DOE.

### *EVOLUTION OF THE LOAN GUARANTEE PROGRAM*

For decades federal loan guarantees supported a variety of policy objectives, “including home ownership, university education, small business growth, international development, and others.”<sup>949</sup> In 1976, the Congressional Budget Office (“CBO”) defined loan guarantees as “a loan or security on which the Federal Government has removed or reduced a lender's risk by pledging to repay

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<sup>943</sup> See David G. Taylor, *Seeds Planted for Green Jobs, but Will They Bear Fruit*, POLITIFACT.COM (St. Petersburg Times), available at <http://www.politifact.com/truth-o-meter/promises/obameter/promise/439/create-5-million-green-jobs/>.

<sup>944</sup> President Barack Obama, Inaugural Speech, in N.Y. TIMES, Jan. 20, 2009 available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=all>.

<sup>945</sup> *Id.*

<sup>946</sup> President Barack Obama, State of the Union Address (Jan. 25, 2011).

<sup>947</sup> COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT, SECOND QUARTERLY REPORT (2010).

<sup>948</sup> *Oversight of Dept. of Energy Recovery Act Spending: Hearing before H. Comm. on Energy & Commerce*, 112th Cong. 1-2 (2011) (statement of Gregory H. Friedman Inspector General U.S. Department of Energy).

<sup>949</sup> PHILLIP R. BROWN, CONGRESSIONAL RESEARCH SERVICE, LOAN GUARANTEES FOR CLEAN ENERGY TECHNOLOGIES: GOALS, CONCERNS, AND POLICY OPTIONS (2012), available at <http://www.crs.gov/pages/Reports.aspx?PRODCODE=R42152&Source=search>, [hereinafter Brown].

principal and interest in case of default by the borrower” – in other words, a loan that the government has promised to pay if the borrower defaults.<sup>950</sup>

Congress first authorized the Department of Energy’s Loan Guarantee Program (the “Program”) under title XVII of the Energy Policy Act of 2005.<sup>951</sup> Generally, the Program attempts to incentivize innovations in energy efficiency, renewable energy and advanced transmission by making it easier for companies to secure loans. Section 1703 of the Act specifically authorizes the Secretary of Energy to make loan guarantees for projects that employ innovative technology to reduce greenhouse gas emissions.<sup>952</sup>

### *A NEW SECTION 1705*

The American Recovery and Reinvestment Act of 2009 amended the Energy Policy Act of 2005 and significantly expanded the Secretary’s loan guarantee authority under a newly-created Section 1705.<sup>953</sup> Section 1705 authorized the Secretary to issue loan guarantees for renewable energy projects – including those employing *non-innovative* technologies – that commenced construction within a certain period of time, or by no later than September 30, 2011.<sup>954</sup> Moreover, in contrast to loan guarantees issued under § 1703, the project sponsor did not have to pay for the cost of the loan guarantee because the government covered the credit subsidy costs.<sup>955</sup> The short timeframe for eligibility and the congressional appropriation of the credit subsidy cost reflect § 1705’s primary purpose: economic stimulus.<sup>956</sup>

The DOE issued its first § 1705 loan guarantee solicitation on July 29, 2009.<sup>957</sup> The DOE’s Loan Programs Office awards and administers loan guarantees under three sets of official rules: the statutory requirements of Sections 1703 and 1705, the departmental regulations issued pursuant to statute, and the department’s formal solicitations for loan guarantee applications.<sup>958</sup> These rules describe the eligibility requirements with increasing specificity to encourage responsible stewardship of the Program and to prevent the issuance of a taxpayer-financed earmark.

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<sup>950</sup> CONGRESSIONAL BUDGET OFFICE, LOAN GUARANTEES: CURRENT CONCERNS AND ALTERNATIVES FOR CONTROL (1978).

<sup>951</sup> 42 U.S.C. §§ 16511-16514.

<sup>952</sup> *Id.* § 16513(a).

<sup>953</sup> *Id.* § 16516.

<sup>954</sup> *Id.* § 16516(a).

<sup>955</sup> U.S. DEP’T OF ENERGY LOAN GUARANTEE PROGRAM, LOAN GUARANTEE SOLICITATION ANNOUNCEMENT: FED. LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE ENERGY EFFICIENCY, RENEWABLE ENERGY, AND ADVANCED TRANSMISSION AND DISTRIBUTION TECH. (July 29, 2009) (“the Recovery Act provides that five billion nine hundred sixty five million dollars (\$5,965,000,000) in appropriated funds be made available until expended to pay the Credit Subsidy Costs”) [hereinafter Innovative Solicitation].

<sup>956</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §3(a), 123 Stat. 115.

<sup>957</sup> COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT, SECOND QUARTERLY REPORT (2010).

<sup>958</sup> 42 U.S.C. §§16511-16516; 10 C.F.R. § 609 (2011); Innovative Solicitation, *supra* note 955; U.S. DEP’T OF ENERGY LOAN GUARANTEE PROGRAM OFFICE, LOAN GUARANTEE SOLICITATION ANNOUNCEMENT: FED. LOAN GUARANTEES FOR COMMERCIAL TECH. RENEWABLE ENERGY GENERATION PROJECTS UNDER THE FIN. INST. P’SHIP PROGRAM (Oct. 7, 2009) [hereinafter FIPP Solicitation].

### *GUARANTEEING “JUNK”*

The § 1705 loan guarantees were issued under two solicitations which differed in their eligibility requirements and financing method. The first solicitation targeted projects that employed innovative technologies.<sup>959</sup> Under this solicitation, the project sponsor could acquire the underlying loan from U.S. government through the Federal Financing Bank.<sup>960</sup> The second solicitation created the “Financial Institution Partnership Program.”<sup>961</sup> This program accepted projects that employed *non-innovative* (i.e., already commercialized) technology, but required the project sponsor to acquire the underlying loan from a private financial institution.<sup>962</sup>

Committee staff evaluated renewable energy projects that received loan commitments from the Department of Energy (“DOE”) or from private lenders partnering with DOE under § 1705. Staff identified a pattern indicative of poor management and a bias toward unconstrained lending that resulted in the creation of a high risk, speculative and undiversified loan portfolio.

By the expiration of Section 1705 program in September 2011, the DOE had approved 27 projects totaling over \$16 billion in guaranteed loans.<sup>963</sup> At the outset, the ratings agencies rated 23 of these loans as non-investment grade categories, also known as “junk,” due to their poor credit quality, while the other four were rated “BBB,” which is at the lowest end of the investment grade of categories. Overall, DOE’s Section 1705 portfolio’s initial average rating was BB-. According to Fitch, a “BB” rating is speculative and indicates an elevated vulnerability to default risk.<sup>964</sup> Accordingly, a BB- is on the low end of what are considered to be “speculative investments,” barely escaping the classification of “highly speculative” investments.

Despite lending to highly speculative and troubled projects, the government only charged those green energy firms its own cost to borrow money. In other words, the government sought no profit or compensation for credit risk. Given the extent of losses apparent, the failure to seek any compensation for credit risk inevitably means the taxpayer will lose substantial funds. This is distinguishable from normal business practices, where banks or investment firms charge a premium or require more upfront capital as a condition for agreeing to finance riskier projects; thus, if the project were to go completely under, the banks would have some capital to show for the losses.

### *“CRONY CAPITALISM” AND WASTEFUL SPENDING*

As the Committee reviewed the risky loans backed by the government through the Department of Energy’s Section 1705 authority, it discovered a pattern within the Administration of hiring persons

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<sup>959</sup> COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT, SECOND QUARTERLY REPORT (2010).

<sup>960</sup> *Id.*

<sup>961</sup> 42 U.S.C. § 16516.

<sup>962</sup> *Id.*

<sup>963</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *The Dept. of Energy’s Disastrous Management of Loan Guarantee Programs*, 112th Cong. (2012).

<sup>964</sup> Fitch Ratings, *Definitions of Ratings and Other Forms of Opinion* (2011), available at [http://www.fitchratings.com/web\\_content/ratings/fitch\\_ratings\\_definitions\\_and\\_scales.pdf](http://www.fitchratings.com/web_content/ratings/fitch_ratings_definitions_and_scales.pdf).

who worked at green energy investment groups – relationships that created significant conflicts of interest. The following are notable findings from the Committee’s oversight activities:

### **Solyndra**

Steve Spinner served as an advisor to Secretary Chu from April 2009 to September 2010. In that position, Mr. Spinner helped oversee the strategic operations of the clean energy loan guarantee program under the Recovery Act.<sup>965</sup> Mr. Spinner was previously an energy-focused venture capitalist and high-tech consultant.<sup>966</sup> He is also an Obama bundler, having raised over \$500,000 for the President in 2008,<sup>967</sup> and over \$200,000 thus far for 2012.<sup>968</sup> Mr. Spinner’s wife, Allison Berry Spinner, is a partner at Wilson Sonsini Goodrich & Rosati, the law firm that represented Solyndra on matters related to the DOE loan.<sup>969</sup> According to federal records, the firm received at least \$2.4 million in federal funds for legal fees related to the representation.<sup>970</sup>

White House e-mails released late last year indicate that Mr. Spinner was influential in securing the \$528 million loan to now-bankrupt Solyndra. Many of those emails were written just days after he signed an ethics agreement pledging that he would “not participate in any discussion regarding any application involving” his wife’s law firm.<sup>971</sup> In one message to a DOE official on August 28, 2009, Mr. Spinner wrote, “How hard is this? What is he waiting for? . . . I have OVP and WH breathing down my neck on this.”<sup>972</sup> The e-mail went on to demand that the DOE official “walk over there and force [the official working on the Solyndra evaluation] to give [him] an answer.”<sup>973</sup>

After just being contacted by Solyndra, Mr. Spinner inquires in another e-mail, “Any word on OMB? Solyndra’s getting nervous.”<sup>974</sup> The e-mail correspondence occurring in the final days before the Solyndra loan closed in September 2009 centers heavily on Spinner’s efforts to coordinate plans for either the President or Vice President to announce the first loan approval at a scheduled visit to Solyndra.<sup>975</sup>

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<sup>965</sup> Matthew Daly, *Steve Spinner, Energy Department Advisor, Pushed Solyndra Loan, Emails Show*, HUFFINGTON POST, Oct. 7, 2011 available at [http://www.huffingtonpost.com/2011/10/07/obama-fundraiser-pushed-s\\_n\\_1000826.html](http://www.huffingtonpost.com/2011/10/07/obama-fundraiser-pushed-s_n_1000826.html).

<sup>966</sup> Matthew Mosk, *Obama Fundraiser Pushed Solyndra Deal From Inside*, ABC NEWS, Oct. 7, 2011 available at <http://abcnews.go.com/Blotter/obama-fundraiser-pushed-solyndra-deal-inside/story?id=14691618#.TzrE9MXQIsI>.

<sup>967</sup> Center for Responsive Politics, “Barack Obama Bundlers,” OpenSecrets available at <http://www.opensecrets.org/pres08/bundlers.php?id=N00009638>.

<sup>968</sup> BarackObama.com, “Obama For America Victory Fund 2012 Volunteer Fundraisers” available at <http://www.barackobama.com/pages/volunteer-fundraisers-Q2/>.

<sup>969</sup> Matthew Mosk, *Obama Fundraiser Pushed Solyndra Deal From Inside*, ABC NEWS, Oct. 7, 2011, available at <http://abcnews.go.com/Blotter/obama-fundraiser-pushed-solyndra-deal-inside/story?id=14691618#.TzrE9MXQIsI>.

<sup>970</sup> Matthew Daly, *Steve Spinner, Energy Department Advisor, Pushed Solyndra Loan, Emails Show*, HUFFINGTON POST, Oct. 7, 2011 available at [http://www.huffingtonpost.com/2011/10/07/obama-fundraiser-pushed-s\\_n\\_1000826.html](http://www.huffingtonpost.com/2011/10/07/obama-fundraiser-pushed-s_n_1000826.html).

<sup>971</sup> Matthew Mosk, *Obama Fundraiser Pushed Solyndra Deal From Inside*, ABC NEWS, Oct. 7, 2011, available at <http://abcnews.go.com/Blotter/obama-fundraiser-pushed-solyndra-deal-inside/story?id=14691618#.TzrE9MXQIsI>.

<sup>972</sup> *Id.*

<sup>973</sup> *Id.*

<sup>974</sup> *Id.*

<sup>975</sup> *Id.*

## Granite Reliable

Nancy Ann DeParle, the former Deputy Chief of Staff for Policy in the White House, had a financial stake in the success of Granite Reliable, which received \$168.9 million loan from DOE. Prior to joining the White House, Ms. DeParle was a Managing Director of multi-billion dollar private equity firm CCMP Capital and she both had a financial interest in and sat on the Board of Directors for Noble Environmental Power, LLC.<sup>976</sup> Noble owned Granite Reliable, a wind energy project.<sup>977</sup> Prior to her departure, her position on Noble's board of Directors positioned her to understand the most confidential and material aspects of Noble Environmental and its subsidiary Granite Reliable. Ms. DeParle misrepresented her relationship with Noble Energy, claiming on disclosure forms that her interest had been divested, when in fact it had merely been transferred to her 10 year old son.<sup>978</sup> During her time at the White House, Granite Reliable sought and, in September 2011, obtained a partial guarantee of a \$168.9 million loan.<sup>979</sup> Ms. DeParle's ownership stake in Noble, which owned Granite Reliable, a beneficiary of a DOE loan, represents a clear conflict of interest.

## Solar Reserve

David Sandalow served as the Assistant Secretary for Policy and International Affairs at DOE, where he acted as Secretary's Chu's principal adviser on energy policy as well as coordinates DOE's foreign policy involvement. Mr. Sandalow's ties to the White House date back to the Clinton Administration, during which he worked with President Clinton on environmental issues. After having gained this experience, Mr. Sandalow became the influential Chair of the Energy & Climate Working Group of the Clinton Global Initiative. He went on to advise President Obama's presidential campaign in 2008.<sup>980</sup> Prior to joining the Obama Administration, Mr. Sandalow was a senior advisor to Good Energies, Inc., an energy-focused venture capital firm.<sup>981</sup> Good Energies is an investor in SolarReserve,<sup>982</sup> a solar power company that received a \$737 million loan guarantee from DOE in September 2011.<sup>983</sup>

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<sup>976</sup> CCMP Capital Company Website *available at* <http://www.ccmcapital.com/>.

<sup>977</sup> Press Release, Noble Environmental Power, Noble Environmental Power Signs Agreement for the Sale of its Interest in its New Hampshire Wind Project (Dec. 7, 2010) *available at* [http://www.noblepower.com/pressroom/documents/10-12-7\\_NEP-SignsAgreementForSaleOfNHWindProject\\_Final.pdf](http://www.noblepower.com/pressroom/documents/10-12-7_NEP-SignsAgreementForSaleOfNHWindProject_Final.pdf).

<sup>978</sup> Nancy Ann DeParle, Executive Branch Personnel Public Financial Disclosure Report (Mar. 9, 2009) *available at* <http://www.scribd.com/doc/62509267/DeParle-Nancy-Ann-278-10A>.

<sup>979</sup> U.S. Dep't of Energy Loan Programs Office, 1705 Program, "Projects: Granite Reliable" *available at* <https://lpo.energy.gov/?projects=granite-reliable>.

<sup>980</sup> See Energy.gov, "About Us: David Sandalow" *available at* <http://energy.gov/contributors/david-sandalow>; see also Staff of H. Cmte. on Oversight & Gov't Reform, *The Dept. of Energy's Disastrous Management of Loan Guarantee Programs*, 112th Cong. (2012).

<sup>981</sup> Press Release, The White House, President Obama Announces More Key Administration Posts (Mar. 20, 2009) *available at* <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-32009>.

<sup>982</sup> Good Energies Company Website, "Investments" *available at* <http://www.goodenergies.com/investment/companies>.

<sup>983</sup> U.S. Dep't of Energy Loan Programs Office, 1705 Program, "Projects: SolarReserve, LLC" *available at* <https://lpo.energy.gov/?projects=solarreserve-llc-crescent-dunes>.

Michael Froman previously served as the Deputy Assistant to the President and Deputy National Security Advisor for International Economic Affairs.<sup>984</sup> He was a friend of President Obama's from law school,<sup>985</sup> and supported his political career by bundling over \$200,000 for his 2008 presidential candidacy.<sup>986</sup> Prior to his arrival at the White House, Mr. Froman was the Managing Director of Alternative Investments at Citigroup,<sup>987</sup> where he managed infrastructure and sustainable development investments.<sup>988</sup> Citigroup became a major investor in SolarReserve,<sup>989</sup> which ultimately received a \$737 million loan guarantee in September 2011.<sup>990</sup>

### Vantage Point Venture Partners

Sanjay Wagle served as Renewable Energy Advisor to DOE under Secretary Chu, where he helped oversee the \$11 billion renewable energy program under the Recovery Act.<sup>991</sup> Mr. Wagle was an Obama fundraiser for the 2008 presidential campaign, garnering much of his support through his *Clean Tech for Obama* group.<sup>992</sup> Another venture capitalist that has acquired an influential role at DOE, his industry colleagues believed that Mr. Wagle, among others, "would help ensure commercial successes from 'the steady flow of dollars coming out of DC.'"<sup>993</sup> Prior to arriving in Washington, Mr. Wagle was a principal at Vantage Point Venture Partners ("Vantage Point"), a cleantech venture capital firm whose investments received \$2.4 billion in taxpayer funds.<sup>994</sup> Among them were Brightsource, which received \$1.6 billion for solar generation; Tesla Motors, which received \$465 million for electric car manufacturing; and Mascoma, which received \$80 million for an ethanol plant.<sup>995</sup> Mr. Wagle left Vantage Point and moved to DOE shortly after Obama's election, "just as the administration embarked on a massive program to stimulate the economy with federal investments in clean-technology firms."<sup>996</sup> His former firm and the

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<sup>984</sup> Center for Responsive Politics, "Barack Obama Bundlers," OpenSecrets available at <http://www.opensecrets.org/pres08/bundlers.php?id=N00009638>.

<sup>985</sup> Jonathan Weisman, *Obama Taps Froman For Joint Security*, *Economic Post*, WALL ST. J., Jan. 30, 2009 available at <http://online.wsj.com/article/SB123328110238231817.html>.

<sup>986</sup> Center for Responsive Politics, "Barack Obama Bundlers," OpenSecrets available at <http://www.opensecrets.org/pres08/bundlers.php?id=N00009638>.

<sup>987</sup> DealBook, *Citigroup Fund Hit a Speed Bump*, N.Y. TIMES, July 20, 2009 available at <http://dealbook.nytimes.com/2009/07/20/citigroup-funds-hit-speed-bump/?ref=michaelfroman>.

<sup>988</sup> Press Release, Harvard Law School, Michael Froman '91 joins White House in joint security, economic post (Feb. 3, 2009) available at [http://www.law.harvard.edu/news/2009/02/03\\_froman.html](http://www.law.harvard.edu/news/2009/02/03_froman.html).

<sup>989</sup> Jim McElhatton, *Feds guarantee \$1 billion in new solar loans*, WASH. TIMES, Sept. 28, 2011 available at <http://www.washingtontimes.com/news/2011/sep/28/feds-guarantee-1-billion-in-new-solar-loans/?page=all>.

<sup>990</sup> U.S. Dep't of Energy Loan Programs Office, "1705 Program: Projects" available at [https://lpo.energy.gov/?page\\_id=45](https://lpo.energy.gov/?page_id=45).

<sup>991</sup> Carol D. Leonnig and Joe Stephens, *Venture capitalists play key role in Obama's Energy Department*, WASH. POST, Feb. 14, 2012 available at [http://www.washingtonpost.com/politics/venture-capitalists-play-key-role-in-obamas-energy-department/2011/12/30/gIQA05raER\\_story.html](http://www.washingtonpost.com/politics/venture-capitalists-play-key-role-in-obamas-energy-department/2011/12/30/gIQA05raER_story.html); Event Announcement, Full Circle Fund, Environment/Energy Circle Meeting (Nov. 16, 2011) available at <http://www.fullcirclefund.org/event.php?id=838>.

<sup>992</sup> Staff of H. Cmte. on Oversight & Gov't Reform, *The Dept. of Energy's Disastrous Management of Loan Guarantee Programs*, 112th Cong. 49 (2012).

<sup>993</sup> Carol D. Leonnig and Joe Stephens, *Venture capitalists play key role in Obama's Energy Department*, WASH. POST, Feb. 14, 2012 available at [http://www.washingtonpost.com/politics/venture-capitalists-play-key-role-in-obamas-energy-department/2011/12/30/gIQA05raER\\_story.html](http://www.washingtonpost.com/politics/venture-capitalists-play-key-role-in-obamas-energy-department/2011/12/30/gIQA05raER_story.html).

<sup>994</sup> *Id.*

<sup>995</sup> *Id.*

<sup>996</sup> *Id.*

companies it invested in, therefore, had a large stake in the financing decisions being made by DOE at the time.<sup>997</sup>

The cronyism discovered by the Committee tells only part of a much greater story—a story of mismanagement, waste and abuse symptomatic of reaching too far, working too fast, and spending too much to achieve unrealistic objectives. There are significant concerns about DOE’s management and administration of the 1705 loan guarantee program. And a management structure unprepared and incapable of dealing with the challenges it faced when pressed to push out the door tens of billions of dollars in a short period of time. These factors lead to the political cronyism at play and as a result a waste of billions of taxpayer dollars. Despite Chairman Issa’s spotlighting the shortfalls of the 1705 program, DOE is continuing to issue 1703 loan guarantees to nuclear projects which share many of the same characteristics that lead to the failure of the 1705 loan guarantees.

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<sup>997</sup> *Id.*

## OBAMACARE LOAN GUARANTEE GAMBLE

Another stunning example of the Federal Government picking winners and losers is found in the Consumer Operated and Oriented Plan (“CO-OP”). As part of the Patient Protection and Affordable Care Act, CO-OP was created to fund the establishment and solvency of non-profit health insurance issuers. An alternative to the “public option,” non-profit CO-OPs were intended to provide “a different delivery model for competition” according to Senator Kent Conrad.<sup>998</sup> With \$6 billion in taxpayer dollars in funding, the Centers for Medicare and Medicaid Services was charged with administering the CO-OP loan program but after strong bipartisan opposition<sup>999</sup> the program’s budget was cut to \$3.8 billion in 2011.

Over time vocal opposition from Democrats and Republicans alike resulted in significant reforms to the program with the benefit of limiting taxpayer exposure. Ultimately, only \$1.98 billion was disbursed before Congress put a stop to the wasteful spending. Notably similar to “the Solyndra scandal, in which the Obama Administration squandered \$535 million in a failed solar-energy company backed by one of Obama’s largest donors,”<sup>1000</sup> the Committee’s examination found that some loan recipients may have unduly influenced the final eligibility criteria and that key employees had close ties with senior Obama Administration officials.<sup>1001</sup>

As background: Start-up loans offer funding for “costs associated with establishing a CO-OP,”<sup>1002</sup> are repayable in five years and are assessed interest, if at all, at a very low rate.<sup>1003</sup> Solvency loans, which are repayable in 15 years at an even lower interest rate,<sup>1004</sup> provide funding intended to help the recipient “meet State solvency and reserve requirements.”<sup>1005</sup>

According to the Administration’s own estimates, taxpayers are projected to lose more than 42 percent of the nearly \$8 billion distributed through the CO-OP loan program.<sup>1006</sup> On September 26,

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<sup>998</sup> Ken Stickland, *A new health-care option?*, NBC NEWS (June 9, 2009), available at [http://firstread.nbcnews.com/\\_news/2009/06/09/4431391-a-new-health-care-option](http://firstread.nbcnews.com/_news/2009/06/09/4431391-a-new-health-care-option).

<sup>999</sup> Some of the strongest criticism came from leading Democrats in the Senate. In a letter to the Chairman and Ranking Member of the Senate Finance Committee, Senator John D. Rockefeller protested, saying, “I believe it is irresponsible to invest over \$6 billion in a concept that has not proven to provide quality, affordable health care.” Letter from Hon. John D. Rockefeller, Chairman, S. Comm. on Commerce, Sci., & Transp., to S. Comm. on Fin. Chairman Max Baucus and S. Comm. on Fin. Ranking Member Charles Grassley (Sept. 16, 2009).

<sup>1000</sup> Avik Roy, *Six Solyndras: ObamaCare blows \$3 billion on Faulty CO-OP Insurance Loans*, FORBES, May 30, 2012; see also H. Cmte. on Oversight & Gov’t Reform, *The Department of Energy’s Disastrous Management of Loan Guarantee Programs*, 112th Cong. (2012).

<sup>1001</sup> See H. Cmte. on Oversight & Gov’t Reform, *Examining the Administration’s \$2 billion ObamaCare Loan Guarantee Gamble: Two Case Studies of Political Influence Peddling and Millions of Taxpayer Dollars Wasted*, 113th Cong. (2014).

<sup>1002</sup> Consumer Operated and Oriented Plan Program, 45 C.F.R. § 156.505 (2011).

<sup>1003</sup> *Id.* § 156.520.

<sup>1004</sup> *Id.*

<sup>1005</sup> *Id.* § 156.505. See the *Budget of the U.S. Government, Fiscal Year 2013, Federal Credit Supplement*, Table 1 for a breakdown of distributions by loan type.

<sup>1006</sup> See *Budget of the U.S. Government, Fiscal Year 2013, Federal Credit Supplement*, Table 1; *Budget of the U.S. Government, Fiscal Year 2015, Federal Credit Supplement*, Table 1; and *Budget of the U.S. Government, Fiscal Year 2015, Federal Credit Supplement*, Table 1, all available at <http://www.gpo.gov/fdsys/browse/collectionGPO.action?collectionCode=BUDGET>.

2014, its most recent distribution, CMS distributed \$274 million to five of the CO-OP program's 23 participants.<sup>1007</sup>

### *CO-OPS AS AN ALTERNATIVE TO THE PUBLIC OPTION*

The provision of health insurance coverage through non-profit cooperatives emerged as a substitute for the “public option” during the debate over health care reform in 2009.<sup>1008</sup> Termed by Senator Kent Conrad as “an alternative to for-profit insurance companies,”<sup>1009</sup> the Consumer Operated and Oriented Plan was added as a final piece of the Patient Protection and Affordable Care Act. The CO-OP program, initially backed with \$6 billion of taxpayer funding, was intended to help establish private entities to serve the small and individual insurance markets both on and off the new health insurance exchange marketplaces.<sup>1010</sup> The Centers for Medicare and Medicaid Services (“CMS”), a unit of the Department of Health and Human Services (“DHHS”), was tasked with administering the program, which provides loans and grants<sup>1011</sup> to eligible non-profits in order to facilitate the set-up and maintenance of health plans – with the expectation that the loan recipients will offer individuals and small businesses “affordable, consumer-friendly and high-quality health insurance options.”<sup>1012</sup>

### *ELIGIBILITY AND FUNDING*

In order to be eligible to receive funding through the program, CO-OP program applicants were required to be a not-for-profit entities and to satisfy state insurance company licensure requirements. Moreover, an applicant was statutorily ineligible “if the organization or a related entity... was a health insurance issuer on July 16, 2009.”<sup>1013</sup> Approved CO-OPs received loans with differing terms and conditions – with terms ranging from five to 15 years with little or no interest charged.<sup>1014</sup>

Democrats and Republicans alike raised concerns related to the CO-OP program's administration and viability, long before ObamaCare became law. In a statement that proved foreshadowing,

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<sup>1007</sup> Distributions to the program by CMS were originally made to 24 entities, including the Vermont Health CO-OP, incorporated as the Consumer Health Coalition of Vermont. However, the Vermont Health CO-OP was denied licensure by the state after an 18-month review – a license that the CO-OP was required to obtain by statute. CMS demanded a return of all unused funds distributed to the CO-OP through the program. Taxpayers lost \$4.5 million of the more than \$33 million originally distributed to an entity approved by the Administration that failed to meet even the most basic requirements for state licensure. See H. Cmte. on Oversight & Gov't Reform, *Examining the Administration's \$2 billion ObamaCare Loan Guarantee Gamble: Two Case Studies of Political Influence Peddling and Millions of Taxpayer Dollars Wasted*, 113th Cong. (2014).

<sup>1008</sup> Ken Stickland, *A new health-care option?*, NBC NEWS, June 9, 2009, available at [http://firstread.nbcnews.com/\\_news/2009/06/09/4431391-a-new-health-care-option](http://firstread.nbcnews.com/_news/2009/06/09/4431391-a-new-health-care-option).

<sup>1009</sup> *Id.*

<sup>1010</sup> Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 1322, 124 Stat. 119.

<sup>1011</sup> According to the Affordable Care Act, funding through the program is to be provided in two forms: loans “to provide assistance... in meeting [the CO-OP's] start-up costs” and grants “to provide assistance... in meeting any solvency requirements of States in which [the CO-OP] seeks to be licensed to issue qualified health plans.” Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 1322(b)(1), 124 Stat. 119.

<sup>1012</sup> New Federal Loan Program Helps Nonprofits Create Customer-Driven Health Insurers, CMS.GOV, [http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/coop\\_final\\_rule.html](http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/coop_final_rule.html).

<sup>1013</sup> 42 U.S.C. § 18042 (2012).

<sup>1014</sup> See *Budget of the U.S. Government, Fiscal Year 2013, Federal Credit Supplement*, Table 1, available at <http://www.gpo.gov/fdsys/browse/collectionGPO.action?collectionCode=BUDGET>.

Senator John D. Rockefeller sent a letter to fellow senators in 2009, stating: “I believe it is irresponsible to invest over \$6 billion in a concept that has not proven to provide quality, affordable health care.”<sup>1015</sup> Over time, opponents to the program have been successful in limiting taxpayer exposure through the program. Funding for the CO-OP program was first cut from \$6 billion to \$3.8 billion in 2011,<sup>1016</sup> and in January 2013 Congress cut the budget almost completely, leaving 10 percent for a “contingency fund.”<sup>1017</sup> Of the 24 entities accepted into the CO-OP program before January 2013, 23 continue to be eligible for loans through the program but no new applicants will be accepted. By the Administration’s own estimates, unrecoverable losses associated with lending to these 24 entities are projected to reach more than \$3.4 billion.<sup>1018</sup>

When undistributed amounts budgeted to the CO-OP program were rescinded in January, 2013, a small amount of funding was reserved to provide “assistance and oversight” of participants to which loans had already been issued.<sup>1019</sup>

After allegations that CMS had improperly distributed loans to entities that were ineligible for the program, the Committee began its investigation in October 2012.

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<sup>1015</sup> Letter from Hon. John D. Rockefeller, Chairman, S. Comm. on Commerce, Sci., & Transp., to S. Comm. on Fin. Chairman Max Baucus and S. Comm. on Fin. Ranking Member Charles Grassley (Sept. 16, 2009).

<sup>1016</sup> Dep’t of Defense and full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 § 1857, 125 Stat. 38.

<sup>1017</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 §644, 126 Stat. 2313 (2013).

<sup>1018</sup> See *Budget of the U.S. Government, Fiscal Year 2013, Federal Credit Supplement*, Table 1; *Budget of the U.S. Government, Fiscal Year 2015, Federal Credit Supplement*, Table 1; and *Budget of the U.S. Government, Fiscal Year 2015, Federal Credit Supplement*, Table 1.

<sup>1019</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 §644, 126 Stat. 2313 (2013).

## WHO'S DRIVING THE AUTO INDUSTRY?

The Federal Government's unusual reach into the private sector is well-documented by its relationship with the auto industry. Yielding unusual leverage in the wake of the financial crisis, the Obama Administration was able to significantly advance its green agenda through new fuel economy standards. Almost simultaneously, the National Highway Traffic Safety Administration was abdicating its responsibilities following allegations that the batteries used in certain electric had a tendency to explode after serious impact. At the nexus of these two events is General Motors: almost inextricably tied to the Federal Government yet still dependent upon consumer demand.

### *HOW TO FORCE AGREEMENT: STRONG-ARM TACTICS AND FUEL ECONOMY STANDARDS*

In 2009, riding the momentum generated by his election, President Barack Obama announced the establishment of stringent new fuel economy and greenhouse gas emissions standards for automobiles.<sup>1020</sup> Billed as a collaborative effort among government, the automobile industry, and environmentalist in which “everyone wins,”<sup>1021</sup> the fuel economy standards were in fact the result of the Administration's heavy-handed politics. The Administration leveraged the economic weakness of the domestic automobile industry and the State of California's threat of aggressive regulation to force automakers to agree to two rounds of rigorous standards. In so doing, the Administration usurped congressional intent, sacrificed vehicle safety and affordability, and picked winners and losers in both auto manufacturers and advanced technologies.

### **The Administration's Leverage: The Power of the Purse and the California Waiver**

When President Obama entered office, the regulatory environment for motor vehicles and the state of the automobile industry provided a distinctive set of circumstances ripe for manipulation. The Supreme Court had recently declared that the Environmental Protection Agency (“EPA”) could regulate greenhouse gasses (“GHGs”) if the Administrator found that they endangered public health or welfare.<sup>1022</sup> The State of California, which had suffered a setback when former EPA Administrator Stephen L. Johnson denied its preemption waiver to regulate GHGs from automobiles in 2007, had secured a promise from the new Administration to reconsider the waiver petition.<sup>1023</sup> The National Highway Traffic Safety Administration (“NHTSA”), which had statutory authority to regulate fuel economy standards for automobiles,<sup>1024</sup> was no longer the only relevant agency, as it faced the likelihood of encroachment of its jurisdiction by both EPA and California. This regulatory scheme created the potential for a “patchwork” of automobile emissions and fuel economy regulations – a possibility that the automakers were loath to accept.

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<sup>1020</sup> The White House, Remarks by the President on National Fuel Efficiency Standards (May 19, 2009). The relationship between fuel economy and vehicular greenhouse gas emissions is so close that compliance tests for fuel economy standards are performed by measuring a vehicle's carbon-dioxide emissions. NAT'L AUTO. DEALERS ASS'N, PATCHWORK PROVEN: WHY A SINGULAR NATIONAL FUEL ECONOMY STANDARD IS BETTER FOR AMERICA THAN A PATCHWORK OF STATE REGULATIONS 11-12 (2009).

<sup>1021</sup> The White House, Remarks by the President on National Fuel Efficiency Standards (May 19, 2009).

<sup>1022</sup> See *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497 (2007).

<sup>1023</sup> DOT- EPA Transition Team Mtg Notes. A waiver given to California would have allowed California to set its own vehicle emissions standards, which other states could then adopt as their own. See 42 U.S.C. §§ 7543(b)(1), 7507.

<sup>1024</sup> See Delegation Under the Energy Policy and Conservation Act, 41 Fed. Reg. 25,015 (June 22, 1976).

Most crucial to the Administration's machinations was the downward spiral American automakers were facing as a result of the recent financial crisis. The automobile industry experienced a dramatic decline in sales due to worsening economic conditions, decreased consumer demand, and high legacy costs.<sup>1025</sup> In 2008, overall automobile sales fell to a twenty-six-year low, with domestic sales down eighteen percent from the previous year.<sup>1026</sup> The three domestic auto manufacturers, General Motors ("GM"), Ford, and Chrysler – the so-called "Detroit 3" – experienced significantly more hardship than the international automakers due to their product mixes and higher pension and retirement obligations.<sup>1027</sup> As a result, by late 2008, both GM and Chrysler were teetering on the edge of fiscal insolvency.<sup>1028</sup> Ford, while not as financially precarious as GM and Chrysler, was also losing money.<sup>1029</sup> Worsening financial conditions made each of them much more vulnerable to Administration pressure.

### **Round One: Standards from 2012 through 2016**

In January 2009 – six days after taking office – President Obama ordered EPA to immediately review the denial of the California waiver request, the first step toward allowing California to regulate GHG emissions separately from EPA.<sup>1030</sup> In the following month the White House began "quietly orchestrat[ing] private discussions... with auto industry officials" on a single national fuel economy and GHG emissions standard.<sup>1031</sup> According to one news report, this work was deliberately shielded from public view, "keep[ing] their discussions as quiet as possible, holding no group meetings and taking care to not leak updates to the press."<sup>1032</sup> Throughout the spring, the White House and the Auto Task Force – a special group created to manage the financial struggles of the automobile industry – continued to engage a small group of automakers. Industry representatives voiced concerns amongst themselves about the Administration's hard line proposals, with one executive lamenting that the "fuel economy requirements are very aggressive."<sup>1033</sup> However, by May 2009 the automakers acquiesced to the Obama Administration's proposal and agreed to implement stricter and costlier fuel economy and greenhouse gas standards through 2016.

The Administration accomplished this coup by leveraging two critical factors. First, the Administration's bailout of GM and Chrysler gave it the power to force the companies to improve vehicle fuel economy even though it would not be a prudent decision financially. The

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<sup>1025</sup> Bill Canis et al., Cong. Research Serv., U.S. Motor Vehicle Industry: Federal Financial Assistance and Restructuring 2 (2009). These legacy costs included pensions and healthcare for industry employees. See Eric Bryant, *Explaining the burden of "legacy costs,"* AUTO BLOG, Sept. 20, 2006.

<sup>1026</sup> Bill Canis et al., Cong. Research Serv., U.S. Motor Vehicle Industry: Federal Financial Assistance and Restructuring 1-2 (2009) (on file with author).

<sup>1027</sup> *Id.* at 2.

<sup>1028</sup> *Id.*

<sup>1029</sup> *Id.* at 7.

<sup>1030</sup> Remarks by the President on Jobs, Independence, and Climate Change (Jan. 26, 2009).

<sup>1031</sup> Colin Sullivan, *Vow of Silence Key to White House-Calif. Fuel Economy Talks*, N.Y. TIMES, May 20, 2009; Neela Banerjee, *The Road to New Fuel Economy Standards Was Not Smooth*, L.A. TIMES, Nov. 18, 2011.

<sup>1032</sup> Colin Sullivan, *Vow of Silence Key to White House-Calif. Fuel Economy Talks*, N.Y. TIMES, May 20, 2009.

<sup>1033</sup> Email from Mark Kemmer, Gen. Motors, to Ken Cole, Gen. Motors (May 12, 2009).

Administration's own estimate placed compliance costs at almost \$200 billion through 2025.<sup>1034</sup> Automobile manufacturers, cognizant of the reality that the bailout had given the Administration "broad leverage to shape not only the industry's finances but its product lines," voluntarily pledged to increase fuel efficiency in spring 2009.<sup>1035</sup> The White House embraced these restructuring plans, envisioning "an auto industry that is once more . . . manufacturing the fuel-efficient cars and trucks that will carry us toward an energy-independent future."<sup>1036</sup>

The second factor that allowed the Administration to dictate the management decisions of the automakers was the threat of the California waiver.<sup>1037</sup> Simply put, the California waiver would allow California to set its own vehicle emissions standards, and the accompanying threat for a patchwork of state regulations was a "gun to the head" of automakers, forcing them to engage the Administration on a path toward an integrated federal-state standard.<sup>1038</sup> Once President Obama ordered EPA to reconsider the waiver, the auto industry became highly incentivized to negotiate an agreement in which the waiver would be moot. The industry's greatest fear was a patchwork of varying regulations. Once EPA began to reconsider the California waiver, the automakers – both foreign and domestic – supported an agreement to prevent that patchwork from becoming a reality.<sup>1039</sup>

## **Round Two: Standards from 2017 through 2025**

The Administration's heavy-handed approach to fuel economy standards proved so successful for the White House in 2009 that it repeated the feat two years later; as one EPA official told auto executives at the time, the President "wants to secure his legacy" before the 2012 presidential election.<sup>1040</sup> For the second round of standard dictating, the Administration adopted a "divide and

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<sup>1034</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,346 (May 7, 2010); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 76 Fed. Reg. 74,854, 74,890 (Dec. 1, 2011).

<sup>1035</sup> See Peter Whoriskey & Kendra Marr, *Tough Test Emerges as Administration Aims to Bolster Automakers, Cut Pollution*, WASH. POST, Mar. 4, 2009. Automobile manufacturers included this pledge in their viability plans submitted to the Administration in early 2009. *Id.*

<sup>1036</sup> The White House, Remarks by the President on the American Automotive Industry (Mar. 30, 2009).

<sup>1037</sup> Under the California waiver, an automaker would have to comply with several sets of standards because compliance would have been based on the automaker's sales fleet in a particular state. See NAT'L AUTOMOBILE DEALERS ASSOC., PATCHWORK PROVEN: WHY A SINGLE NATIONAL FUEL ECONOMY STANDARD IS BETTER FOR AMERICA THAN A PATCHWORK OF STATE REGULATIONS (2009).

<sup>1038</sup> "Running on Empty: How the Obama Administration's Green Energy Gamble Will Impact Small Business and Consumers": Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov't Spending of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (2011) (question and answer with Jeremy Anwyl, Chief Executive Officer of Edmunds.com).

<sup>1039</sup> Email from Peter Lawson, Ford Motor Co., to Katie Murtha, Office of Rep. Dingell (Feb. 1, 2011) ("We (the Auto Industry) supported one national standard which the White House was brokering with California, EPA, and NHTSA. The deal through 2016 was that EPA and NHTSA would develop technically equivalent standards at CA levels . . .").

<sup>1040</sup> Mazda, Handwritten Notes.

conquer” approach to securing the automakers’ cooperation in establishing new, stricter standards for model years 2017 through 2025.<sup>1041</sup>

Documents reviewed by the Committee during the course of its oversight activities detail the Obama Administration’s strong-arm tactics. As described by one participant in the closed-door discussions with the White House: **“I have never seen such power coupled with such incompetence. It is simply embarrassing from a tax-payer perspective.”**<sup>1042</sup> The same automaker explained that the discussions were intended to arrive at a predetermined result:

The gov’t is playing we [automakers] off of each other. They are telling us lies (we know cause we [automakers] talk amongst ourselves) to trick us into caving or giving us points [of] information. The entire exercise is focused on finding a way to get us to the previously announced 56mpg (5% per year for both car an[d] truck) in 2025.<sup>1043</sup>

This unbalanced and inequitable approach to stakeholder engagement was confirmed by another auto executive. In an email preparing the company’s chief executive officer for a phone call with the White House, the executive warned that the White House “ha[s] been trying to play one company off another – so if [Auto Task Force staffer Ron Bloom] tells you others have agreed, don’t buy it.”<sup>1044</sup> As the negotiations intensified, the White House focused on securing the support of a select “few” auto companies to pressure the others to agree.<sup>1045</sup> These meetings were arranged by the White House with little advanced notice, no discussion on the companies’ availability, and on essentially a “take it or leave it” basis.<sup>1046</sup>

The Administration also refused to consider concerns raised by the automakers. In one meeting, representatives from GM explained to Administration officials how their proposal was “overly aggressive” and commercially unworkable.<sup>1047</sup> “[A]fter lengthy discussions . . . the Admin reps (and [California]) eventually fell back on the point that they need an aggressive number – and *one that will ‘force’ substantial and increasing numbers of advanced technology vehicles into the market*; the cost of those vehicles (to customers and/or to the automakers) was clearly not a significant concern of the regulators.”<sup>1048</sup> It is evident from that the White House sought an “aggressive target” that would “force” the automakers to offer advanced technology vehicles.<sup>1049</sup> When faced with the reality that the stringency “would impose . . . substantial unrecoverable costs” on the auto

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<sup>1041</sup> Email from Tom Lehner, Toyota, to Kazuo Abe et al., Toyota (July 7, 2011) (“Government is trying to pressure each company into an agreement with divide and conquer approach.”).

<sup>1042</sup> Email from Dwight Brown, Gen. Motors, to Mary Sipes, Gen. Motors (July 15, 2011) (emphasis added).

<sup>1043</sup> *Id.*

<sup>1044</sup> Email from Tom Lehner, Toyota, to Jim Lentz & Dian Ogilvie, Toyota (July 16, 2011).

<sup>1045</sup> Email from Robert Bienenfeld, Am. Honda Motor Co., to Ed Nam, Env’tl. Prot. Agency (July 13, 2011) (“Ron Bloom said you are working with just a few companies, and Honda is one of them.”); Email from Barbara Nocera, Mazda, to Keiko Takihana, Mazda (July 7, 2011).

<sup>1046</sup> Email from Stuart Johnson, Volkswagen, to Christoph Kohnen, Volkswagen (July 10, 2011).

<sup>1047</sup> Email from Mark L. Kemmer, Gen. Motors, to Bob Ferguson, Gen. Motors (June 22, 2011).

<sup>1048</sup> *Id.* (emphasis added).

<sup>1049</sup> *Id.*

industry,<sup>1050</sup> the Administration was forced to invent loopholes to ease automaker compliance while maintaining the aggressive headline number.

These loopholes ultimately favored the domestic automakers over foreign manufacturers. The foreign manufacturers noticed the inherent unfairness. “The proposal lacks competitive equity,” according to one executive of a foreign automaker, “[w]ithin the light truck category, there is further inequity since the largest trucks (made by the Big 3) have almost no burden in the first three years.”<sup>1051</sup> Another described the loopholes as “unfair” in that it gave “a complete pass on trucks” to manufacturers with a truck-heavy product mix.<sup>1052</sup> One executive even described the light-truck carve-out as a “second auto bailout.”<sup>1053</sup> The White House, too, recognized the inequity. In a phone call with a Toyota executive, a senior White House official confessed: “I know how difficult this must have been in a culture where fairness is very important.”<sup>1054</sup>

With the loopholes targeted for them, the three domestic automakers assisted the Administration in lobbying other automakers to accept the deal.<sup>1055</sup> After weeks of cajoling, the White House began moving toward a definitive agreement in the latter half of July 2011. The second round agreement was announced in July 2011.<sup>1056</sup> Through coercion and enticements, the White House cobbled together an agreement of stakeholders to support this radical re-write of fuel economy policy. But beyond merely restructuring the process, the Administration openly sought a stringent standard that would “force” alternative vehicles into the American marketplace – without regard for consumer acceptance, safety consequences, or vehicle pricing. The Obama Administration’s picking of winners and loser, as a result, will have lasting consequences for American consumers.

#### *PROTECTING GOVERNMENT MOTORS: THE CASE OF THE CHEVY VOLT*

Rather than allowing General Motors and Chrysler to enter into a traditional bankruptcy process at the beginning of the Great Recession, the Federal Government intervened and forced the companies to participate in a politically orchestrated process whereby GM and Chrysler emerged as quasi-private entities, partially owned by the United States government. President Obama used this unusual blurring of public and private sector boundaries to openly tout the results of this partnership as a top accomplishment of his Administration<sup>1057</sup> – creating a dynamic where the President is politically reliant on the success of GM and Chrysler.

In support of General Motors and the President’s green-fuel agenda, the Obama Administration offered substantial taxpayer funded subsidies to encourage production of the Chevrolet Volt, one of the few automobiles able to meet the stricter fuel economy standards that also happened to be

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<sup>1050</sup> *Id.*

<sup>1051</sup> Email from David Geanacopoulos, Volkswagen, to Christoph Kohnen et al., Volkswagen (July 26, 2011).

<sup>1052</sup> Email from Anna Schneider, Volkswagen, to David Geanacopoulos, Volkswagen (July 14, 2011).

<sup>1053</sup> Email from Tom Lehner, Toyota, to Martha Voss, Toyota (July 26, 2011) (emphasis added).

<sup>1054</sup> Handwritten Notes of Conversation between Jim Lentz, Toyota, and Ron Bloom, Exec. Office of the Pres. (July 27, 2011).

<sup>1055</sup> Email from Ziad Ojakli, Ford Motor Co., to Ron Bloom, Exec. Office of the Pres. (July 26, 2011).

<sup>1056</sup> The White House, Remarks by the President on Fuel Efficiency Standards (July 29, 2011).

<sup>1057</sup> Kerry Picket, *Axelrod ponders ‘GM is Alive Bin Laden is Dead*, THE WASHINGTON TIMES (Nov. 1, 2011), available at <http://www.washingtontimes.com/blog/watercooler/2011/nov/1/picket-axelrod-ponders-gm-alive-osama-dead-campaign/> [hereinafter Picket].

produced by General Motors. These subsidies included \$151.4 million in stimulus funds for a Michigan-based company that produces lithium-ion polymer battery cells as well as \$105.9 million directly to GM for the production of high-volume battery packs for the Volt, \$105 million to GM to construct facilities for electric drive systems, and \$89.3 million to Delphi Automotive Systems, a former division of GM, to expand manufacturing facilities for electric drive power components.<sup>1058</sup> It also extended a significant subsidy to encourage consumers to purchase the vehicle, offering buyers of plug-in vehicles, including the Volt, a federal tax credit of up to \$7,500 per vehicle.<sup>1059</sup> However, in 2011-2012, the delayed public notification of serious safety concerns relating to the Chevy Volt raised significant concerns regarding the extent of crony capitalism existing within the Obama Administration.

### **Is the Volt Really “safe to drive”?**

As part of its New Car Assessment Program, on May 12, 2011, NHTSA subjected a Volt to a side-pole impact crash test at MGA Research Corporation, a NHTSA crash-test contractor in Burlington, Wisconsin.<sup>1060</sup> Because the test dummies fared well, NHTSA awarded the Volt a 5-star Crash Rating – the Agency’s highest rating.<sup>1061</sup> Three weeks later, the crash-tested Volt exploded, igniting a fire that destroyed three vehicles parked nearby at the MGA facility.<sup>1062</sup> In his response to the Committee’s request for information, Administrator Strickland stated that NHTSA employees first learned of the fire on Monday, June 6, 2011.<sup>1063</sup> NHTSA retained a fire investigation firm to determine the cause of the explosion, and on July 5, 2011, NHTSA was notified that the Volt was the source of the fire.<sup>1064</sup> Subsequently, NHTSA deconstructed the Volt’s battery and concluded that the crash test had damaged the lithium-ion battery pack and that the resulting damage caused the explosion.<sup>1065</sup> Specifically, during the crash the battery was subject to “battery intrusion by a ferrous instrument” – in plain terms, a piece of the car’s frame or chassis punctured the battery case

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<sup>1058</sup> U.S. Dept. of Energy, Recovery Act Awards for Electric Drive Vehicle Battery and Component Manufacturing Initiative (Oct. 2011), [http://www1.eere.energy.gov/recovery/pdfs/battery\\_awardee\\_list.pdf](http://www1.eere.energy.gov/recovery/pdfs/battery_awardee_list.pdf).

<sup>1059</sup> This tax credit is good until the second quarter after the manufacturer has produced 200,000 eligible vehicles, at which point a phase out of the credit will begin. Internal Revenue Serv., *Qualified Vehicles Acquired after 12-31-2009*, <http://www.irs.gov/Businesses/Qualified-Vehicles-Acquired-after-12-31-2009> (last visited Dec. 16, 2014).

<sup>1060</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, *available at* [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary) [hereinafter NHTSA]; H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1061</sup> Nat’l Highway Traffic Safety Admin., Database of Vehicle Safety Ratings, *available at* <http://www.safercar.gov/Vehicle+Shoppers/5-Star+Safety+Ratings/2011-Newer+Vehicles/Vehicle-Detail?vehicleId=232>.

<sup>1062</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, *available at* [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1063</sup> Letter from David L. Strickland, Administrator, Nat’l Highway Traffic Safety Admin., to Hon. Darrell Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, (Jan. 12, 2012) [hereinafter Strickland letter].

<sup>1064</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, *available at* [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1064</sup> Strickland letter.

<sup>1065</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, *available at* [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1065</sup> Strickland letter.

– piercing the battery and causing a leak in the coolant system. Over the next three weeks the leaking coolant crystallized. When this crystallized coolant came into contact with the fuel cells, which remained in a powered state, the battery was subject to “thermal runaway” and exploded. The explosion was powerful: one of the Volt’s struts – a fairly heavy piece of the suspension – was found almost 80 feet away from the burned-out car.<sup>1066</sup>

Administrator Strickland asserted to the Committee that, after determining the Volt’s battery pack was to blame, “NHTSA worked continuously to replicate the May crash test in order to understand the possible safety implications following a severe crash event.”<sup>1067</sup> However, the Administrator was unable to identify any actions taken by NHTSA to investigate the explosion between July 2011, when NHTSA first learned the battery was to blame, and late September of that same year, when the Volt was subjected to a follow-up side pole impact test.

On November 11, 2011, Bloomberg News broke the story of the June fire.<sup>1068</sup> A week later, after developing component-level testing procedures in conjunction with outside agencies, NHTSA conducted a series of simulated crash tests on Volt lithium-ion battery packs.<sup>1069</sup> One tested battery pack began to emit smoke and sparks within a few hours of the simulated crash, but another damaged battery did not catch fire until November 24, a full week after being tested.<sup>1070</sup> NHTSA opened its formal safety defect investigation of the post-crash fire risk in the Chevrolet Volt the next day – almost six months after the initial explosion occurred.<sup>1071</sup> Despite the clear evidence to the contrary, on December 6, 2011, Transportation Secretary Ray LaHood declared “that the Chevy Volt is safe to drive.”<sup>1072</sup>

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<sup>1066</sup> H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1067</sup> Strickland letter. Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, available at [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1067</sup> Strickland letter.

<sup>1068</sup> Jeff Green, David Welch, and Angela Greiling Keane, *Regulators probe lithium batteries after GM’s Volt catches fire*, THE WASH. POST (Nov. 12, 2011).

<sup>1069</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, available at [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012). Other agencies included Department of Energy and Department of Defense. *Id.*

<sup>1069</sup> Strickland letter.

<sup>1070</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, available at [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1070</sup> Strickland letter.

<sup>1071</sup> Nat’l Highway Traffic Safety Admin., Summary of NHTSA Action Number PE11037, available at [http://www-odi.nhtsa.dot.gov/defects/results.cfm?action\\_number=PE11037&SearchType=QuickSearch&summary](http://www-odi.nhtsa.dot.gov/defects/results.cfm?action_number=PE11037&SearchType=QuickSearch&summary); H. Comm. on Oversight and Gov’t Reform Staff Briefing by NHTSA (Jan. 17, 2012).

<sup>1071</sup> Strickland letter.

<sup>1072</sup> The Associated Press, *LaHood: Chevy Volt is Safe Despite Battery Fires*, MLIVE.COM (Dec. 6, 2011), available at [http://www.mlive.com/auto/index.ssf/2011/12/lahood\\_chevy\\_volt\\_is\\_safe\\_desp.html](http://www.mlive.com/auto/index.ssf/2011/12/lahood_chevy_volt_is_safe_desp.html).

## Reluctance to Admit Danger

Public statements by General Motors indicate the company was aware of the dangers of a damaged battery even before NHTSA's May 12, 2011, side impact test.<sup>1073</sup> After news of the June explosion became public in November 2011, GM spokesman Greg Martin insisted that GM had already established a set of safety protocols to prevent such explosions from occurring following similar battery damage. "The engineers tested the Volt's battery pack for more than 300,000 hours to come up with the procedures, which include discharge and disposal of the battery pack," he said.<sup>1074</sup> Mr. Martin went so far as to claim that "had those protocols been followed after [the May 12<sup>th</sup> test], this incident would not have occurred."<sup>1075</sup> Although NHTSA could have demanded the recall all Chevy Volts with original, flawed batteries, it chose to allow GM to replace the old batteries on its own through a "voluntary customer satisfaction program."<sup>1076</sup> On January 5th, GM announced that all of the 8,000 Volts on the road and another 4,400 still in dealership inventory were eligible for free repairs to their battery systems.<sup>1077</sup> GM avoided the federal monitoring that would have occurred under a recall conducted in cooperation with the NHTSA.<sup>1078</sup> According to the January 5th press release:

NHTSA crashed a Chevy Volt retrofitted with GM's newly designed steel reinforcement device in a side-pole impact test on December 22. The results of that crash showed no intrusion into the vehicle's battery compartment . . . . [T]he preliminary results of the crash test indicate the remedy proposed by General Motors today should address the issue of battery intrusion.<sup>1079</sup>

Not only did this approach allow General Motors to avoid the strict federal monitoring of a formal recall process, it also allowed the company an opportunity to put a positive spin on a potentially deadly problem.

NHTSA's six month silence on the Volt's fire risks baffled automotive safety advocates. Joan Claybrook, a former Administrator of NHTSA and well known auto-safety advocate, told the industry newspaper *Automotive News* that "not to tell [the public] anything for six months makes no sense to me. NHTSA could have put out a consumer alert and I think they should have done so."<sup>1080</sup> She went on to say, "**I believe they delayed it because of the fragility of sales.**"<sup>1081</sup>

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<sup>1073</sup> Joan Lowry & Tom Krisher, *Electric car battery catches fire after crash test*, ASSOCIATED PRESS, Nov. 11, 2011.

<sup>1074</sup> *Id.*

<sup>1075</sup> *Id.*

<sup>1076</sup> Tom Krisher & Dee-Ann Durbin, *GM to add more steel to Volt to protect battery*, ASSOCIATED PRESS, Jan. 5, 2012.

<sup>1077</sup> *Id.*

<sup>1078</sup> *Id.*

<sup>1079</sup> Press Release, Nat'l Highway Traffic Safety Admin., *Statement of NHTSA on GM's Plan to Address Potential Fire Risk in Chevy Volts* (Jan. 5, 2012).

<sup>1080</sup> Christina Rogers, *The Volt battery challenge*, AUTOMOTIVE NEWS, Dec. 5, 2011.

<sup>1081</sup> Tom Krisher & Dee-Ann Durbin, *GM to add more steel to Volt to protect battery*, ASSOCIATED PRESS (Jan. 5, 2012) (emphasis added).

The decision by the Nation's primary highway safety watchdog not to participate in the recall process stands in marked contrast to the responses of other safety organizations. For example, as of January 2012 the Consumer Products Safety Commission ("CPSC") had, conducted thirty-nine unique recalls involving lithium-ion batteries that presented a safety risk. These recalls were often demanded after just a few reported incidents of overheating, and sometimes even less.<sup>1082</sup>

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<sup>1082</sup> Consumer Products Safety Commission, Database of Product Recalls, *available at* [www.saferproducts.gov](http://www.saferproducts.gov) (last visited Jan. 19, 2012). The CPSC viewed the situation as being so dangerous that, in some cases, a recall was issued based on mere suspicion of that overheating might occur.

## CHAPTER 5. FEDERAL FINANCIAL UN-ACCOUNTABILITY

According to Earl Devaney, former Inspector General for the Department of Interior and former Chairman of the Recovery Accountability and Transparency Board, “[t]he conventional estimate is that 7 percent of government spending is lost to waste, fraud or abuse.”<sup>1083</sup> With stories about how nearly \$1 million dollars were spent on a Las Vegas conference for one agency, how billions of dollars are spent on technology projects that never succeed and how the Social Security Administration lacks an effective procedure by which it can remove ineligible recipients from disability rolls, it is not surprising that Americans have lost faith in the ability of the Federal Government to balance its budget. Exposing the truth behind allegations like these and many others has the work of the Committee on Oversight and Government Reform in its efforts deliver on the right of Americans “to know that the money Washington takes from them is well spent.”

### “PUT IT ON THE COMPANY CARD”: IRRESPONSIBILITY IN GOVERNMENT SPENDING

In recent years, the press has repeatedly reported stories of outrageous spending by employees of the Federal Government. The Committee’s investigations into this outrageous behavior contributed to the significant reforms adopted by a number of agencies – real reforms for the benefit of the American Taxpayer. In a number of these instances, it seemed that a mentality existed among public servants that even irresponsible charges could be charged to the public account.

#### *THE GENERAL SERVICES ADMINISTRATION’S 2010 LAVISH LAS VEGAS CONFERENCE*

Throughout Chairman Issa’s first few years leading the Committee, the General Services Administration (“GSA”) went unnoticed with the exception of routine matters the Committee approves by virtue of its legislative jurisdiction. Then, on April 2, 2012, when news broke that Administrator Martha Johnson resigned from the GSA, the Committee quickly began working with the GSA Office of the Inspector General (“GSA OIG”) to obtain all the facts related to her resignation. Specifically, the Committee obtained copies of the GSA OIG investigative report and underlying documents regarding the 2010 Western Regions Conference (“WRC”), held in Las Vegas.

Once public, the GSA OIG’s report revealed wasteful and excessive spending of taxpayer dollars by agency officials. Following is a summary of the GSA OIG’s findings. In December 2010, the GSA Deputy Administrator contacted the GSA OIG to report details about a lavish conference held between October 25 and 29, 2010.<sup>1084</sup> Immediately, the OIG’s forensic audit unit and investigators began working on tracking the cost of the conference.<sup>1085</sup> After reviewing documents, conducting interviews, and reviewing financial information from the agency and contractors, the OIG issued its report on April 2, 2012. The OIG reached the following conclusions:

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<sup>1083</sup> Michael Cooper, *On the Lookout for Stimulus Fraud*, NEW YORK TIMES, Sept. 17, 2009.

<sup>1084</sup> General Services Administration Office of Inspector General, Management Deficiency Report: General Services Administration Public Buildings Service 2010 Western Regions Conference (Apr. 2, 2012) [hereinafter GSA OIG Report] at 14.

<sup>1085</sup> Briefing by Gen. Serv. Admin. Office of Inspector Gen. for Comm. on Oversight & Gov’t Reform staff (Apr. 4, 2012).

- GSA spending on conference planning was excessive, wasteful, and in some cases impermissible;
- GSA wasted taxpayer dollars and failed to follow contracting regulations in many of the procurements associated with the WRC;
- GSA incurred excessive and impermissible costs for food at the WRC;
- GSA incurred impermissible and questionable miscellaneous expenses; and,
- GSA’s approach to the conference indicates that minimizing expenses was not a goal.<sup>1086</sup>

The total cost of the conference was \$822,751, which consisted of \$136,504 in pre-conference planning costs and \$686,247 for the actual event.<sup>1087</sup> In addition to the egregious spending, the OIG also uncovered government contracting improprieties.

According to the OIG Report, Public Building Service (“PBS”) Regions 7, 8, 9, and 10 in the western portion of the U.S. have held conferences since the 1990s.<sup>1088</sup> Previously, they held an annual conference, but it the event is now biennial.<sup>1089</sup> Prior to the conference, “GSA held eight scouting and off-site pre-conference meetings.”<sup>1090</sup> Six of the pre-conference meetings were held at the M Resort, where the conference took place.<sup>1091</sup>

Then-Acting PBS Region 9 Commissioner Jeff Neely directed those planning the conference to make it “over the top.”<sup>1092</sup> To achieve this goal, conference planners spent over \$30,000 on catered food and beverages during multiple pre-conference planning trips and a total of \$100,405.37 on employee travel for pre-conference planning. PBS selected “A Showcase of World-Class Talent” as the conference theme.<sup>1093</sup> The purpose was “to celebrate, share, and showcase the diverse professional and personal talents of GSA associates.”<sup>1094</sup>

On April 4, 2012, in a briefing by GSA OIG staff, Committee staff learned that Martha Johnson and her close aides were briefed on the OIG investigation in May 2011. At that time, she took no action. Instead, regional commissioner Jeff Neely and others involved in the planning of the WRC received sizable bonuses. On April 6, 2012, the Committee decided to hold a hearing regarding the WRC on April 16, 2012. The notice of this hearing was made public on April 9, 2012.

On or about April 9, 2012, videos produced to the Committee by the OIG revealed the extent of waste and abuse occurring at GSA. The “American Idle” video, for example, features GSA employees joking about avoiding an investigation by the Inspector General and lavish GSA spending. After the

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<sup>1086</sup> GSA OIG Report at 1-2.

<sup>1087</sup> *Id.* at 1.

<sup>1088</sup> *Id.* at 3.

<sup>1089</sup> *Id.* at 3.

<sup>1090</sup> *Id.* at 1, 3-4.

<sup>1091</sup> *Id.*

<sup>1092</sup> *Id.* at 13.

<sup>1093</sup> *Id.* at 3.

<sup>1094</sup> *Id.*

video was screened at the WRC, Deputy Commissioner David Foley presented the employee responsible for producing it with an award and joked about the scrutiny it might draw from Congress. These videos were all made public.

Also on April 9, 2012, the Chairman wrote to Acting Administrator Daniel Tangherlini, who succeeded Martha Johnson, requesting all documents pertaining to the WRC and the “Hats Off” program. PBS Region 9 developed an awards program known as the “Hats Off Program” in 2001.<sup>1095</sup> Under this program, Region 9 employees received 40 virtual cards or on-line coupons that could be given to their co-workers for a “specific, work-related reason.” Employees could redeem these virtual cards in the Hats Off store. Initially, the store maintained items of nominal value such as mugs, mouse pads, and backpacks labeled with GSA logos. Eventually, the store also included high-value items such as iPods, digital cameras, GPS devices, portable DVD players, and other electronic devices.<sup>1096</sup> Award items exceeding with values in excess of \$99 violate GSA policy.

The program came to light after approximately 40 iPods were reported stolen from a GSA storage room.<sup>1097</sup> PBS’s Region 9 is the same region which substantially planned the 2010 Western Regions Conference. The leadership of Region 9 signed off on WRC spending.

On April 12, 2012, the Chairman authorized and issued subpoenas to Acting Administrator Tangherlini for documents, and to Jeff Neely for his testimony at the Full Committee hearing on April 16, 2012. Neely’s attorney indicated that he would be asserting his Fifth Amendment privilege. After a series of questions from the Chairman, Neely indeed asserted his Fifth Amendment privilege and was excused from the hearing room. Just prior to the date of the hearing, Neely was placed on administrative leave. He was ultimately dismissed from the agency and indicted on September 25, 2014.

During the hearing Committee Members learned from GSA Inspector General Miller that many of his findings may lead to prosecutions for bribery and kickbacks. From an institutional perspective, it became clear during the hearing, that GSA lacked proper financial controls and oversight. During the second panel, Acting Administrator Tangherlini pledged to do a top-to-bottom review, put new controls in place, and centralize the reporting structure at GSA.

#### *NOAA AND THE IRS’S LAVISH CONFERENCE SPENDING: IS THE PROBLEM WIDESPREAD?*

Out of concern that other governmental departments and agencies were similarly spending excessive amounts on overnight conferences, on April 10, 2012, the Chairman sent letters to 23 federal departments and agencies requesting a list of all overnight conferences since 2005 attended by more than 50 department or agency employees, the total cost of each conference, and the funding source(s). In addition, the letter asked for copies of any websites used to promote the conferences and the title and salary of any employees who plans conferences at each agency. This rigorous oversight initiative caused departments and agencies to examine their prior conferences.

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<sup>1095</sup> Gen. Servs. Admin., Office of the Inspector Gen., *Hats Off – Employee Recognition Program, Pacific Rim Region (Region 9)* 5 (June 16, 2011).

<sup>1096</sup> *Id.*

<sup>1097</sup> *Id.* at 3.

Media reports of waste and abuse combined with whistle blower accounts of waste at conferences flooded the Committee.

On May 4, 2012, as a result of media attention, the Chairman wrote to the head of the National Oceanic and Atmospheric Administration (“NOAA”), part of the Department of Commerce, asking for information regarding a solicitation NOAA issued for a magician-like motivational speaker and information regarding NOAA Office of General Counsel’s conference in Philadelphia that appeared to raise concerns.

NOAA briefed Committee staff on both topics. Regarding the magician, the agency apologized and conveyed to the Committee results of an internal investigation. Regarding Philadelphia conference, based on NOAA’s briefing, Committee staff determined the agency did not engage in any improper or wasteful conduct. In fact, NOAA staff conveyed cost-savings measures they had undertaken.

On April 20, 2012, after receiving information from whistleblowers, the Chairman wrote then-IRS Commissioner Douglas Shulman requesting information about a conference the IRS held in Anaheim, California during the week of August 23, 2010. This conference reportedly cost taxpayers approximately \$6 million. On May 18, 2012, the IRS responded to the Chairman’s letter. The Commissioner explained that the conference was necessary to provide training to employees on the implementation of significant changes. He also pledged to continue cutting travel costs at IRS. However, after TIGTA conducted an audit, the following came to light:

- The IRS held 225 conferences at a total cost of over \$50 million from 2010 to 2012.
- In August 2010, the IRS held a conference in Anaheim, California at a cost of over \$4 million. Approximately 2,700 people attended. Attendees stayed at the Hilton, Marriott, and Sheraton hotels in Anaheim.
- The stated purpose for the conference was continuing professional education (CPE), but no CPE credits were actually available.

Like the GSA conference, IRS executives stayed in lavish suites, created costly videos to be shown to conference attendees, and were entertained by expensive speakers. In fact, the IRS hired 15 outside speakers to present at the conference at a total cost of \$135,000. One of the speakers was Erik Wahl, a speaker and artist who led a session entitled, *Leadership Through Art*. Several paintings were created during the session, including one painting of Michael Jordan, a painting of Abraham Lincoln, a painting of Bono, and two paintings of the Statue of Liberty.<sup>1098</sup> According to TIGTA, two of these paintings were given away to conference attendees, at least one of the paintings was auctioned to benefit the Combined Federal Campaign, and one was lost. On June 6, 2013, the Chairman convened a full Committee hearing to examine this excessive spending by the IRS.

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<sup>1098</sup> An Erik Wahl original painting of Michael Jordan, labeled as “one of a kind,” is currently selling on eBay for \$2,500. See <http://compare.ebay.com/like/181144944053?var=lv&ltyp=AllFixedPriceItemTypes&var=sbar> (last visited June 3, 2013).

### *THE DEPARTMENT OF VETERANS AFFAIRS*

Also in 2012, the media began reporting about an extravagant conference held by the Department of Veterans Affairs (“VA”). In the wake of the Chairman’s extensive oversight of the frivolous spending on conferences, on August 7, 2012, the Department of Veteran Affairs Office of Inspector General contacted the Committee to discuss its ongoing investigation into the two HR conferences held in Orlando, Florida in 2011.

On August 13, 2012, the Chairman wrote to Veterans Affairs Secretary Eric Shinseki regarding reports of conferences and videos produced using taxpayer dollars. The Secretary had assured the Chairman of the Department’s full cooperation in an August 10 telephone call. On August 21, 2012, the Chairman again wrote to Secretary Shinseki regarding the Department’s failure to cooperate with the investigation. On July 9, 2013, the Chairman issued a subpoena to Secretary Shinseki for all documents relating to the 2011 Orlando conferences. The subpoena’s return date was July 23, 2013. In August 2013 the VA finally began substantive productions of documents to the Committee.

Inspector General George Opfer released his report on the conferences on October, 1 2012. He found:

- The Department of Veteran Affairs spent at least \$6.1 million on the two HR conferences. Because there was not a firm budget and expense records were not maintained, the Inspector General was unable to determine the exact total cost of the conferences.
- According to IG Opfer’s report, senior VA officials demonstrated a “lack of concern and awareness for the true costs” of the conference series.
- IG Opfer found at least \$762,000 in unauthorized, unnecessary, and/or wasteful expenses.<sup>1099</sup>

The Committee released its own 96 page report in conjunction with a hearing before the full Committee on October 30, 2014.<sup>1100</sup> This hearing received significant press attention and will hopefully serve as a deterrent to any federal employees considering engaging in waste, abuse, and mismanagement.

The Committee’s investigation found that the Department’s conference planners unapologetically and recklessly wasted taxpayer dollars. The Department paid \$50,000 to produce a parody video of the movie *Patton*, \$863 for an employee to operate karaoke equipment, and \$98,000 for promotional items, including notebooks, water bottles, fitness walking kits, and hand sanitizers. Planners proposed using the \$450,000 marketing budget for the conferences – which was set aside to hype the Department and the conferences – to purchase hand clappers, aprons, and umbrellas. Conference planners joked about adding flat screen televisions, iPads, iPhones, and Blu-ray players to the collection of promotional items that were provided to attendees. The conference planners

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<sup>1099</sup> U.S. DEP’T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL, ADMIN. INVESTIGATION OF THE FY 2011 HUMAN RESOURCES CONFERENCES IN ORLANDO, FLORIDA (2012).

<sup>1100</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *U.S. Dept. of Veterans Affairs 2011 Human Resources Conferences: A Culture of Mismanagement and Reckless Spending*, 113th Cong. (2013).

also organized gift card giveaways to incentivize government employees to fill out surveys related to their experience at the conferences.<sup>1101</sup>

Conference planners traveled to Nashville, Dallas, and Orlando to scout possible locations for the conferences. During these site visits, VA employees improperly accepted gifts from hotels under consideration to host the conferences, including meals, spa treatments, gift baskets, show tickets, and limousine and helicopter rides. The Office of Inspector General referred one of these employees to the Department of Justice for criminal prosecution. E-mails between and among conference planners show that they viewed and treated the site visits as paid vacations.<sup>1102</sup>

Because there were no budgetary restrictions, the total cost of the conferences grew rapidly. The conference planners were advised not to worry about the escalating costs. When conference planners inquired about the source of the money for the conferences, one senior Department official stated, “[w]e will take care of you . . . you don’t have anything to worry about.”<sup>1103</sup> Another Department official stated that “[w]e are a large agency with deep pockets.”<sup>1104</sup> So conference planners stopped worrying about costs and focused on spending what appeared to them an unlimited budget. Afterwards, the planners sought bonuses because they believed they saved the Department money during the course of negotiations with the hotel that hosted the conferences. Four VA officials ended up resigning as a result of their actions or omissions related to the 2011 Orlando conferences.

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<sup>1101</sup> See Staff of H. Cmte. on Oversight & Gov’t Reform, *U.S. Dept. of Veterans Affairs 2011 Human Resources Conferences: A Culture of Mismanagement and Reckless Spending*, 113th Cong. (2013).

<sup>1102</sup> *Id.*

<sup>1103</sup> E-mail from Mary Santiago to Thomas Barritt and Alice Muellerweiss (Aug. 4, 2010).

<sup>1104</sup> E-mail from Annie Spiczak to Thomas Barritt (Oct. 1, 2010).

## ANOTHER RULE, ANOTHER DOLLAR, SAME PROBLEM: DUPLICATIVE GOVERNMENT PROGRAMS

Aside from irresponsible spending associated with the previously discussed conference spending scandals, the Federal Government wastes the investment of American Taxpayers through poorly researched, poorly implemented, and poorly managed government programs. According to the Government Accountability Office (“GAO”), “annual simulations of the Federal Government’s fiscal outlook show continually increasing levels of debt that are unsustainable over time, absent changes in the Federal Government’s current fiscal policies.”<sup>1105</sup> Given the environment of fiscal instability, government waste due to unnecessary spending, poor collaboration, and negligence is unconscionable.

To address concerns about potential government waste, Senator Tom Coburn attached an amendment to the 2010 debt limit increase<sup>1106</sup> that added the following provision:

The Comptroller General of the Government Accountability Office shall conduct routine investigations to identify programs, agencies, offices, and initiatives with duplicative goals and activities within Departments and government-wide and report annually to Congress on the findings, including the cost of such duplication and with recommendations for consolidation and elimination to reduce duplication identifying specific rescissions.<sup>1107</sup>

In compliance with the statutory directive, GAO has issued annual reports identifying duplication, overlap, fragmentation, and other opportunities for savings since 2011.<sup>1108</sup> One of the Committee’s central duties is to ensure Federal Government operations are efficient, effective, and fiscally responsible. The GAO’s series of reports on duplication, fragmentation, overlap, and other opportunities to achieve financial benefits are important tool for congressional oversight because they help to identify issues of concern.

### *GAO’S ANNUAL DUPLICATION REPORTS*

GAO sought to develop its annual report so that it would be informative to government policymakers as they address the rapidly building fiscal pressures facing the Federal Government.<sup>1109</sup> The reports address two key issues: (1) federal programs or functional areas where unnecessary duplication, overlap, or fragmentation exists and the potential benefits of addressing of addressing the conditions and (2) other opportunities for potential cost savings or enhanced revenues.

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<sup>1105</sup> Testimony of Gene L. Dodaro, Comptroller General of the United States. “Opportunities to Reduce Potential Duplication in Government Programs Save Tax Dollars, and Enhance Revenue.” (March 3, 2011) available at <http://gao.gov/assets/130/125629.pdf>

<sup>1106</sup> S. AMDT. 3303 Division I to H.J. RES. 45

<sup>1107</sup> Public Law No: 111-139.

<sup>1108</sup> GAO’s annual reports, as well as a continuously updated action tracker, are available at <http://www.gao.gov/duplication>

<sup>1109</sup> Testimony of Gene L. Dodaro, Comptroller General of the United States. “Opportunities to Reduce Potential Duplication in Government Programs Save Tax Dollars, and Enhance Revenue.” (March 3, 2011) available at <http://gao.gov/assets/130/125629.pdf>

GAO found that problems with fragmentation, overlap, and duplication persist and the impact on taxpayers and our economy is great and damaging. These persistent problems may be wasting billions of dollars annually. Over the course of four annual reports, GAO has identified 188 problem areas and over 400 actions that executive branch agencies and Congress could take to address the opportunities for greater efficiency and effectiveness. Issues span the entire Federal Government and include areas of potential fragmentation, overlap, duplication, or cost savings.<sup>1110</sup>

Each year, the Committee has held a hearing to highlight GAO's work and to discuss what needs to be done to achieve greater efficiency and cost savings. As of March 6, 2014, 64 percent of actions directed to Congress and 63 percent of actions directed to executive branch agencies identified in 2011, 2012, and 2013 remained only partially addressed or were not addressed at all. For Congress, "addressed" means relevant legislation has been enacted and "partially addressed" means a relevant bill has passed committee. For executive action, addressed means implementation of the action and partially addressed means the action has been started but not completed.<sup>1111</sup> While the Committee has performed its constitutional obligation, others within the Federal Government must take action to implement reform.

#### *MOVING FORWARD: THE FEDERAL GOVERNMENT NEEDS BETTER DATA*

In the process of conducting these annual evaluations, the Government Accountability Office has identified a core issue that inhibits improvement: a lack of data hinders its ability to conduct thorough and comprehensive audits. GAO's work is complicated by agencies that are unable, unwilling or slow in providing accurate data. This, in turn, delays the transmission of information to Congress, thus inhibiting Congress' ability to provide the highest service to American Taxpayers.<sup>1112</sup>

GAO cannot provide more specific estimates because most agencies cannot provide program specific spending information. Many agencies could not sufficiently respond to questions about internal management of programs, funds, and/or documentation. The DATA Act, which became law this year, requires agencies to develop program activity spending data.<sup>1113</sup> At the Committee's 2014 hearing, Comptroller General Dodaro noted that the implementation of the DATA Act will address this problem.<sup>1114</sup>

In the 113th Congress, the House passed the Taxpayer Right-to-Know Act, introduced by Representative James Lankford and Representative Jim Cooper.<sup>1115</sup> The bill would require that OMB provide vital information such as the administrative costs and expenditures of each federal

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<sup>1110</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-343SP, 2014 ANNUAL REPORT ADDITIONAL OPPORTUNITIES TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE OTHER FINANCIAL BENEFITS. (2014) available at <http://www.gao.gov/products/GAO-14-343SP>.

<sup>1111</sup> *Id.*

<sup>1112</sup> Testimony of Gene L. Dodaro, Comptroller General of the United States. "Opportunities to Reduce Potential Duplication in Government Programs Save Tax Dollars, and Enhance Revenue." (April 8, 2014) available at <http://oversight.house.gov/wp-content/uploads/2014/04/GAO-statement.pdf>

<sup>1113</sup> Digital Transparency and Accountability Act of 2014, Pub. L. No. 113-101, 128 Stat. 1146. For a discussion of the DATA Act and its implications, see the Legislative Activities section of this report above.

<sup>1114</sup> *Reducing Waste in Government: Addressing GAO's 2014 Report on Duplicative Federal Programs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

<sup>1115</sup> H.R. 1423, 113th Cong. (as passed by the House, Feb. 25, 2014).

program in the program inventory, the number of people that the program serves, the number of employees working on the program, and the statutory authorization of the program. The bill currently awaits consideration in the Senate.

The Taxpayer Right-to-Know Act also allows GAO to cease production of annual reports in order to focus on continuous updates to the Action Tracker. GAO launched the Action Tracker, a publicly accessible website containing the status of actions suggested in these reports, in 2013.<sup>1116</sup> The Action Tracker will allow Congress, federal agencies and the public to track on-going progress in addressing the issues identified in the four reports. GAO also plans to add areas and suggested actions as they identify them through their continued work. Congressional staff on this Committee and beyond should use this as a resource to see where to focus congressional efforts to achieve government reform.

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<sup>1116</sup> GAO's Action Tracker, U.S. Gov't Accountability Office, [http://www.gao.gov/duplication/action\\_tracker/all\\_areas](http://www.gao.gov/duplication/action_tracker/all_areas).

## ENTITLEMENT ABUSE: WHO IS THE BENEFICIARY, REALLY?

Due to their ever-increasing size and scope, agencies administering entitlement programs find it more and more difficult to ensure payments are being made in the correct amount and to the correct person. America's entitlement programs have laudable goals but oversight is often lacking, and misspent dollars means that the intended beneficiaries of these programs may not receive the support they have been promised.

Because of the constantly growing size and scope of entitlement programs administered by agencies such as the Social Security Administration ("SSA") and the Centers for Medicare and Medicaid Services ("CMS"), it is inevitable that agencies become unable to effectively police not only themselves, but also the individuals seeking services. As a result, abuses occur that may not be detected until decades later. The Committee's oversight into waste and abuse in major entitlement programs has uncovered that both SSA and CMS have wasted billions of taxpayer dollars for decades because of failed long-standing policies that were left unchecked. The Committee exposed systematic problems with how SSA awards benefits to claimants, and how CMS reimburses states under its Medicaid funding program. As a result of the Committee's oversight, both CMS and SSA instituted preliminary reforms. However, more institutional oversight mechanisms are needed to ensure that such long-standing abuses do not continue in the future.

### *MEDICAID ABUSE: OVERPAYMENTS TO NEW YORK STATE*

Medicaid is a program funded jointly by states and the Federal Government that finances health and long-term care services for low-income individuals. In fiscal year 2012, combined state and federal spending on Medicaid totaled approximately \$415 billion dollars,<sup>1117</sup> and spending under the program has grown by more than 250 percent since 1990.<sup>1118</sup> Given the ever-increasing size and scope of the program and its complex funding mechanism, the Medicaid program is particularly vulnerable to abuse.

The Federal Government reimburses state Medicaid spending at different levels, typically equal to half of the Medicaid expenditures in states with the highest per capital income, and about 75 percent in states with the lowers per capita income. The large amount of taxpayer dollars spent on the program underscores the need for effective oversight. Over the past six years, the Committee has conducted extensive oversight of waste, fraud and abuse in the Medicaid programs, including billions of dollars in overpayments to New York State.

In March 2013, after months of investigation, the Committee issued a report finding that New York had misspent billions of federal tax dollars on the state's Medicaid program.<sup>1119</sup> Most notably, the

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<sup>1117</sup> <http://kff.org/medicaid/state-indicator/total-medicaid-spending/>

<sup>1118</sup> In 1990, national expenditures on Medicaid equaled \$73.7 billion (See National Health Expenditures, Levels and Annual Change, Table 3, Center for Medicaid and CHIP Services, available at <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/tables.pdf>). Adjusted for inflation, this would equal about \$129.5 in 2012 dollars since the average annual consumer price index was 130.7 in 1990 and 229.594 in 2012. See Consumer Price Index, Bureau of Labor Statistics, U.S. Dept. of Labor, available at [www.bls.gov/pub/special.requests/cpi/cpi.txt](http://www.bls.gov/pub/special.requests/cpi/cpi.txt).

<sup>1119</sup> Staff of H. Cmte. on Oversight & Gov't Reform, *Billions of Federal Tax Dollars Misspent on New York's Medicaid Program*, 113th Cong. (2013).

report called attention to overpayments made by the Federal government to state-run developmental centers, which the Committee estimates totaled more than \$15 billion over two decades.<sup>1120</sup>

New York has the largest Medicaid program in the country, spending \$53 billion in state and federal dollars in 2012.<sup>1121</sup> In 2012, the Inspector General (“IG”) at the Department of Health and Human Services (“HHS”) found that developmental centers in New York received nearly \$1.7 billion in Medicaid payments beyond the facilities’ reported costs in fiscal year 2009 alone. The high payments resulted from a complicated methodology that was initially approved more than two decades ago by HHS. This methodology resulted in daily payment rates exceeding \$5,000 for each institutional resident by 2011. Although the facilities housed roughly 1,700 patients in 2009, total Medicaid payments to New York’s developmental centers were nearly equal to the total payments to Indiana’s Medicaid program made for long-term care services in 2009, and were greater than the total Medicaid long-term care expenditures of 36 states.<sup>1122</sup>

Within one month of the report’s issuance, the Department of Health and Human Services (“HHS”) cut payments to these developmental centers from a daily rate of \$5,100 per patient to \$1,200.<sup>1123</sup> This cut in payments has already saved taxpayers approximately \$1.2 billion in its first 18 months.<sup>1124</sup> On July 25, 2014, CMS announced that they would seek to recover \$1.26 billion in overpayments made to New York developmental centers between 2011 and 2012. CMS has also indicated that they would likely seek to recover additional overpayments made to New York once a review of payments made in additional years was complete.<sup>1125</sup>

The Committee’s oversight of the excessive payments to New York developmental centers has also led to a broader policy change at CMS. On July 29, 2014, Cindy Mann, Director of the Center for Medicaid and CHIP Services, testified before the Committee that new CMS guidance would require “states to submit annual demonstrations that their federal upper limits were in fact operating consistent with this law.”<sup>1126</sup> Ms. Mann explained:

Until the guidance was issued, States reviewed upper payment limits only when a State made a change. As we saw in the instance of New York, without regular review, an upper payment methodology that was approved decades ago may stay in place and ultimately through the passage of time and events become out of compliance with statutory requirements. We are now reviewing upper payment

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<sup>1120</sup> *Id.*

<sup>1121</sup> <http://kff.org/medicaid/state-indicator/total-medicaid-spending/>

<sup>1122</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *Billions of Federal Tax Dollars Misspent on New York’s Medicaid Program*, 113th Cong. (2013).

<sup>1123</sup> Gerry Shields, *Medicaid payments slashed in deal between Feds and Cuomo*, NY POST (Apr. 1, 2013), <http://nypost.com/2013/04/01/medicaid-payments-slashed-in-deal-between-feds-and-cuomo/>.

<sup>1124</sup> Press Release, H. Com. on Oversight & Gov’t Reform, Oversight Committee Prompts \$1.2 Billion in Medicaid Savings, (Apr. 1, 2013), available at <http://oversight.house.gov/release/oversight-committee-prompts-1-2-billion-in-medicaid-savings/>.

<sup>1125</sup> Robert Slavin, *U.S. Demanding at Least \$1.3 Billion from New York*, BOND BUYER, Aug. 7, 2014.

<sup>1126</sup> Testimony of Cindy Mann (July 29, 2014).

limits annually. We have received the first submissions and are now reviewing them.<sup>1127</sup>

Finally, at the Committee's request, the Office of Inspector General agreed to undertake additional audits of the New York Medicaid program.<sup>1128</sup> In a letter to the Committee, the Inspector General reported that their audits identified \$150 million in questioned costs as well as an additional \$346 million in potential annual cost savings.<sup>1129</sup> Discussions between HHS and New York State regarding those overpayments are ongoing.<sup>1130</sup>

The Committee's oversight into the Medicaid program has already saved taxpayers billions of dollars and led to changes in how CMS monitors state payment arrangements. The Committee continues to work with HHS and the HHS OIG to strengthen internal oversight mechanisms and protect taxpayers from overpayments in the Medicaid program.

#### *SOCIAL SECURITY ABUSE: FAILURES IN PROGRAM OVERSIGHT*

The Social Security Administration ("SSA") administers two large federal disability programs: the Social Security Disability Insurance program ("SSDI") and the Supplemental Security Income program ("SSI"). SSDI is the federal disability program for adults under age 65 who meet work and payroll tax contribution requirements and for their dependents. SSI is the federal disability program for children under age 18 and adults aged 18 to 64 who meet specified income and asset requirements and who lack significant work history.<sup>1131</sup> Most claims, for both SSDI and SSI, are initially processed by state disability determination services ("DDS") employees. In 40 states, the first level of appeal goes to a different examiner in the same state DDS office. Therefore, in the vast majority of cases adjudicated by an ALJ, the claimant has already been denied benefits *twice*. Over the last decade, hundreds of ALJs routinely allowed benefits to more than 80 percent of the claimants denied benefits by DDS, with dozens routinely allowing benefits to more than ninety percent of the claimants denied benefits by DDS.

Over the past 25 years, the number of disabled workers enrolled in SSDI has grown by 6.1 million people, from 2.8 million to over 8.9 million people.<sup>1132</sup> As a result of this growth, there are now 6.2 disabled workers on SSDI for every 100 workers in the United States, compared to 2.4 disabled workers on SSDI for every 100 workers 25 years ago.<sup>1133</sup> Once individuals are enrolled in a federal

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<sup>1127</sup> Testimony of Cindy Mann (July 29, 2014).

<sup>1128</sup> Letter from Hon. Daniel R. Levinson, Inspector General, Dep't of Health and Human Svcs, to Representative Darrell Issa, Chairman, H. Com on Oversight & Gov't Reform; Representative James Lankford, Chairman, Sub Com on Energy Policy, Health Care and Entitlements; and Representative Jim Jordan, Chairman, Sub Com on Economic Growth, Job Creation and Regulatory Affairs, Sep. 10, 2013 (copy on file with author).

<sup>1129</sup> *Id.*

<sup>1130</sup> Telephone briefing with HHS OIG, Oct. 14, 2014.

<sup>1131</sup> Social Security Administration document, Supplemental Security Income (SSI), *available at* <http://www.ssa.gov/pubs/EN-05-11000.pdf>.

<sup>1132</sup> Social Security Administration, Social Security Online Beneficiary Data, *available at* <http://www.socialsecurity.gov/cgi-bin/currentpay.cgi>. At the end of 1988, 2,830,284 people were enrolled in SSDI as a disabled worker. At the end of 2013, this number reached 8,942,584.

<sup>1133</sup> *Id.*, and Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, *available at* <http://www.bls.gov/cps/cpsaat01.htm>. There were 116,104,000 workers at the end of 1988 and 143,929,000 workers at the end of 2013.

disability program, they almost never go back to work. Less than one percent of those who were on SSDI at the beginning of 2011 have returned to the workforce.<sup>1134</sup>

As the number of individuals enrolled in SSDI has increased, so has program spending, which amounted to more than \$143 billion in 2013.<sup>1135</sup> A decade ago, SSDI payroll tax revenue exceeded program outlays by 17 percent, but this year, program spending will be 30 percent more than dedicated payroll tax revenue.<sup>1136</sup> The Social Security Board of Trustees<sup>1137</sup> and the Congressional Budget Office<sup>1138</sup> estimate that, without reform, the SSDI trust fund will be depleted in 2016. Growth in SSDI enrollment also increases Medicare spending since individuals enrolled in SSDI for two years are automatically enrolled in Medicare.<sup>1139</sup> The Medicare program spent \$80 billion on SSDI beneficiaries in 2012.<sup>1140</sup>

Currently, 8.4 million people are enrolled in SSI,<sup>1141</sup> at a cost to the Federal Government of nearly \$56.5 billion in 2013.<sup>1142</sup> The number of participants in SSI has nearly doubled over the last 25 years.<sup>1143</sup> Growth in SSI enrollment also increases Medicaid spending since individuals enrolled in SSI are automatically eligible for Medicaid.

In March 2013, the Committee began a major oversight effort to examine the Social Security Administration's management of the federal disability programs. The Committee's oversight consisted of three main areas: (1) SSA's mismanagement of their administrative law judges ("ALJs"), (2) ALJs who essentially rubber-stamped claimants onto disability programs for years, and (3) SSA's failure to guarantee program integrity by completing continuing disability reviews ("CDRs") in a timely manner to ensure that beneficiaries are still eligible for the programs. The Committee also uncovered a systemic problem that prevents SSA from removing beneficiaries who were improperly awarded benefits.

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<sup>1134</sup> Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America* (2013), available at <http://apps.npr.org/unfit-for-work/>.

<sup>1135</sup> Social Security Administration, Data on Disability Insurance Trust Fund, 1957-2013, available at <http://www.ssa.gov/oact/STATS/table4a2.html>.

<sup>1136</sup> Social Security Administration, Data on DI Receipts and Expenditures, available at <http://www.ssa.gov/oact/STATS/table4a3.html>.

<sup>1137</sup> Social Security Administration, "2012 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds," available at <http://www.ssa.gov/oact/TRSUM/index.html>.

<sup>1138</sup> The Congressional Budget Office, *2012 Long-Term Projections for Social Security: Additional Information*, October 2012.

<sup>1139</sup> Social Security Administration, "Disability Planner: Medicare Coverage If You're Disabled," available at <http://www.socialsecurity.gov/dibplan/dapproval4.htm>.

<sup>1140</sup> CONGRESSIONAL BUDGET OFFICE, CBO TESTIFIES ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (2013), available at <http://www.cbo.gov/publication/43996>.

<sup>1141</sup> See Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America* (2013), available at <http://apps.npr.org/unfit-for-work/>.

<sup>1142</sup> Social Security Administration, Supplemental Security Income Program Fiscal Year 2015 Budget Justification, available at <http://www.ssa.gov/budget/FY15Files/2015SSI.pdf>.

<sup>1143</sup> See Annual Report of the Supplemental Security Income Program at Table IV.B9 at 43, available at <http://www.ssa.gov/oact/ssir/SSI13/ssi2013.pdf>.

## SSA's Mismanagement of Administrative Law Judges

The Committee found that SSA mismanaged their ALJs by instituting an arbitrary production targets meant to decrease the backlog in cases, and by failing to remove ALJs when SSA had evidence of judicial misconduct. Over the past decade, due to a variety of political pressures, SSA prioritized reducing the backlog of disability claimants waiting for their hearings. As part of that prioritization, the agency encouraged SSA ALJs to decide more cases by requiring each ALJ to decide a “goal” number of cases per month. At a Subcommittee hearing in June 2013, two current SSA ALJs and two former SSA ALJs testified that the agency’s policy amounted to “paying down the backlog” since it is so much easier for judges to award benefits than deny benefits.<sup>1144</sup>

Then-Commissioner Michael Astrue testified before Congress on May 23, 2007, to announce his plan to eliminate the hearings backlog: “We project 360 cases per judge as the ideal pending to maximize service to disability claimants without compromising our mission of providing both timely and legally sufficient hearings and decisions.”<sup>1145</sup> A week later, Mark Bailey, a Director of the SSA OIG’s Kansas City Audit Division, confirmed to then Chief ALJ Frank Cristaudo that a target of “400 cases per ALJ per year is a reasonable minimum level of production.”<sup>1146</sup> Bailey noted that this figure was based on “the average and median number of cases processed by ALJs in 2006.”<sup>1147</sup> On October 31, 2007, Cristaudo formally issued the agency’s comprehensive plan to eliminate the hearing backlog and prevent a reoccurrence of the backlog.<sup>1148</sup> The Cristaudo plan directed ALJs to issue 500 to 700 legally sufficient decisions annually, targets substantially higher than Commissioner Astrue’s projection or OIG’s estimates from six months earlier. When asked to explain the development of the 500-case minimum, CALJ Cristaudo said that he thought that number was achievable even though there was not any empirical basis for the range.<sup>1149</sup>

Furthermore, agency policy to reduce the case backlog has benefited claimant representatives in several ways. First, the agency’s singular focus on quantity of dispositions meant that more people overall were placed onto disability programs. Second, the agency’s refusal to properly deal with rubber-stamping ALJs meant that claimant representatives could count on hundreds of ALJs to award benefits with near certainty. Third, SSA’s disposition targets caused many ALJs to award benefits inappropriately since issuing a denial is more time-consuming and, unlike an allowance, is often appealed. Fourth, the immense pressure to meet agency disposition targets led many ALJs to fail to consider all evidence when deciding cases so that they could issue decisions more quickly, thereby reducing claimants’ burden of proof. Finally, as a result of pressure to dispose of as many cases as possible by the agency’s leadership, ALJs resorted to techniques like OTR decisions and

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<sup>1144</sup> *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing before the Subcomm. on Energy Policy, Health Care, and Entitlements of the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (2013).

<sup>1145</sup> *Funding Social Security’s Administrative Costs: Will the Budget Meet the Mission?: Hearing Before the S. Comm. on Finance*, 110th Cong. (2007) (testimony of SSA Commissioner Michael Astrue), available at [http://www.ssa.gov/legislation/testimony\\_052307\\_addendum.html](http://www.ssa.gov/legislation/testimony_052307_addendum.html).

<sup>1146</sup> E-mail from Mark Bailey, Director of Kansas City Audit Division, to former CALJ Frank Cristaudo, et al. (May 30, 2007) [Request 5 – 004792].

<sup>1147</sup> *Id.*

<sup>1148</sup> See Letter from former CALJ Frank Cristaudo to SSA Colleagues (Oct. 31, 2007) (on file with author).

<sup>1149</sup> Transcribed interview of Frank Cristudo at 21.

bench decisions which made it easier to award benefits more quickly and at reduced cost to the claimant representative's time.

The agency has consistently emphasized the 500 to 700 annual disposition targets since 2007. In October 2013, Chief ALJ Debra Bice implemented daily, rather than monthly or yearly, disposition targets ranging between 2.0 to 2.8 decisions per ALJ.<sup>1150</sup> However, Chief ALJ Bice admitted that “if you do the math, 2.0 to 2.8 is 500 to 700.”<sup>1151</sup> Despite Chief ALJ Bice's efforts to create the appearance of change, the same aggressive disposition targets instituted by former CALJ Cristaudo remain in effect today.

On June 27, 2013 the Energy Policy, Health Care, and Entitlements Subcommittee held a hearing entitled *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges* where four current or former SSA ALJs testified about fundamental problems with the disability adjudication process.<sup>1152</sup> Former SSA ALJ J.E. Sullivan testified that “the SSA management's high volume and speedy production goal agenda results in management pressuring judges to stop all meaningful adjudication work” and results “in production of a large number of disability decisions that have not been properly reviewed, analyzed, or decided.”<sup>1153</sup>

In the fall of 2013, the Committee conducted three transcribed interviews of SSA officials to assist with the oversight. The three witnesses testified that while SSA introduced a 500-700 production goal for ALJs in 2007, many ALJs decided thousands of cases per year until the agency started limiting case assignments in 2011. The witnesses also testified that any ALJs who decide more than 700 cases per year may be sacrificing quality yet the agency currently still allows ALJs to be assigned 860 cases per year. Jasper Bede, a Regional Chief ALJ (“RCALJ”) for SSA, testified that allowance rates<sup>1154</sup> in excess of 75 percent or 80 percent raise a “red flag” about the quality of ALJ decisions.<sup>1155</sup> RCALJ Bede also testified that “it was generally felt that anything over 700 [dispositions] brought into question whether or not the judge was properly handling cases” and that “[i]f you're well over 700 [dispositions], you know, if you're doing 1,000, and I think that's almost *prima facie* evidence that you're not doing a good job and you should be looked at.”<sup>1156</sup>

As a result of the agency's pressure for ALJs to decide more cases, SSA management turned a blind eye to ALJs who exhibited poor judicial decision-making and focused on the quantity of decisions, over quality. Starting in 2011, SSA began conducting “focused reviews” of a limited number of ALJs to assess the degree to which their decisions complied with disability law.<sup>1157</sup> To date, the agency

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<sup>1150</sup> Transcribed interview of CALJ Debra Bice Tr., at 84 (May 13, 2014).

<sup>1151</sup> *Id.*

<sup>1152</sup> *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).

<sup>1153</sup> *Id.* (testimony of Judge J. E. Sullivan, U.S. Administrative Law Judge, Social Security Administration).

<sup>1154</sup> ALJ allowance rate equals the percentage of cases in which ALJs allowed benefits.

<sup>1155</sup> Transcribed Interview of RCALJ Jasper Bede at 75 (Oct. 22, 2013) [hereinafter Bede Tr.]. Defined by Mr. Bede as “certainly anything over ... 75 or 80 percent. Several years ago, that might have been [defined as] 85 percent, when everyone, as a whole, nationally and regionally, were reversing cases in the 65 percent range.”

<sup>1156</sup> *Id.*

<sup>1157</sup> Transcribed Interview of CALJ Debra Bice at 114 (May 13, 2014) [hereinafter Bice Tr.].

has completed focused reviews of about 50 of the agency's approximately 1,400 ALJs. A Committee analysis of the reviews revealed troubling patterns with the manner in which ALJs decide cases.<sup>1158</sup> Every focused review found deficiencies in ALJ decision-making and compliance with federal disability law. Several problems permeate these reviews, including inadequate use of vocational experts, poor assessments of an individual's ability to work, improper evaluation of claimants with a history of drug and alcohol abuse, overreliance on claimant representatives' briefs for ALJ decisions, and inadequate hearings with claimants.

ALJs that refuse to follow the law and essentially rubber stamp claimants onto the federal disability rolls have abused the public trust, harmed the nation's truly disabled, and therefore should be fired. It is unacceptable that SSA refused to take disciplinary action after focused reviews conducted in 2011 for ALJ Gerald Krafzur, ALJ Charles Bridges, and ALJ Harry Taylor revealed gross errors and incompetence in applying the law. In some cases, these ALJs created their own rules and standards for deciding cases and allowing benefits.<sup>1159</sup> The agency conducted follow-up focused reviews on each of these ALJs within the past year and all three reviews found the same significant problems with the ALJs' decisions. For example, ALJ Charles Bridges' 2014 review found that 60 percent of a sample of his decisions was not substantiated by evidence.<sup>1160</sup> The agency's senior management is directly responsible for allowing these ALJs to erroneously award benefits after their first focused review and is, therefore, also directly responsible for these three rubber-stamping ALJs placing more than 4,300 additional people onto federal disability programs between October 1, 2011, and May 30, 2014.<sup>1161</sup>

In theory, the "focused review" program is a good first step toward improving the quality of decisions and ensuring the integrity of the disability appeals process. In practice, the program is effectively meaningless. Rather than disciplining or removing an ALJ when overwhelming evidence of incompetence exists, the agency allows the ALJ to continue deciding a full caseload, hoping that the ALJ agrees to training and that ALJ performance improves. Unfortunately, ALJs who have received training generally fail to show improvement.

### **ALJs Rubber-Stamped Claimants**

According to information obtained by the Committee, hundreds of ALJs rubber-stamped applicants onto disability programs for years. As a result, at a minimum, hundreds of thousands of individuals who are able to work and who do not meet the program's eligibility criteria are receiving benefits. The agency failed to assess the quality of the decisions of ALJs with high disposition totals despite widespread recognition within the agency that ALJs cannot properly evaluate the evidence if they are deciding too many cases. The agency failed to assess the quality of the decisions of ALJs with

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<sup>1158</sup> Committee staff analysis of focused reviews of ALJs provided by the Social Security Administration on Jan. 17, 2014 and May 9, 2014.

<sup>1159</sup> ALJ Krafzur's 2014 Focused Review found that ALJ Krafzur developed his own "cause and effect" theory to decide cases. An October 28, 2013 memo from Hearing Office Chief ALJ Theodore Burock to Regional Chief ALJ Jasper Bede details how ALJ Bridges manipulated vocational experts' testimony to find claimants disabled.

<sup>1160</sup> See Follow-up Focused Review of A.L.J. Gerald Krafzur (Mar. 2014); Fiscal Year 2013 Focused Review of A.L.J. Charles Bridges (Jan. 2014); Focused Review of A.L.J. Harry Taylor (May 2013).

<sup>1161</sup> SSA Public Data Files, ALJ Disposition Data (June 24, 2014).

high allowance rates, including ALJs who were allowing a large number of decisions without hearings.

On June 10, 2014, the Committee published a staff report entitled *Systemic Waste and Abuse at the Social Security Administration: How Rubber-Stamping Disability Judges Cost Hundreds of Billions of Taxpayer Dollars*.<sup>1162</sup> Among the findings: between 2005 and 2013, over 1.3 million people were placed on the program by ALJs with an annual allowance rate in excess of 75 percent and over 650,000 people were placed on the program by an ALJ with an annual allowance rate in excess of 85 percent. Overall, there were 191 ALJs who had a *total* allowance rate in excess of 85 percent during this time period. These 191 ALJs awarded more than \$150 billion in lifetime benefits between 2005 and 2013. Additionally, the agency failed to assess the quality of the decisions of ALJs with high disposition totals in spite of widespread recognition with the agency that ALJs cannot properly evaluate the evidence if they are deciding too many cases.

On June 10 and June 11, 2014, the Committee held two hearings entitled, *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process*<sup>1163</sup> and *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process, Part II*.<sup>1164</sup> During the first hearing, the Committee heard testimony from four current ALJs who met RCALJ Bede's definition of red-flag ALJs. These ALJs routinely disposed of a large number of cases, many without holding a hearing, and approved virtually every claimant who came before them for benefits. Internal reviews showed continued policy non-compliance yet the ALJs continued to decide full caseloads and were often praised by their supervisors and other agency officials because they met or exceeded agency production goals and therefore helped reduce the hearings backlog. At the second hearing, Acting Commissioner Carolyn Colvin's testimony raised more questions than answers about her or the agency's appreciation of the substantial problem created when ALJs essentially approve every claimant before them, regardless of whether they are disabled or unable to work, and that the agency lacks commitment to fundamental program reform.

### **Problems with Re-Evaluations of Disability**

SSA's policy of conducting continuing disability reviews ("CDRs") of beneficiaries to assess their continued eligibility for the program is fundamentally flawed. Over the past decade, due to a variety of political pressure, SSA prioritized reducing the backlog of individuals who applied for disability benefits. Because SSA did not prioritize CDRs, the agency is behind schedule on over 1.3 million reviews. More importantly, however, is that the criteria used by the agency when conducting these reviews does not properly ensure that only individuals currently meeting the agency's definition of disability continue to receive benefits.

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<sup>1162</sup> Staff of H. Cmte. on Oversight & Gov't Reform, *Systemic Waste and Abuse at the Social Security Administration: How Rubber-Stamping Disability Judges Cost Hundreds of Billions of Taxpayer Dollars*, 113th Cong. (2014).

<sup>1163</sup> *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

<sup>1164</sup> *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process, Part II*, 113th Cong. (2014).

On April 9, 2014, the Energy Policy, Health Care, and Entitlements subcommittee held a hearing entitled, *Examining Ways the Social Security Administration Can Improve the Disability Review Process*. Witnesses from the National Association of Disability Examiners as well as GAO and OIG, testified about how the agency’s decision to prioritize initial determinations lead to a backlog of over 1.3 million reviews leading to many individuals who are able to work and who do not meet program eligibility criteria continuing to receive benefits. Additionally, the agency’s criteria for conducting the reviews is flawed as it does not allow beneficiaries who were wrongfully awarded benefits to be removed from the program following a CDR since the examiner must find medical improvement to cease benefits.

From 1980 to 1983, SSA reviewed a large number of prior awards, finding that 40 percent of program beneficiaries were not disabled.<sup>1165</sup> The agency received additional funding in the FY 2014 appropriations for an increased number of CDRs; Congress expects a significant increase in the number of CDRs performed this year because of this additional funding. However, an increase in CDRs must be coupled with a change to the “medical improvement” standard, because this standard does not allow the agency to remove claimants who were wrongfully awarded benefits in the first place.<sup>1166</sup> Under the current standard, the claimant’s record must show that the claimant made significant medical improvement in order to end benefits; if the claimant was not disabled and wrongfully received benefits initially, this standard of review will not remove them.<sup>1167</sup>

### **More Action Needed**

After considering the recommendations from the Administrative Conference of the United States, as well as academic literature, oversight hearings, and empirical analysis, Chairman Lankford and Ranking Member Speier wrote a joint letter to SSA on April 8, 2014, with eleven recommendations urging the agency to overcome bureaucratic inertia and to initiate the necessary administrative actions to significantly improve the integrity of the disability programs.

The agency has made a few positive changes since the Committee began its oversight efforts, but more reform and oversight is still needed. The agency received \$1.197 billion of program integrity funding for FY 2014. Thus, the agency plans to perform more CDRs and redeterminations in FY 2014 and FY 2015 than it performed in FY 2013.<sup>1168</sup> However, the agency’s current procedure to conduct CDRs is inadequate and does not address the problem of beneficiaries added to programs inappropriately by red-flag ALJs.

Additionally, the agency has advanced rulemaking that would require claimant representatives to submit all evidence relating to a disability claim. However, other rules and policies within the agency still need reform. For example, the agency currently uses outdated rules to determine whether or not a claimant meets SSA’s definition of disability. SSA has not updated the medical-vocational guidelines (“the grid”) it implemented in 1978 to reflect that Americans live longer, work longer, and collect Social Security benefits later in life and for a longer period of time. SSA should

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<sup>1165</sup> *Id.*

<sup>1166</sup> 20 CFR § 404.1594(b)(1).

<sup>1167</sup> *Id.*

<sup>1168</sup> Letter from Scott L. Frey, Social Security Administration to Rep. James L. Lankford, H. Cmte.on Oversight and Gov’t Reform (March 10, 2014).

explore ways to update the grid more quickly and in the interim issue alternative guidance to assist ALJs when they assess an individual's ability to work in the modern job market.

Beginning in FY 2012, the agency began limiting the number of dispositions an ALJ could be assigned annually. Currently, ALJs cannot be assigned more than 840 dispositions per fiscal year, but a 2012 SSA internal study about when quality is impacted by quantity shows that this limit may not be low enough to ensure high quality, fair decisions. To date, the agency has refused to conduct a study on the average amount of time it takes for an ALJ to evaluate evidence, hold a hearing, and issue a decision and continues to enforce arbitrary production goals with no regard for the waste and abuse of taxpayer dollars and the impact a shortfall in the trust fund would have on the truly disabled.

Since the agency began publishing adjudication data in 2010, the nationwide ALJ allowance rate has declined each year. The agency began a limited internal review system in 2011—the focused review program—to review the decisions of problematic ALJs. These reviews revealed a widespread problem of non-compliance with the law and agency policy, but to date, the agency has not disciplined any of the ALJs with poor focused reviews or limited their caseloads. With many ALJs defiantly refusing to absorb targeted training to improve their decision-making, the agency must take steps to discipline and then remove ALJs who do not follow the law and are rubber-stamping claimants onto the federal disability programs.

The Committee requested that the U.S. Government Accountability Office (“GAO”) review the role of private consultants and organizations in increasing the number of individuals enrolled in federal disability programs. GAO accepted this project as well as the Committee's request that it identify red-flag ALJs and review a statistically significant, random sample of these reversed cases to assess whether the cases were processed in a manner consistent with SSA's policies and procedures. The GAO is expected to post the results of its review before the end of 2014.

As a result of the agency's emphasis on high volume adjudications over quality decision-making, the credibility of the disability appeals process has been eroded. Genuinely disabled individuals are harmed from the programs' explosive growth and face large future benefit cuts as the SSDI trust fund is scheduled for bankruptcy in 2016<sup>1169</sup> because the program has too many beneficiaries who do not meet the disability programs' requirements. Moreover, the tens of millions of Americans who pay taxes to finance federal disability programs have seen their hard-earned tax dollars squandered because of the agency mismanagement that potentially has led to hundreds of billions of dollars of improper payments. The Committee continues to investigate this issue and urges the agency to make common-sense reforms that would ensure fairness to both claimants and taxpayers.

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<sup>1169</sup> The Congressional Budget Office, *2012 Long-Term Projections for Social Security: Additional Information*, October 2012.

## WASTED SPENDING ON INFORMATION TECHNOLOGY: A SYSTEMIC PROBLEM?

Investments in intellectual property (“IT”) have been a perennial source of problems for the Federal Government in recent years. As noted by OMB:

IT has transformed how the private sector operates and has revolutionized the way in which it serves its customer. The Federal Government has largely missed out on these transformations, due in part to its poor management of large [IT] investments.<sup>1170</sup>

The fiscal year 2014 budget request indicates that the Federal Government plans to invest over \$82 billion in IT during fiscal year 2014.<sup>1171</sup> The practices by which IT is acquired have been heavily criticized by the nonpartisan Government Accountability Office (“GAO”) for their lack of efficiency and size of redundancies and overlap. GAO has repeatedly identified broad waste and unnecessary duplication in the government’s IT investments, both within and across the agencies. Of particular concern to the American taxpayer is the high incidence of “failed” IT investments. Many major IT projects are abandoned after significant effort and significant taxpayer cost because the systems cannot be made to work. In addition to the high-profile failure of HealthCare.gov catalogued at length elsewhere in this report, the GAO has identified several other key failed IT projects<sup>1172</sup>:

- In December 2012, the Department of Defense (“DOD”) canceled the Air Force’s Expeditionary Combat Support System after having spent more than \$1 billion. GAO issued several reports on this system and found that, among other things, the program was not fully following best practices for developing reliable schedules and cost estimates.
- In February 2010, the Defense Integrated Military Human Resources System (“DIMHRS”) was canceled after 10 years of development and approximately \$850 million spent. The system was intended to provide an integrated, standardized personnel and pay system for all military personnel.
- In January 2011, the Department of Homeland Security (“DHS”) ended the Secure Border Initiative Network (“SBI-net”) program after obligating more than \$1 billion to the program because it did not meet cost-effectiveness and viability standards.
- In February 2010, a presidential task force decided to disband the National Polar-orbiting Operational Environmental Satellite System (“NPOESS”) after having spent 16 years and almost \$5 billion on the program. NPOESS was a tri-agency weather satellite program managed by NOAA, DOD, and NASA.
- In March 2005, the FBI discontinued the Virtual Case File project after investing 3 years and \$170 million. The FBI terminated the project after Trilogy’s overall projected costs grew

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<sup>1170</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-297T, INFORMATION TECHNOLOGY: OMB AND AGENCIES NEED TO FULLY IMPLEMENT MAJOR INITIATIVES TO SAVE BILLIONS OF DOLLARS (2013), *available at* <http://www.gao.gov/products/GAO-13-297T>.

<sup>1171</sup> Fiscal Year 2014 Budget of the U.S. Government, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>.

<sup>1172</sup> GAO-13-297T, *supra* note 1170.

from \$380 million to \$537 million, the program fell behind schedule, and pilot testing showed that completion of VCF was infeasible and cost prohibitive.

- In July 2010, Office of Management and Budget (“OMB”) directed the National Archives and Records Administration to halt development of its Electronic Records Archive system after having already invested \$375 million on the system. OMB cited concerns about the system’s cost, schedule, and performance.

Below is a chart of failed IT investment projects, as compiled by the GAO since 2003:

**FAILED IT INVESTMENTS SINCE 2003 (Source: GAO)**

PROJECT NAME	AGENCY	WASTED DOLLARS (Estimated)	STATUS
Expeditionary Combat Support System (ECSS)	DOD	More than \$1B	Terminated
Defense Integrated Military Human Resources System (DIMHRS)	DOD	\$850M	Terminated
Computer-Assisted Passenger Prescreening System (CAPPS II)	DHS/TSA	\$41.5M	Terminated
Electronically Managing Enterprise Resources for Government Effectiveness and Efficiency (eMerge2)	DHS	\$52M	Terminated
Next Generation Homeland Security Information Network (HSIN Next Gen)	DHS	\$129M	Terminated
Secure Border Initiative Network (SBInet)	DHS	More than \$1B	Terminated
Virtual Case File (VCF)	FBI	\$170M	Terminated
e-Authentication Program	GSA	\$13.5M	Terminated
Electronic Records Archive (ERA)	NARA	\$375M	Terminated
National Polar-orbiting Operational Environmental Satellite System (NPOESS)	DOC(NOAA)/ DOD/NASA	\$5B*	Terminated
Retirement Systems Modernization	OPM	\$231M	Terminated
Scheduling Replacement Project	VA	\$127M	Terminated
Core Financial and Logistics System (CoreFLS)	VA	\$249M	Terminated
Financial and Logistics Integrated Technology Enterprise (FLITE) Program	VA	Unavailable	Terminated
VA's Health Information Systems and Technology Architecture— Foundations Modernization (VistA-FM)	VA	Unavailable	Terminated
<b>TOTAL:</b>		<b>\$9.2B</b>	

\*There may be some value received for the delivered satellite systems that provide lesser capabilities.

## GAO BEST PRACTICES

President Obama has called for reform of how agencies acquire and manage IT, noting that “one of the things [the Federal Government] does not do well is information technology procurement.” The President went on to call it “a systematic problem that we have across the board.”<sup>1173</sup> Through its audit work, GAO has identified nine “critical factors underlying successful major acquisitions.” GAO audited seven successful investment acquisitions and found nine factors common to the success of three or more of those acquisitions. According to testimony from the GAO’s David Powner before the Committee in November 2013, these best practices were:

1. Program officials were actively engaged with stakeholders;
2. Program staff had the necessary knowledge and skills;
3. Senior department and agency executives supported the programs;
4. End users and stakeholders were involved in the development of requirements;
5. End users participated in testing of system functionality prior to formal end user acceptance testing;
6. Government and contractor staff were stable and consistent;
7. Program staff prioritized requirements;
8. Program officials maintained regular communication with the prime contractor;
9. Programs received sufficient funding.<sup>1174</sup>

It is noteworthy that almost every best practice identified above requires someone in the agency exercise leadership to ensure appropriate attention is paid. In this context, GAO has also identified opportunities to improve the role played by Chief Information Officers (“CIO”) in IT management. GAO noted that agency CIOs have not always had sufficient control over IT investments and that more consistent implementation and empowerment of CIOs’ authority could enhance their effectiveness.<sup>1175</sup> GAO publicly stated that the bipartisan IT acquisition reform legislation proposed by the Committee could play an important role in increasing the authority of agency CIOs and improving federal IT acquisition management practices.<sup>1176</sup>

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<sup>1173</sup> Statement by the President on the Affordable Care Act. (November 14, 2013) available at <http://www.whitehouse.gov/photos-and-video/video/2013/11/14/president-obama-speaks-affordable-care-act#transcript>

<sup>1174</sup> See generally *Data Centers and the Cloud: Is the Government Optimizing New Information Technologies Opportunities to Save Taxpayers Money?: Hearing Before Subcomm. on Gov’t Operations of H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (2013) (testimony of David A. Power, Director, Info. Tech. Mgmt. Issues, U.S. Gov’t Accountability Office); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-183T, INFORMATION TECHNOLOGY: LEVERAGING BEST PRACTICES TO HELP ENSURE SUCCESSFUL MAJOR ACQUISITIONS (2013), available at <http://www.gao.gov/assets/660/658958.pdf>.

<sup>1175</sup> GAO-14-183T, *supra* note 1174.

<sup>1176</sup> *Id.*

The Committee believes an agency CIO should play a central role in all aspects of IT within the entire agency. CIOs must be able to design and deliver transformational enterprise-wide IT solutions that support the mission and business function while overcoming bureaucratic impediments and parochialism. The Committee also expects, along with increased stature and authority, for each CIO to be accountable for the success or failure of the agency's overall IT management. Perpetuation of collective failure and obscure accountability must stop and be replaced by a culture of transformative leadership and a recognition of success or failure.

### *RE-INVENTING THE WHEEL*

The incorporation of these best practices into major IT acquisitions will save taxpayer money and improve the effectiveness of government. But even successful IT acquisitions can produce considerable waste and duplication. A noticeable example of this is the staggering number of common back office support systems or business applications in the Federal Government. In the fiscal year 2011 budget submissions, agencies reported:

- 777 separate investments or \$3.3 billion in supply chain management IT;
- 622 investments or \$2.4 billion in human resource management IT;
- 580 investments or \$2.7 billion in financial management IT;
- 444 investments or \$5 billion in health IT;
- 372 investments or \$1.6 billion in general science and innovation IT;
- 358 investments or \$9.3 billion in defense and national security IT;
- 301 investments or \$800 million in administrative management IT; and the list continues.<sup>1177</sup>

Considering most of these back office systems perform similar functions, there are opportunities to consolidate them into smaller, more manageable numbers within each major agency and perhaps even share services across multiple agencies. These duplications appear most often in large federated agencies where there are numerous CIOs at their component organizations with little or no accountability to the central agency CIO. An empowerment of an agency CIO and associated enterprise-wide management oversight can significantly reduce these duplications.

Not all IT acquisition issues are limited to technological failures and unnecessary duplication. In June 2013, the Committee released a report detailing a problematic and abusive contracting relationship between the Internal Revenue Service (“IRS”) and contractor Strong Castle. The report found that a personal relationship between an IRS contracting official and the owner of a company, Strong Castle/Signet Computers, facilitated contracts in a six month period that could be worth nearly \$500 million. Prior to January 2012, the company had only \$250,000 in annual revenue. The report, detailing a Committee investigation that began in February, also found that Strong

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<sup>1177</sup> *Id.*

Castle/Signet Computers gained an advantage over competitors by gaining a socioeconomic “Historically Underserved Business Zone” (“HUBZone”) designation by making false representations about the company’s headquarters and workforce to the Small Business Administration.<sup>1178</sup>

Despite knowing about these concerning issues with Strong Castle/Signet Computers, the IRS has failed to revoke tainted large contract awards or take disciplinary action against IRS employees who acted inappropriately. Throughout the report, numerous examples from texts, emails, and witness testimony show that the IRS contracting officer played an often hands-on role in tilting the table in Strong Castle’s favor in numerous contract competitions. The Committee held a hearing on June 26, 2013 at which that employee, Mr. Gregory Roseman, the Deputy Director for Enterprise Networks and Tier Systems Support at IRS, claimed his Fifth Amendment privilege not to incriminate himself and refused to testify. As a result of information uncovered by the Committee’s investigation, the SBA revoked the contractor’s HUBZone designation.<sup>1179</sup>

The Committee worked with whistleblowers at the Social Security Administration (“SSA”) to bring attention to the SSA’s faltering project to update their system for tracking disability claims; this work was highlighted in Senator Tom Coburn’s annual *Wastebook* in 2014.<sup>1180</sup> The SSA system upgrade is two-and-half years away from completion, despite being in process for the past 6 years. *Wastebook* notes the Committee’s analysis that “the stagnation may be attributed to a failure of leadership. There is no single person in charge of the completion of the project and the resulting ‘IT Boondoggle’ has cost taxpayers \$288 million over six years and delivered nothing.” This IT failure is draining taxpayer money away from other priorities at this troubled agency. As the Committee’s letters to SSA Administrator Carolyn Colvin noted, she and other agency officials routinely testified as to the need for more funding from Congress in order to meet challenges related to disability claims, yet have by their own admission wasted \$288 million and five years’ time developing a system that doesn’t work and even by their own estimates is not projected to work for at least another two to three years.<sup>1181</sup>

In addition to the waste and duplication of IT systems throughout the government, the government’s priorities in terms of IT spending often perpetuate the use of obsolete and outdated systems. Of the approximately \$80 billion federal agencies spend on IT each year, about 69 percent, or \$54 billion, is spent on the operations and maintenance of existing systems (so-called “legacy IT systems,” commonly referred to as “steady state investment”). GAO has determined that several major agencies, namely the Departments of Treasury, Agriculture, Energy and State, spend well over 80 percent of their IT budget on operations and maintenance of potentially obsolete legacy

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<sup>1178</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *Questionable Acquisitions: Problematic IT Contracting at the IRS*, 113th Cong. (2013), available at <http://oversight.house.gov/wp-content/uploads/2013/06/Strong-Castle-IRS-Final-Report.pdf>

<sup>1179</sup> *Id.*

<sup>1180</sup> SEN. TOM COBURN, M.D., 2014 WASTEBOOK: WHAT WASHINGTON DOESN’T WANT YOU TO READ (2014), available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=6932c44c-6ef4-491d-a0f1-078b69f1f800](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=6932c44c-6ef4-491d-a0f1-078b69f1f800)

<sup>1181</sup> Letter to The Honorable Carolyn W. Colvin, Administrator, Social Security Administration. (July 17, 2014); Letter to The Honorable Carolyn W. Colvin, Administrator, Social Security Administration. (July 23, 2014).

systems.<sup>1182</sup> Maintaining outdated IT systems may be necessary and the risks of a technology transition can be very high. However, agencies are supposed to be undertaking operational analysis to stay ahead of the technology curve, and many are not. This indicates that potentially up to two thirds of the annual \$80 billion IT investment is being spent without sufficient transparency and at a sub-optimal efficiency.

### *FEDERAL DATA CENTER MISMANAGEMENT*

The Administration's mismanagement of federal data centers can serve as a case study of this on-going challenge. The Federal Data Center Consolidation Initiative ("FDCCI") was first announced as a Federal initiative in February 2010. The FDCCI's goal is to reverse the historic growth of Federal data centers and close, consolidate or streamline existing data centers wherever possible and practical. By optimizing redundant and wasteful data centers, the government will reduce the cost of data center hardware, software and operations; shift IT investments to more efficient computing platforms such as cloud solutions; promote sustainability within data centers by reducing their energy consumption and real estate footprint; and improve the nation's cyber security posture. OMB's stated goal is for agencies to close or consolidate 40 percent of federal data centers by 2015, for a purported savings of \$3 billion.

Operating large number of data centers is a significant cost to the Federal Government, including hardware, software, real estate, and cooling costs. According to the Department of Energy, data center spaces can consume 100 to 200 times more electricity than a standard office space. The Environmental Protection Agency estimates that the cost of electricity alone to operate federal data centers is \$450 million annually. Information collected by OMB also shows relatively low utilization rates (as low as 5 percent) of current infrastructure and limited reuse of data centers within or across agencies.<sup>1183</sup>

As of December 2011, 24 major departments and agencies (i.e., CFO Act agencies) had identified 3,133 data centers. This number ballooned in 2013, with OMB reporting more than 7,000 data centers in accordance to the expanded definition OMB is now applying.<sup>1184</sup>

GAO found significant weaknesses in the FDCCI. First, OMB has not measured agencies' progress against its \$3 billion cost savings goal. Three years into the FDCCI, neither OMB nor the participating agencies have determined a consistent and repeatable method for tracking cost savings. This is contrary to the basic management principle that performance measures should be measurable, outcome-oriented, and actively tracked and reported. Second, OMB does not have a complete inventory of data centers to be closed or consolidated. Third, OMB has not exercised adequate management oversight over the governance of the FDCCI program.<sup>1185</sup> For example, the Subcommittee on Government Operations' July 2013 hearing revealed that the CIO of GSA, an agency serving as FDCCI program management office for the entire Federal Government, was not

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<sup>1182</sup> GAO-13-297T, *supra* note 1170.

<sup>1183</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-627T, DATA CENTER CONSOLIDATION: STRENGTHENED OVERSIGHT NEEDED TO ACHIEVE BILLIONS OF DOLLARS IN SAVINGS (2013), *available at* <http://www.gao.gov/products/GAO-13-627T>.

<sup>1184</sup> *Id.*

<sup>1185</sup> *Id.*

actively engaged in the agency's data center consolidation effort. As of the date of the hearing, GSA had 3 Core and 115 Non-core data centers. Of these data centers, GSA had closed only 1, less than 1 percent of its data centers. This again illustrates the significance of the role of agency CIOs in improving federal IT management practices.

Recently, the FDCCI has been rolled up into the broader "PortfolioStat" process, an OMB-initiated technical and programmatic review of troubled IT projects. The Committee has expressed concerns that this will cause OMB's focus on data center consolidation to weaken. During the 113th Congress, the Committee, together with its Subcommittee on Government Operations, held four hearings that specifically addressed technology investment waste and failures. In the last such hearing, held on July 25, 2013, the Committee requested GAO to compile a list of significant IT investments that have either failed or were in trouble. The chart provided by GAO and provided earlier in this section identify 15 failed IT investments, totaling \$9.2 billion and 17 current, troubled IT investments totaling \$102 billion.

### *REFORMING THE PROCESS*

Going forward, solving many of the Federal Government's most vexing problems will require complex technological solutions and major IT acquisitions. Few issues have drawn as much attention as the inability of the Department of Defense and the Department of Veterans Affairs to resolve problems associated with the transition of wounded service members from DoD systems to VA systems. Despite numerous recommendations made by an Independent Review Group, a presidential commission, the GAO, and Office of the Inspector General of DoD and VA, and this Committee in bipartisan work conducted under the past several chairmen, problems remain.

IT acquisition was a key focus of the Subcommittee on National Security, Homeland Defense, and Foreign Operations hearing convened on April 28, 2011, titled *Is This Any Way to Treat Our Troops? Part III: Transition Delays*, as much of the discussion focused on the joint development of an Electronic Health Record system by VA and DoD. In February 2013, the secretaries of the two departments decided to develop separate systems, citing cost and schedule concerns. A February 2014 GAO report criticized that decision, noting that:

Major investment decisions—including terminating or significantly restructuring an ongoing program—should be justified using analyses that compare the costs and schedules of alternative proposals. Yet, the departments have not developed revised cost and schedule estimates for their new modernization efforts and any additional efforts needed to achieve interoperability between the new systems.<sup>1186</sup>

DoD is currently moving forward with DoD Healthcare Management System Modernization ("DHMSM") contract, a \$11 billion contract to replace its electronic health record system and

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<sup>1186</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-302, VA AND DOD NEED TO SUPPORT COST AND SCHEDULE CLAIMS, DEVELOP INTEROPERABILITY PLANS, AND IMPROVE COLLABORATION (2014), *available at* <http://www.gao.gov/assets/670/661208.pdf>.

enhance interoperability with the VA, and concerns are already being raised by outside groups.<sup>1187</sup> The Oversight Committee as well as the other legislative committees of jurisdiction will need to be vigilant to protect the taxpayer dollar and ensure the success of this and other critical missions.

The Federal Information Technology Acquisition Reform Act (“FITARA”), with strong bipartisan and bicameral support, addresses many of the problems that plague the Federal Government’s efficient purchase and implementation of information technology.<sup>1188</sup> FITARA will empower the chief information officers of agencies by ensuring access to sufficient money and resources and would make decision-makers more accountable and ensure program transparency.<sup>1189</sup>

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<sup>1187</sup>Verton, Dan, *Chuck Hagel and the secret war over DOD & VA electronic health records*, FEDSCOOP.COM (Aug. 12, 2014, 4:32 P.M.), <http://fedscoop.com/chuck-hagel-and-the-secret-history-of-vas-quest-for-a-modern-electronic-health-record-system/view-all/>.

<sup>1188</sup>Federal Information Technology Acquisition Reform Act, H.R. 1232, 113th Cong. (as passed by the House, Feb. 25, 2014).

<sup>1189</sup>For a more complete discussion of FITARA, see the Legislative Activities section of this report above.

## DESIGNED FOR ABUSE: MISMANAGEMENT OF FEDERAL RESOURCES

The total federal real property portfolio is massive, totaling over 900,000 buildings and structures with a combined area of over 3 billion square feet. As mentioned in the Legislative Accomplishments chapter of this report, the Government Accountability Office (“GAO”) has repeatedly stated that nationally, the Federal Government owns tens of thousands of structures that have been deemed vacant or underutilized.<sup>1190</sup> As a result, the government wastes a staggering \$1.67 billion in taxpayer dollars each year through the mismanagement of these assets.<sup>1191</sup>

### *OVERSIGHT OF UNDERUTILIZED AND EXCESS PROPERTIES*

The Committee on Oversight and Government Reform has worked diligently to address some of the key problems with disposing of excess and underutilized properties. A key piece of its oversight in this area were the numerous hearings held highlighting the operations, maintenance, management, and disposal costs for underutilized or excess federal real property, and the need for a more efficient disposal process.

During the 113th Congress in particular, the Government Operations Subcommittee, led by Representatives John Mica and Gerald Connolly, focused on the mismanagement of federal property assets. These efforts began early in the Congress, with Subcommittee Chairman Mica holding a hearing entitled, *Failures in Managing Federal Real Property: Billions in Losses*, on February 27, 2013.<sup>1192</sup> The hearing brought to light the egregious waste that occurs annually in maintaining underutilized and excess properties. The Government Accountability Office’s witness, David Wise, testified that poor communication between agencies and out-of-date or unreliable data on the condition of federal properties has exacerbated this problem.

The next several hearings demonstrated that mismanagement of federal property is not an issue with just one agency, but is pervasive throughout the Federal Government. To showcase the mismanagement of assets firsthand, the Subcommittee held the hearings at the actual underutilized locations. On March 8, 2013, the Subcommittee held a field hearing entitled, *Addressing Unused and Vacant Federal Courthouses: A Case Study in Miami-Dade, Florida*<sup>1193</sup> at the David W. Dyer Federal Building and U.S. Courthouse in Miami, Florida. This particular courthouse has been vacant for approximately six years. The General Services Administration (“GSA”) has struggled to reposition it, and, unfortunately, it costs the taxpayers \$1.2 million annually to maintain. This is despite the fact that GAO testified that between 2000 and 2010, the government constructed a total of 33 new courthouses, including 3.5 million square feet that it did not need. The unnecessary space cost taxpayers \$835 million to construct and continues to cost \$51 million annually to maintain. On April 25, 2013, the Subcommittee held a field hearing entitled, *Government Operations Oversight: Addressing Unused and Vacant Federal Property*, in GSA’s vacant L Street Warehouse in Washington,

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<sup>1190</sup> Government Accountability Office (GAO), GAO High Risk Report 2013, GAO-13-283, Feb. 2013 at 106.

<sup>1191</sup> *Id.*

<sup>1192</sup> *Failures in Managing Federal Real Property: Hearing before Subcomm. on Gov’t Operations of H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2013).

<sup>1193</sup> *Addressing Unused and Vacant Federal Courthouses: A Case Study in Miami-Dade, Florida: Field Hearing before Subcomm. on Gov’t Operations of H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2013).

D.C.<sup>1194</sup> The hearing examined the cost to the taxpayers of underperforming or vacant assets and, in particular, the status of the vacant GSA L Street Warehouse, which costs GSA approximately \$70,000 per year to operate and maintain. Another field hearing regarding the FTC's assets was held in December, and, finally, on February 10, 2014, Chairman Mica held a hearing entitled, *Assessing NASA's Real Property Assets at the Kennedy Space Center* near Cocoa Beach, Florida.<sup>1195</sup> The hearing explored NASA's plan for the operations, maintenance, and use by private interests of the unneeded launch pads at the Kennedy Space Center, as well as the U.S. Air Force's plans for the 600,000+ of underutilized space located at Cape Canaveral Air Force Station ("CCAFS").<sup>1196</sup>

The purpose of these hearings was not only to highlight problems, but to encourage GSA to find creative ways for underutilized properties to generate revenue for the government, reduce deficit spending, create jobs and provide new opportunities. As a result of the Committee's work, many valuable yet non- or underperforming assets were sold or leased. One prominent success story is that of the Georgetown Heating Plant in Washington, D.C. Due to previous oversight conducted by both the Subcommittee on Government Operations and the House Transportation and Infrastructure Committee's Subcommittee on Economic Development, Public Buildings and Emergency Management, GSA finally sold the property in March of 2013 at a net profit to the taxpayers of \$19.5 million. The complex sat vacant for nearly a decade prior. Another example is that of the Old Post Office building, also located in Washington, D.C., which was leased by GSA to The Trump Organization for re-development into a hotel in 2013.

#### *GAINING ACCESS TO THE FEDERAL REAL PROPERTY PROFILE*

In order to inform federal real property legislation and assist in the oversight of the government's real property assets, the Committee requested access to the Federal Real Property Profile ("FRPP") data held by OMB. The Federal Real Property Council ("FRPC"), created in 2004 under GSA, developed the FRPP database to collect key information about the government's real property assets in order to better manage its requirements and implement remedial measures.<sup>1197</sup> The data fields include the agency occupying the property, location, square footage, use type, status (i.e. active, inactive), operating costs for the property, and the replacement value.

In the 2013 High Risk Report, GAO found that a lack of "accurate and useful data" hampers GSA and agencies' ability to make informed, effective decisions on how to manage their real property assets.<sup>1198</sup> As a result, the FRPP does not provide a complete picture of the uses and extent of underutilized and excess real property held by agencies. As such, GAO recommended that that GSA and the FRPC take action to improve the FRPP.<sup>1199</sup>

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<sup>1194</sup> *Government Operations Oversight: Addressing Unused and Vacant Federal Property: Field Hearing before Subcomm. on Gov't Operations of H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).

<sup>1195</sup> *Assessing NASA's Real Property Assets at the Kennedy Space Center: Field Hearing before Subcomm. on Gov't Operations of H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).

<sup>1196</sup> Attachment to Letter from Mr. Joe Sciabica, Director, Air Force Civil Engineer Ctr., Dep't of the Air Force, to Hon. John Mica, Chairman Subcomm. on Gov't Operations, H. Comm. on Oversight & Gov't Reform, Jan. 17, 2014.

<sup>1197</sup> Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

<sup>1198</sup> GOV'T ACCOUNTABILITY OFFICE, GAO-13-283, HIGH RISK REPORT 2013 107 (2013).

<sup>1199</sup> *Id.* at 108.

In December of 2011, Chairman Issa and Government Operations Subcommittee Chairman Mica first wrote to OMB requesting FRPP data pertaining to all federal real property with an appraisal value greater than \$50 million, including those properties which OMB may consider to be “high value assets.”<sup>1200</sup> Committee staff made follow-up requests via email to OMB staff on May 24 and May 31, 2012, and again on November 15, 2012, but the data was not received. On March 24, 2014, the Committee wrote to OMB requesting access to the FRPP data, again to no avail.<sup>1201</sup> Thus, on May 23, 2014, the Committee subpoenaed OMB for all underutilized and excess properties listed in the FRPP, including those assets valued at greater than \$50 million. On May 27, 2014, almost three years after the original request, OMB provided documents and information to the Committee.<sup>1202</sup>

On July 29, 2014, the Government Operations Subcommittee held a hearing entitled, *Federal Real Property: Eliminating Waste and Mismanagement of Real Property Assets*, to examine the excess and underutilized real property listed in the FRPP and what is being done to more efficiently manage those assets.<sup>1203</sup> Committee staff analysis and witness testimony from OMB, GSA and the Department of Veterans Affairs confirmed what GAO reports: the thoroughness and accuracy of the FRPP is in a woeful state, and the Federal Government continues to hold expensive assets that it does not need.

As of this writing, the 4,209 properties classified as “underutilized properties” in the database account for:

- over 24 million square feet of property,
- cost approximately \$95.7 million per year to operate and
- have a total replacement value of over \$8 billion.

Of these properties listed in the FRPP data, 156 of these properties cannot be disposed of for various reasons, such as security concerns, but 1,411 properties sit inactive or underutilized. The 3,293 properties that have been declared excess account for approximately 15.3 million square feet, cost \$37.2 million per year in operating costs and have a replacement value totaling nearly \$6.5 billion. 1,114 properties have been classified as unable to be disposed, while 1,563 (just under half) properties are slated to be disposed. The remaining 616 properties are divided as such: 357 have been reported excess, and 259 have had reports of excess submitted, but not yet accepted by GSA. The agencies with the largest number of underutilized properties are the Departments of Interior (1,542 properties), Agriculture (749), and Energy (723). These same three agencies have the highest number of excess properties: 1,075, 956 and 593, respectively.

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<sup>1200</sup> Letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform, to Jeffrey D. Zients, Deputy Director for Management, Office of Management and Budget, December 19, 2011.

<sup>1201</sup> Letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform, and Hon. John Mica, Chairman, Subcommittee on Government Operations, to Hon. Sylvia Mathews Burwell, Director, Office of Management and Budget, March 24, 2014.

<sup>1202</sup> H. Comm. on Oversight and Gov’t Reform Subpoena to Hon. Sylvia Mathews Burwell, May 23, 2014.

<sup>1203</sup> *Federal Real Property: Eliminating Waste and Mismanagement of Real Property Assets: Hearing before Subcomm. on Gov’t Operations of H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2014).

### *ADDRESSING THE EXCESS*

During Chairman Issa's tenure as leader of the Oversight and Government Reform Committee, more light has been shed on the waste and mismanagement of federal real property than ever before. The Committee succeeded in holding agencies accountable for their use of property assets and finally accessing the database used by the government to track its building inventory.

The foundation for ending the waste has been laid, and the next steps are crucial to preserving the momentum toward proper management and disposal of federal real property. The Oversight and Government Reform Committee must remain vigilant in its oversight of the real property portfolio, particularly the costs incurred by underutilized and excess properties. In partnership with GAO, OMB, GSA and federal agencies, the Committee must continue to explore ways to more efficiently decrease the number of unused federal buildings.

Additionally, the Committee's work analysis of the FRPP has highlighted the fact that the database is not a useful tool for assessing the true state of the federal real property portfolio. While the FRPP was intended to be a purely informational resource and not a property management system, it is a crucial piece of the decision-making process. The Federal Government must first know what it has in order to know what it can do without, or use more efficiently. Furthermore, the Congress needs, and the public deserves, transparency from the government -- least of all in what property it holds.

Since the Government Operations Subcommittee hearing in July, Committee staff has opened discussions with OMB and GSA as to how to implement GAO's recommendations for improving the process by which agencies collect and report FRPP data. The Committee urges future Oversight and Government Reform leadership to continue both the oversight of the FRPP and work with the FRPC to find legislative and administrative avenues for raising the integrity of the database.

## CHAPTER 6. HOW GOVERNMENT WORKS (OR DOESN'T)

Americans deserve an efficient, effective government that works for them. Too often, however, they are short-changed, and the Federal Government fails to hold itself and its employees accountable to American Taxpayers. As the size of the federal workforce continues to grow, Americans are right to question whether their money is being well-spent. Below, this report highlights some of the efforts by the Committee on Oversight and Government Reform to hold the Federal Government accountable to the American Taxpayers it serves.

### HEALTHCARE.GOV: WE SHOULD HAVE KNOWN BETTER

The Obama Administration entrusted the Centers for Medicare and Medicaid Services (“CMS”) with the lead role in the implementation of the Patient Protection and Affordable Care Act (“PPACA” or “ACA”), or commonly referred to as “ObamaCare.”<sup>1204</sup> Among other provisions, PPACA established state-based health insurance exchanges.<sup>1205</sup> Within CMS, the Center for Consumer Information and Insurance Oversight (“CCIIO”) was responsible for developing and operating the federally-facilitated exchange, or federally-facilitated market place (“FFM”), in the 36 states that declined to set up their own state exchange.<sup>1206</sup> The health insurance exchanges were conceptualized as an online marketplace that facilitates the buying and selling of health insurance products.

Before the health insurance exchanges opened for enrollment in October 2013, the Committee and non-partisan government watchdogs raised questions about the Administration’s readiness. The Government Accountability Office noted that “much remains to be accomplished within a relatively short amount of time.... factors such as the still-evolving scope of CMS's required activities in each state and the many activities yet to be performed--some close to the start of enrollment--suggest a potential for challenges going forward.”<sup>1207</sup> Alan Duncan, with the Treasury Inspector General for Tax Administration (“TIGTA”), raised concerns that there will be insufficient testing of federal exchange components, including the portions developed and run by the IRS.<sup>1208</sup> Finally, the HHS Office of Inspector General raised concerns about delays with the security assessments for the federal data services hub and FFM.<sup>1209</sup>

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<sup>1204</sup> Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat 119 (2010).

<sup>1205</sup> *Id.*

<sup>1206</sup> *Id.*

<sup>1207</sup> GOVERNMENT ACCOUNTABILITY OFFICE, STATUS OF CMS EFFORTS TO ESTABLISH FEDERALLY FACILITATED HEALTH INSURANCE EXCHANGES, GAO-13-601 (June 19, 2013), available at: <http://www.gao.gov/products/GAO-13-601>.

<sup>1208</sup> *Evaluating Privacy, Security, and Fraud Concerns with Obamacare's Information Sharing Apparatus, Before the Subcomm. on Energy Policy, Health Care and Entitlements, Comm. on Oversight and Government Reform, joint with the Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies, Comm. on Homeland Security*, 113 Cong. (July 17, 2013) (Testimony of Alan Duncan, Assistant Inspector General for security and information technology services, Treasury Inspector General for Tax Administration) (“And also, the thing we’ve been talking about quite often, which is the interagency testing—this is all the components, including the IRS, that there is sufficient testing for the entire system, not just the pieces.”).

<sup>1209</sup> DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, OBSERVATIONS NOTED DURING THE OIG REVIEW OF CMS'S IMPLEMENTATION OF THE HEALTH INSURANCE EXCHANGE-DATA SERVICES HUB (Aug. 2, 2013), available at: <https://oig.hhs.gov/oas/reports/region1/181330070.asp>.

Just over two months before open enrollment began, CMS Administrator Marilyn Tavenner testified before the Committee: “I want to assure you that October 1, 2013, the health insurance marketplace will be open for business. Consumers will be able to log onto [healthcare.gov](http://healthcare.gov), fill out an application and find out what coverage and benefits they qualify for.”<sup>1210</sup> Despite the confident assurances of Administrator Tavenner and other Administration officials, the federal health insurance website, [Healthcare.gov](http://Healthcare.gov), crashed right after it went live. Users experienced long wait times, errors, bugs, and other problems. The problems regarding CMS’s failure to launch a functioning website are consistent with broader issues in transparency and accountability within the Administration. Even after the high profile functionality problems, officials at CMS and HHS refused to admit to the public that the website was not on track to launch without significant functionality problems and substantial security risks, despite evidence to the contrary.

By the first day of enrollment on October 1, 2013, CMS had already spent hundreds of millions of dollars on exchange development.<sup>1211</sup> The widespread problems reported with [Healthcare.gov](http://Healthcare.gov) prompted the Committee to investigate the Administration’s mismanagement of the project. On October 10, 2013, Chairman Issa, along with Senator Lamar Alexander, wrote to HHS requesting information on the design, development, and testing of [Healthcare.gov](http://Healthcare.gov) and its related systems. After HHS refused to comply with the Committee’s request, the Committee was forced to issue a subpoena in order to obtain documents.

To date, the Committee has held multiple hearings on the management of the exchange development. The Committee has interviewed over a dozen current and former Administration officials involved with the development of the FFM. On September 17, 2014, the Committee released a staff report titled *Behind the Curtain of the HealthCare.gov Rollout* which shows multiple troubling instances where ineffective government agencies concealed information about their failures not only from their own colleagues and leaders, but also from the news media, state partners, Congress, and the American people.<sup>1212</sup> Additionally, the Committee found that CMS launched the website in the face of security concerns, thereby risking users’ personally identifiable

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<sup>1210</sup> *Evaluating Privacy, Security, and Fraud Concerns with Obamacare’s Information Sharing Apparatus, Before the Subcomm. on Energy Policy, Health Care and Entitlements, Comm. on Oversight and Government Reform, joint with the Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies, Comm. on Homeland Security*, 113 Cong. (July 17, 2013) (Testimony of Marilyn Tavenner, Administrator, Centers for Medicare and Medicaid Services (July 17, 2013).

<sup>1211</sup> Estimates of the amount spent prior to October 1, 2013, varied widely. According to HHS, \$174 million was spent on the website and its related IT components by the end of August. This number increased to \$319 million by the end of October. See Glenn Kessler, *How much did HealthCare.gov cost? (Part 2)*, WASH. POST (Nov. 19, 2013). This number continues to grow. According to HHS, the Federal Government “obligated a total of approximately \$834 million on Marketplace-related IT contracts and interagency agreements” as of February 28, 2014. See Department of Health and Human Services, Responses to Questions for the Record, Committee on Health, Education, Labor, and Pensions Hearing on May 8, 2014 (2014), available at: [http://www.help.senate.gov/imo/media/050814\\_HELP\\_Burwell\\_QFRs-Alexander-FINAL.pdf](http://www.help.senate.gov/imo/media/050814_HELP_Burwell_QFRs-Alexander-FINAL.pdf).

<sup>1212</sup> Staff of H. Cmte. on Oversight & Gov’t Reform, *Behind the Curtain of the HealthCare.gov Rollout*, 113th Cong. (2014), available at: <http://oversight.house.gov/wp-content/uploads/2014/09/Healthcare-gov-Report-Final-9-17-14.pdf>.

information (“PII”). This finding was corroborated by a non-partisan GAO report released on September 16, 2014.<sup>1213</sup>

#### *LACK OF TRANSPARENCY AND ACCOUNTABILITY DURING LAUNCH OF HEALTHCARE.GOV*

Following the collapse of Healthcare.gov, the Administration endeavored to keep the true nature of the website’s problems out of the public eye. For example, on October 6, 2013, five days after the website’s disastrous launch, Todd Park, a White House official, assured the public that high volume was the reason for the so-called glitches: “These bugs were functions of volume.... Take away the volume and it works.”<sup>1214</sup> However, high-ranking CMS and HHS officials who reported to Mr. Park knew that high volume was not primarily to blame.<sup>1215</sup> Two days after the launch, HHS’s Chief Technology Officer, Bryan Sivak, wrote “[t]his is a fucking disaster. It’s 1am and they don’t even know what the problem is, for sure. Basic testing should have been done hours ago that hasn’t been done.”<sup>1216</sup> A CMS employee responded, “This is going to turn ugly and someone is going to leak that CMS has no clue about the problem.”<sup>1217</sup>

The relationship between CMS and HHS IT officials deteriorated in the months leading up to the website’s launch, as CMS officials refused to share vital information with superiors at HHS, opting instead to communicate directly with White House officials. In January 2013, Frank Baitman, HHS Chief Information Officer (“CIO”), asked Tony Trenkle, CMS CIO, and Henry Chao, CMS Deputy CIO and a key manager in the development of Healthcare.gov, for greater access to information regarding the development of Healthcare.gov. Mr. Baitman wrote that, “[g]iven the importance of this project to the Secretary and the White House, it’ll continue to receive very high level attention; thus, we need to ensure that emerging issues – which are inevitable – are effectively understood and analyzed at the appropriate level.”<sup>1218</sup> Mr. Baitman expressed concerns about “poor information flow between policy, operational and IT planners/developers,” and noted that “critical knowledge is concentrated in key personnel at CMS.”<sup>1219</sup> In September, Mr. Baitman again reiterated his concerns about his lack of access to information related to the project’s development. Writing to a senior CMS official, Mr. Baitman wrote “[o]ne of the challenges I have faced is the lack of vision into the Marketplace development effort since I came onboard – as well as the Marketplace security preparations.”<sup>1220</sup>

An August 2013 email chain further illustrates the odd relationship between CMS and HHS on the project, as HHS officials began to secretly seek information about the project through informants. Julie Herron, a former subordinate to Mr. Sivak, had been transferred to CMS to work on activities

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<sup>1213</sup> GOV’T ACCOUNTABILITY OFFICE, GAO-14-730, ACTIONS NEEDED TO ADDRESS WEAKNESSES IN INFORMATION SECURITY AND PRIVACY CONTROLS (2014), available at <http://www.gao.gov/products/GAO-14-730>.

<sup>1214</sup> Tim Mullaney, *Obama adviser: Demand overwhelmed HealthCare.gov*, USA TODAY, Oct. 6, 2013.

<sup>1215</sup> Email between Monique Outerbridge and Tony Trenkle (Sept. 25, 2013) [HHS-0110879].

<sup>1216</sup> Email from Bryan Sivak, Chief Technology Officer, Dep’t of Health and Human Services to Julie Herron, Project Manager, Dep’t Health and Human Services (Oct. 3, 2013) [SIVAK\_HOGR 000038-000040].

<sup>1217</sup> *Id.*

<sup>1218</sup> Email from Frank Baitman, Chief Information Officer, Dep’t Health and Human Services, to Tony Trenkle, Chief Information Officer, CMS, et.al (Jan. 22, 2013) [HHS-0108861,2].

<sup>1219</sup> *Id.*

<sup>1220</sup> Email Frank Baitman to Michelle Snyder.

occurring on “Day 2”, referring to website components not needed on October 1st, but needed shortly afterwards. Ms. Herron funneled information to Mr. Sivak about the development of Healthcare.gov. For example, she wrote that “Jon, Ketan, & Henry [Chao] are apparently locked in the Command Center (still) working through issues and I suspect that will continue until launch.”<sup>1221</sup> Mr. Sivak indicated that he wanted to keep communications with Ms. Herron secret from CMS, writing “I don’t want to tell anyone that we talk anymore :).”<sup>1222</sup> In reply, Ms. Herron wrote “Good point.”<sup>1223</sup>

On September 10, 2013, Ms. Herron forwarded Mr. Sivak a message from another staff member involved with the project. The email, titled “From Ed” read:

I don’t know who is making the calls about what gets cut and what stays. The relationships between OIS, OC [Office of Communications], and CCIIO are very opaque. CGI seems to have failed to deliver so much that all the timelines and deadlines of the last 8 months seem like a total fiction. It does not surprise me that Bryan [Sivak] has only seen parts. I would be very surprised to hear if there is a working end-to-end version in existence. I have yet to hear of one.

So to your question of how I’m feeling about launch...not good. Kind of Heartbroken, actually. Whatever launches, if functional, will only technically meet the criteria of launching the exchange. It will be riddled with confusing and hard-to-use compromises. But I don’t really. I’m not seeing anything that’s being delivered. I’m just piecing things together through the grapevine.<sup>1224</sup>

Mr. Sivak responded, “like I said, it’s all negative. I’m going to embark on a campaign to declare victory without fully launching. We’ll see.”<sup>1225</sup> Mr. Sivak testified that on September 10, 2013, he along with Frank Baitman approached HHS leadership about implementing a phased launch of Healthcare.gov, similar to a beta test.<sup>1226</sup> Mr. Baitman and Mr. Sivak brought up the idea of a limited launch at a meeting of HHS leadership including Deputy Secretary, Bill Corr, Director of the HHS Office of Health Reform, Mike Hash, and CMS Administrator, Marilyn Tavenner.<sup>1227</sup> However, both testified that their suggestion was rejected.<sup>1228</sup>

CMS and HHS officials failed to effectively collaborate and communicate during the testing and launch of Healthcare.gov, leading to disastrous outcomes. CMS officials developing the exchange

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<sup>1221</sup> Email from Julie Herron, Project Manager, Dep’t Health and Human Services, to Bryan Sivak, Chief Technology Officer, Dep’t of Health and Human Services (Aug. 20, 2013) [SIVAK\_HOGR 000280,81].

<sup>1222</sup> *Id.*

<sup>1223</sup> *Id.*

<sup>1224</sup> *Id.*

<sup>1225</sup> *Id.*

<sup>1226</sup> A beta test is “a field test of the beta version of a product (as software) especially by testers outside the company developing it that is conducted prior to commercial release.” *Beta test*, MERRIAM WEBSTER <http://www.merriam-webster.com/dictionary/beta%20test>.

<sup>1227</sup> Transcribed Interview Franklin Baitman, Chief Information Officer, Dep’t Health and Human Services, in Washington, D.C. (Jan. 14, 2014); Transcribed Interview of Bryan Sivak, Chief Technology Officer, Dep’t of Health and Human, in Washington, D.C. (Feb. 12, 2014).

<sup>1228</sup> *Id.*

refused to share vital information with senior IT officials at HHS, even while communicating directly with White House officials. Left out of the loop, HHS officials resorted to using informants within CMS to obtain crucial information, often communicating over private email. These tense relationships resulted in blame-shifting, little collaboration, and ultimately, a complete lack of accountability on the part of officials responsible for the Healthcare.gov debacle.

### *HEALTHCARE.GOV LAUNCHED WITH KNOWN SECURITY WEAKNESSES*

The pressure for Healthcare.gov to meet an arbitrary launch date forced CMS officials to take risks with users' personally identifiable information ("PII"). The Committee found numerous problems related to CMS oversight of the security of Healthcare.gov. These include deficiencies in the security testing of the system, infighting amongst CMS officials and contractors over the security of the FFM, and launching the FFM with high risks, and over the objection of the agency's Chief Information Security Officer. The Committee's findings were corroborated by the GAO, which found that weaknesses still remained in the Healthcare.gov system as of September 2014.<sup>1229</sup> Furthermore, GAO found that, "Until these weaknesses are fully addressed, increased and unnecessary risks remain of unauthorized access, disclosure, or modification of the information collected and maintained by Healthcare.gov and related systems, and the disruption of service provided by the systems."<sup>1230</sup>

Two separate teams within CMS conducted security testing for the federal exchange, also known as the Federally-Facilitated Marketplace. The first team, headed by Thomas Schankweiler, an Information Security Officer at CMS, coordinated the day-to-day security activities of the FFM development, working closely with CMS Deputy CIO Henry Chao and the federal marketplace development team. The second team was run through the Enterprise Information Security Group (EISG) within CMS, headed by Teresa Fryer, the Chief Information Security Officer. EISG's role was to oversee the Security Control Assessment, a key milestone the system needs to complete in order to begin operations. Instead of collaborating, documents show significant conflicts between Mr. Schankweiler's FFM development team and Ms. Fryer's EISG team. This counterproductive infighting contributed to poor security testing results and Mr. Schankweiler's scheme to contest negative and embarrassing findings from the independent assessment.

Ms. Fryer testified she felt that the daily reports on SCA tests did not fully convey the testing challenges experienced by the security testers.<sup>1231</sup> For example, in a September 17, 2013, email, Ms. Fryer wrote: "there were many interruptions affecting testing such as the environment was

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<sup>1229</sup> *Examining Obamacare's Failures in Security, Accountability, and Transparency: Hearing Before the Comm. On Oversight and Government Reform*, 113 Cong. (Sept. 18, 2014) (Testimony of Gregory C. Wilshusen, Director, Information Security Issues, Government Accountability Office) ("While CMS has taken important steps to apply security and privacy safeguards to Healthcare.gov and its supporting systems, significant weaknesses remain that put these systems and the sensitive, personal information they contain at risk of compromise."), available at: <http://oversight.house.gov/wp-content/uploads/2014/09/Mr.-Wilshusen-Statement-Bio.pdf>.

<sup>1230</sup> GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-730, HEALTHCARE.GOV: ACTIONS NEEDED TO ADDRESS WEAKNESSES IN INFORMATION SECURITY AND PRIVACY CONTROLS (2014), available at: <http://www.gao.gov/products/GAO-14-730>.

<sup>1231</sup> Transcribed Interview with Teresa Fryer, Chief Information Security Officer, CMS, in Washington, D.C. (Mar. 26, 2014).

unstable and EIDM was also down. So not much testing got done.”<sup>1232</sup> Therefore, despite the fact that there were no security vulnerability “findings” during that day of testing, very little testing was actually performed given the components of the system that were inoperable that day. Ms. Fryer then wrote to Mr. Linares “Kevin Charest [HHS CISO] has asked for an update of the FFM testing by noon tomorrow and I’m going to give him a truthful update of exactly what is going on. I am tired of the cover ups.”<sup>1233</sup> In a transcribed interview, Ms. Fryer testified: “[O]ur job as security experts is to portray the posture or the events that are happening and to brief senior leadership management on the security issues that are being raised during testing. And I felt that they were not being properly being briefed or properly portrayed, the issues that were happening that week during security testing.”<sup>1234</sup>

Once MITRE completed their September Security Assessment, Mr. Schankweiler’s FFM development team was unhappy with the report and sought to have it changed. On September 26, 2013, Darren Lyles, one of the IT security officials assigned to the FFM development team, wrote Ms. Fryer:

The Draft SCA [security control assessment] Report has been called into question by CGI [primary contractor building the FFM] and CIISG [Consumer Information Insurance Group, the team within CMS that works with contractors to develop the FFM and other Healthcare.gov components] Stakeholders. There are assertions made in the report that are deemed to be erroneous and misrepresentative of what actually occurred. I have attached the report that has been commented on by CGI and would like to submit this for your review.<sup>1235</sup>

Michael Mellor, Ms. Fryer’s deputy, responded to Mr. Lyles: “Keep in mind – that the purpose of the SCA is to provide an independent assessment of the security posture of a system. As part of that independent assessment, the maintainer of the system likely will not agree with all of the findings and the SCA report.”<sup>1236</sup>

Mr. Schankweiler, Mr. Lyles’ superior, then responded to Mr. Mellor, insisting that the report should be reviewed by senior CMS officials and worried the report would be seen by others outside CMS:

“We need to hit the pause button on this report and have an internal meeting about it later next week. It is important to look at this within the context of the decision

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<sup>1232</sup> Email from Teresa Fryer, Chief Information Security Officer, CMS, to George Linares, Chief Technology Officer, CMS (Sept. 17, 2013) [HHS-0103293].

<sup>1233</sup> *Id.* (emphasis added).

<sup>1234</sup> Transcribed Interview with Teresa Fryer, Chief Information Security Officer, CMS, in Washington, D.C. (Mar. 26, 2014).

<sup>1235</sup> Email from Darren Lyles, to Teresa Fryer, Chief Information Security Officer, CMS (Sept. 26, 2013) [HHS-0017249] (emphasis added).

<sup>1236</sup> Email from Michael Mellor, Deputy Chief Information Security Officer, CMS, to Darrin Lyles, Information System Security Officer, CMS (Sept. 27, 2013) (emphasis in original).

memos and ATO memo that is going up for Tony [Trenkle, CMS Chief Information Officer] and Michelle [Snyder, CMS Chief Operating Officer] to sign.<sup>1237</sup>

Mr. Schankweiler then wrote the report was “only partially accurate, and extremely opinionated, false, misrepresentative, and inflammatory.” Mr. Schankweiler noted that “It is very possible that this report will be reviewed at some point by OIG, and could see the light of day in other ways.”<sup>1238</sup> Mr. Schankweiler offered to “look at the report from the government perspective and provide ... analysis.”<sup>1239</sup>

MITRE’s role was to provide an independent assessment of the FFM system prior to launch. However, at the time of testing, significant components of the FFM remained unfinished and MITRE faced difficulties in testing the system. Their inability to effectively test the system was a significant concern for both the MITRE testers and Ms. Fryer’s EISG team. Because of these concerns, Ms. Fryer testified that she recommended denying the Authority to Operate (“ATO”) for the FFM, which would prevent the system from launching.<sup>1240</sup> However, other CMS employees disagreed with Ms. Fryer and advocated signing the ATO regardless of security concerns.<sup>1241</sup>

Tony Trenkle, then CMS CIO, felt uncomfortable signing the ATO authorizing the FFM to go-live. At a meeting in late September with Michelle Snyder, then-CMS Chief Operating Officer, CMS officials discussed elevating the ATO decision to CMS Administrator Tavenner.<sup>1242</sup> At this meeting, Ms. Fryer’s concerns were conveyed to Michelle Snyder. Some of these concerns were:

- Unknown risk of applications to withstand attacks aimed at system availability – high risk.<sup>1243</sup>
- Unknown risks associated with those controls and those functionalities that were not tested – high risk.<sup>1244</sup>
- Risk of code being released into production and available to the public, which is not functionally complete or security tested.<sup>1245</sup>
- Risk of being vulnerable to attacks... as application had insecure configuration settings and multiple access control deficiencies in the tested environments.<sup>1246</sup>

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<sup>1237</sup> Email from Thomas Schankweiler, Security Officer, CMS, to Michael Mellor, Deputy Chief Information Security Officer, et. al. (Sept. 27, 2013) (emphasis added).

<sup>1238</sup> *Id.* (emphasis added).

<sup>1239</sup> *Id.* (emphasis added).

<sup>1240</sup> Transcribed Interview with Teresa Fryer, Chief Information Security Officer, CMS, in Washington, D.C. (Dec. 17, 2013).

<sup>1241</sup> Ordinarily, the Chief Information Officer’s signature on an ATO signifies that the federal system was sufficiently tested to be secure, and was ready to go-live. However, due to the problems with the security testing, CMS CIO Tony Trenkle took the unprecedented step of elevating the ATO decision to Administrator Tavenner who authorized the FFM on September 27, 2013.

<sup>1242</sup> Transcribed Interview with Tony Trenkle, Chief Information Officer, CMS, in Washington, D.C. (Dec. 4, 2013).

<sup>1243</sup> Centers for Medicare and Medicaid Services, Marketplace Security Briefing (Sept. 23, 2013).

<sup>1244</sup> *Id.*

<sup>1245</sup> *Id.*

According to Mr. Trenkle:

the reason we issued the memo as it was because of the fact that this was the biggest effort that CMS had done since Part D, and there was a lot of political and other interest in this effort, so we felt because we couldn't do the complete testing that that qualified as something we would go to the administrator for to make a decision on whether she was willing to accept the risk.<sup>1247</sup>

None of the officials interviewed by the Committee, including senior IT officials at CMS and HHS, could recall an instance where the Administrator had authorized a system to go-live.

Along with the security authorization for the FFM, Administrator Tavenner also authorized nine states to connect to the data services hub despite not having completed all of their security documentation.<sup>1248</sup> In order for a state exchange, as well as other state eligibility systems, to connect to the data hub, they need to obtain an authority to connect from CMS. According to documents obtained by the Committee, CMS officials were scrambling to approve applications for states to connect before the October 1<sup>st</sup> start of open enrollment.<sup>1249</sup> These applications were approved despite approximately two-thirds of the states being rated as a "high risk" by the CMS CISO.

Over the past year, the Committee has conducted a thorough review of the management failures over the development and implementation of Healthcare.gov. The Committee's investigation found numerous failures of management, including where users' PII was put at risk to meet a political deadline, as well as failures in transparency to Congress, the press, and the American public. The Administration has already spent a billion dollars on a website that is still not fully operational, and it remains unclear whether the Administration has corrected the many deficiencies that led to the disastrous launch. The same government officials responsible for the lack of transparency and accountability a year ago remain in positions of authority. Administration officials must be held accountable for obstructing public and private access to necessary information, and the Administration must acknowledge that it has failed to live up to President Obama's declaration that he is running the "most transparent administration in history."<sup>1250</sup>

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<sup>1246</sup> *Id.*

<sup>1247</sup> Transcribed Interview with Tony Trenkle, Chief Information Officer, CMS, in Washington, D.C. (Dec. 4, 2013).

<sup>1248</sup> Memorandum from James Kerr and Julie Boughn, Centers for Medicare and Medicaid Services, to Marilyn Tavenner, Administrator, Centers for Medicare and Medicaid Services, States Connecting to the Marketplace—Decision (Sept. 27, 2013).

<sup>1249</sup> Ricardo Alonso-Zaldivar, *AP Exclusive: Health law cybersecurity challenges*, ASSOCIATED PRESS BLOG (Feb. 25, 2014, 4:43 P.M.), <http://news.yahoo.com/ap-exclusive-health-law-cybersecurity-challenges-194241774--finance.html>.

<sup>1250</sup> Jonathan Easley, *Obama Says His is the 'Most Transparent Administration in History'*, HILL (Feb. 14, 2013).

## RIGHTSIZING THE FEDERAL WORKFORCE

The federal workforce grew by more than 350,000 employees between 2000 and 2010. By the end of fiscal year 2015, the size of the Federal Government will have grown by an estimated 239,000 workers, to 2.1 million employees.<sup>1251</sup> The President's National Commission on Fiscal Responsibility and Reform called for immediate reforms to reduce federal spending and make the Federal Government more efficient. The recommendations included a reduction in the size of the federal workforce by 10 percent through attrition. The Commission estimated this proposal would save \$13.2 billion in savings by 2015.<sup>1252</sup> In consultation with the Committee, the House Budget Resolution included a similar policy, assuming a 10 percent reduction in the federal workforce through attrition at a one for three replacement rate.<sup>1253</sup> The Congressional Budget Office estimated \$248 billion in savings through 2021 from shrinking the federal workforce combined with a pay freeze for civilian employees through 2015.

The Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy held a hearing to review the Commission's recommendation,<sup>1254</sup> and several Committee members, including Chairman Issa, introduced legislation to right-size the federal workforce.<sup>1255</sup> The Reducing the Size of the Federal Government Through Attrition Act of 2011, introduced by Congressman Mick Mulvaney was reported by the Committee on December 19, 2011.<sup>1256</sup>

Members of the Committee appreciate our talented federal workforce and the critically essential services it provides. However, the current size of the federal workforce is fiscally unsustainable. Congress has an obligation to consider all policy reforms that halt the sprawl of government and force agency heads to make government more efficient. The Committee recognizes that the ratio of federal employees to the overall U.S. population has declined in recent decades, but this should not be understood to mean that the Federal Government is now understaffed.

### *FEDERAL WORKER PAY AND PERFORMANCE MANAGEMENT*

Federal workers receive generous benefits, pay, and job security – a combination rare in the private sector, regardless of the economy. A January 2012 CBO study found that federal employees receive an average of 16 percent more in total compensation than their private sector counterparts.<sup>1257</sup>

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<sup>1251</sup> <http://www.whitehouse.gov/omb/budget/historicals>

<sup>1252</sup> NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM, *THE MOMENT OF TRUTH* (Dec. 2010) available at

[http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12\\_1\\_2010.pdf](http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf).

Although there is much debate over the consequences, as technology improves the need for human labor is in some ways reduced. *Should technology replace human labor?* DEBATE.ORG, <http://www.debate.org/opinions/should-technology-replace-human-labor>.

<sup>1253</sup> H.Con.Res. 34., H. Con. Res. 96.

<sup>1254</sup> *Rightsizing the Federal Government: Hearing before the Subcomm. on Fed. Workforce, U.S. Postal Service and Labor Policy of H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011).

<sup>1255</sup> H.R. 2114 (Rep. Issa), H.R. 6474 (Rep. Ross), H.R. 657, H.R. 829 (Rep. Lummis), H.R. 3029 (Rep. Mulvaney).

<sup>1256</sup> H.R. 3029, 112th Cong. (as reported by H. Cmte. on Oversight & Gov't Reform, Dec. 19, 2011).

<sup>1257</sup> CONGRESSIONAL BUDGET OFFICE, *COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE SECTOR EMPLOYEES* (2012), available at <http://www.cbo.gov/publication/42921>.

Much has changed since 1949 when the General Schedule was established to classify federal workers according to their job duties and assign pay. Minimum wage was 70 cents an hour, the average yearly wage was just under \$3000, and the Federal Government's workforce consisted mainly of clerical staff. Sixty-five years later, the government continues to classify and pay 80 percent of its workforce using the same, antiquated system, ignoring the realities of the current labor market. It is no wonder we continue to bear the burden of an inefficient and unaccountable Federal Government.

The Committee reviewed federal worker compensation and found that current federal salaries and benefits are not in line with the marketplace when compared to private workforce compensation.<sup>1258</sup> Since the Federal Government has no incentive or obligation to reduce salaries in order to be competitive to stay in business, it simply borrows more money or raises taxes. In November 2010, President Obama announced a 2-year pay freeze for federal employees. Unfortunately, the pay freeze did not impact salary increases driven primarily by the passage of time or bonuses, meaning President Obama's pay freeze wasn't really a freeze.

Federal workers who have not reached the maximum rate of pay for his or her grade are advanced in pay successively to the next higher rate of pay with the passage of time, provided the employee's work is of an acceptable level of competence as determined by the agency head.<sup>1259</sup>

- Workers advance to the next pay level following completion of one year of service in steps 1, 2, and 3; two years of service in steps 4, 5, and 6; or three years of service in steps 7, 8, and 9.
- Each step represents, on average, a 3 percent increase in base salary.
- The within-grade increase denial rate is 0.06 percent. In other words, only 4 out of every 1000 federal workers are deemed to be performing at a less-than-fully successful level.

At the same time, the percentage of federal workers fired every year by agencies fell from 0.57 percent in fiscal 2009 to 0.46 percent in 2013. The private sector fires nearly six times as many employees – about 3.2 percent.<sup>1260</sup>

Federal pay is not based on real data for real occupations in real places, nor is it kept up to date based on data. It has been 17 years since the Bureau of Labor Statistics collected survey data for

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<sup>1258</sup> *Are Federal Workers Underpaid?: Hearing before Subcomm. on Federal Workforce, U.S. Postal Service and Labor Policy of H. Comm. on Oversight & Gov't Reform, 112th Cong. (2011). Oversight of the Federal Workforce: The Viability of the Senior Executive Service: Hearing before the Subcomm. on Federal Workforce, U.S. Postal Service, and Labor Policy of H. Comm. on Oversight & Gov't Reform, 113th Cong. (2014); Oversight of the Federal Workforce: Is the Federal Government's General Schedule (GS) a Viable Personnel System for the Future?: Hearing Before the Subcomm. on Federal Workforce, U.S. Postal Service, and Labor Policy, 113th Cong. (2014).*

<sup>1259</sup> 5 U.S.C. § 5335.

<sup>1260</sup> Andy Medici, *Federal firings continue to drop*, FED. TIMES, Jun. 23, 2014, available at <http://www.federaltimes.com/article/20140623/MGMT/306230009/Federal-firings-continue-drop>.

the benchmark jobs used for pay assessments.<sup>1261</sup> No employer, except for the President's Pay Agent, uses BLS data as its primary survey source.<sup>1262</sup>

At the Committee's request, GAO examined OPM's management of the General Schedule. GAO found that OPM's implementation of the system has diminished several attributes needed in a modern job classification system, including transparency, internal equity, simplicity, flexibility, and adaptability.<sup>1263</sup> GAO recommended that OPM needs to improve the design, management, and oversight of the General Schedule.<sup>1264</sup>

### *OFFICIAL TIME: GOOD VALUE FOR THE TAXPAYER?*

Labor relations law currently permits federal workers to charge "official time" when negotiating collective bargaining agreements, participating in proceedings before the Federal Labor Relations Authority, and performing certain representational activities. Simply stated, official time is when federal employees stop doing their assigned duty work to instead remain in duty status and receive pay when performing tasks for labor unions. Official time has increased under the Obama Administration. The Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy held a hearing to examine the use of official time.<sup>1265</sup>

Since fiscal year 2009, the total official time hours have been steadily increasing, with federal workers spending 3.4 million hours on official time in 2012 at a cost to the taxpayer of \$157 million, an increase of 450,000 hours over 2009.<sup>1266</sup> The increase comes with little evidence of improved government or individual employee performance. At the same time, OPM has stated collecting and reporting data on official time is not a priority at this time. OPM continues to use a data collection method that may not fully represent the true cost of this taxpayer-funded activity.<sup>1267</sup>

Continued and timely release of information concerning union activities conducted by federal employees while on official time is necessary for taxpayers to ensure such time contributes to the productivity and effectiveness of the Federal Government.

### *RESTRAINING GOVERNMENT SPENDING THROUGH WORKFORCE REFORM*

Our fiscal situation requires tough choices to restrain government spending. In his budget request for FY2015, President Obama stated that "the Federal personnel system ... remains inflexible and outdated" and that "the pay and classification systems need to be updated." He further stated that

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<sup>1261</sup> Howard Risher, *Analysis: Ten reasons to Replace the General Schedule*, GOV'T EXEC., Nov. 23, 2011, available at <http://www.govexec.com/pay-benefits/2011/11/analysis-ten-reasons-to-replace-the-general-schedule/35481/>.

<sup>1262</sup> Howard Risher, *The Heat is Turned Up on Federal Pay*, FEDSMITH.COM, Apr. 22, 2014, available at <http://www.fedsmith.com/2014/04/22/the-heat-is-turned-up-on-federal-pay/>.

<sup>1263</sup> GAO-14-677.

<sup>1264</sup> GAO-14-677.

<sup>1265</sup> *Official Time: Good Value for the Taxpayer?: Hearing before Subcomm. on Federal Workforce, U.S. Postal Service and Labor Policy of H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011).

<sup>1266</sup> U.S. OFFICE OF PERSONNEL MANAGEMENT, LABOR-MANAGEMENT RELATIONS IN THE EXECUTIVE BRANCH, October 2014, available at <http://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf>.

<sup>1267</sup> GAO-15-9.

“An alternative, cost-effective system needs to be developed that will allow the Government to compete for and reward top talent, while rewarding performance.”

The Committee agrees. Agencies must focus on their core mission, reassess priorities, and direct taxpayer dollars to where they are most needed. The taxpayer can no longer be asked to foot the bill for federal employees while watching their own salaries remain flat and their benefits erode. Going forward, Congress and the Administration have an obligation to consider all policy reforms that overhaul federal compensation to reduce costs and better align with the private sector. At the same time, federal workers must be held accountable for their taxpayer-funded work.

## POWER AND RESPONSIBILITY: FAILED LEADERSHIP AT CHEMICAL SAFETY BOARD AND NUCLEAR REGULATORY COMMISSION

During Chairman Issa's tenure the Committee has conducted in depth investigations into egregious mismanagement at two independent agencies. This mismanagement results in wasted taxpayer dollars and lost efficiency – resulting in a Federal Government that cannot perform the duties expected by the American Taxpayer.

### *THE NUCLEAR REGULATORY COMMISSION INVESTIGATION IN 2011*

In March 2011, the Committee launched an investigation into the Nuclear Regulatory Commission (“NRC”) and the actions of its Chairman, Gregory Jaczko. Initially, the Committee's investigation focused on the Yucca Mountain license application and allegations that Chairman Jaczko abused his position to further the political objectives of the Obama Administration and his former boss, Senate Majority Leader Harry Reid.

Over the course of the investigation, it became apparent that Chairman Jaczko's abuse of authority reached well beyond the NRC's Yucca Mountain activities and threatens the NRC's golden reputation in the US and internationally.<sup>1268</sup>

The Nuclear Regulatory Commission is responsible for ensuring the safe and secure use of commercial nuclear power in the United States. It is governed by a five member Commission, with at least two from each party, and has approximately 4000 employees. The NRC is frequently named “One of the Best Places to Work” in the Federal Government and the staff's commitment at all levels to its core values – Integrity, Service, Openness, Commitment, Cooperation, Excellence, and Respect – is often credited for the high morale.

Historically, and certainly under the two previous chairmen, the five member Commission operated as a collegial body. Over the course of its investigation, the Committee found the situation drastically changed under Chairman Jaczko. Chairman Jaczko had a different interpretation of his roles and responsibilities under the relevant law – the Reorganization Plan No. 1 of 1980 – than his predecessors.

Under Chairman Jaczko's interpretation of the law, power was much more centralized in the Chairman's office. The Committee's investigation revealed many negative consequences of this centralization of power, including:

- Preventing the Commission's unfettered access to the advice and opinions of NRC staff, including deletion of the staff's recommendations in formal staff papers.
- Control of what policy issues are brought to the Commission and when, enabling him to prioritize those issues of greatest importance to the Chairman.

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<sup>1268</sup> For more detailed information about the Committee's investigation into the actions of Chairman Jaczko, see the Committee's staff report, *A Crisis of Leadership*. Staff of H. Cmte. of Oversight & Gov't Reform, *A Crisis of Leadership: How the Actions of Chairman Gregory Jaczko are Damaging the Nuclear Regulatory Commission*, 112th Cong. (2011).

- Preventing his fellow Commissioners from contributing their advice and expertise to agency's response to the March 2011 Fukushima Daiichi nuclear disaster in Japan through his use of emergency authorities.

Effectively, the NRC was being run not by a bipartisan, five member Commission but rather by a single, highly political individual. As a result, the NRC was not operating as carefully designed to ensure the safe and secure use of commercial nuclear power, with decisions informed by the technical expertise of the staff rather than politics.

On October 13, 2011, four Commissioners – two Democrats and two Republicans – signed a letter to White House Chief of Staff Bill Daley expressing their concerns about Chairman Jaczko's leadership and abusive management style, including harassment and intimidation of career NRC staff.

On the December 12, 2011 – two months later – the White House responded and encouraged the NRC Commissioners to work with the Chairman and NRC Inspector General to resolve internal differences. The Commissioners indicated to the Committee that they would not have sent the letter if they felt differences could be resolved internally.

On December 13, 2011, the Committee released a report entitled, *A Crisis in Leadership: How the Actions of Chairman Gregory Jaczko are Damaging the Nuclear Regulatory Commission*.

The following day, the Committee held a hearing entitled, *The Leadership of the Nuclear Regulatory Commission*. The Committee received testimony from Chairman Jaczko, the four Commissioners, the head of the NRC technical staff, and the General Counsel of the NRC.

At the hearing, Commissioners and NRC staff reiterated concerns about Chairman Jaczko's leadership and behavior. Commissioner Magwood testified that he spoke with three female employees who were "humiliated" and "embarrassed" by interactions with Chairman Jaczko.

After the December 14, 2011 hearing and the release of the Committee's report, individuals within the NRC suggested to the Committee that Chairman Jaczko has done little, if anything, to improve his interactions with his colleagues or the NRC staff. Some are concerned that the situation is getting worse. One March 12, 2012 the Committee sent a letter to Chairman Jaczko providing him an opportunity to clarify a number of inconsistent statements in his testimony at the December 14, 2011 hearing. On April 6, 2012, Chairman Issa joined Chairman Jaczko on a tour of the San Onofre Nuclear Generation Station (SONGS) to learn more about ongoing difficulties with recently replaced steam generators. This visit did not relate to the Committee's investigation but instead focused on a policy issue important to Chairman Issa's district.

On May 7, 2012, the Committee sent a second letter to Chairman Jaczko regarding inconsistent statements before Congress. He still had not responded to the Committee's March 12, 2012 letter and staff had identified additional questionable testimony. Shortly before her term was set to expire, the Obama Administration renominated Commissioner Kristine Svinicki – a Republican – for a second five-year term on the Commission. This only occurred after Republican Members questioned why a female Commissioner, who blew the whistle on Chairman Jaczko's conduct, had

not been renominated. She was confirmed by the Senate on June 29, 2012 as part of a deal brokered to approve Chairman Jaczko's replacement.

On May 21, 2012, Chairman Jaczko announced his resignation from the NRC, conditioned on the confirmation of his successor. On May 24, 2012, the White House announced the nomination of Dr. Allison Macfarlane to replace Chairman Jaczko. She was confirmed by the Senate on June 29, 2012 along with Commissioner Svinicki.

More recently, beginning in the Committee investigated allegations of mismanagement and improper treatment of whistleblowers at the U.S. Chemical Safety and Hazard Investigation Board ("CSB").

#### *THE U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD INVESTIGATION OF 2014*

The CSB is an independent agency charged with investigating chemical accidents. In the fall of 2012, the U.S. Environmental Protection Agency's Inspector General ("EPA IG"), who has authority over the CSB, began investigating allegations that CSB General Counsel Richard Loeb learned the identities of several CSB whistleblowers who filed complaints with the U.S. Office of Special Counsel ("OSC"). The whistleblowers—all of whom worked in the Office of General Counsel—had been exposed to retaliation by virtue of the leak. In fact, because of the likelihood that managers may retaliate against whistleblowers who file complaints with OSC, federal law requires OSC to protect the identities of complainants.

In light of the seriousness of the allegations against Loeb, and the OSC employee who leaked information to him, it was imperative that Loeb and CSB Chairman Dr. Rafael Moure-Eraso fully cooperate with the IG's investigation. They did not. Instead, Loeb—with Moure-Eraso's consent—refused to provide key documents to the Inspector General, citing attorney-client privilege. The EPA IG discovered that CSB leadership used personal e-mail accounts to conduct official business to avoid scrutiny from investigators. Loeb's novel—and mistaken—application of attorney-client privilege to documents that may have implicated him in the leak, and his and his colleagues' use of personal e-mail accounts to avoid scrutiny, caused the IG to eventually bring the matter to the attention of Congress.

On September 5, 2013, EPA Inspector General Arthur A. Elkins, Jr. sent a "seven-day letter" to Congress regarding CSB's refusal to cooperate with his leak investigation. Section 5(d) of the Inspector General Act, as amended, requires IGs to report immediately to the agency head whenever the IG becomes aware of "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs or operations."<sup>1269</sup> Reports made pursuant to Section 5(d) of the IG Act are commonly referred to as "seven-day letters."<sup>1270</sup> Because IGs typically reserve the use of a seven-day letter for only the most urgent matters, Congress—and the House Committee on Oversight and Government Reform specifically—takes these matters very seriously.

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<sup>1269</sup> Inspector General Act of 1978, as amended, Pub. L. 110-409 [hereinafter IG Act].

<sup>1270</sup> *Id.*

In response to the seven-day letter, the Committee on Oversight and the House Committee on Science and Technology sought more information regarding CSB's unwillingness to cooperate with the EPA IG's leak investigation.<sup>1271</sup> The seven-day letter was a red flag that CSB was suffering from mismanagement. Once the Committee began its investigation of the seven-day letter allegations with assistance from the Science Committee, it became clear there were in fact serious management deficiencies at the CSB.

The Committee on Oversight and Government Reform conducted ten transcribed interviews of current and former CSB employees, received several briefings, and reviewed several hundred documents produced by the EPA OIG, the OSC, and the CSB. To date, it is unclear whether CSB has provided the Committee with a complete production of relevant documents, given its lack of full cooperation with the Committee's investigation. The deficiencies uncovered during the course of the investigation led the Committee to conclude that CSB is failing to fulfill its mission under Chairman Moure-Eraso's leadership.

Dr. Rafael Moure-Eraso was nominated to the CSB by President Obama in March 2010 and confirmed by the Senate in June 2010. Chairman Moure-Eraso's term will expire in 2015 as CSB Board Members serve fixed terms of five years. Since Dr. Moure-Eraso took over as Chairman in June 2010, at least nine employees—investigators and attorneys—have left the agency, which has approximately 40 employees in total. Current and former CSB employees informed the Committee that under Chairman Moure-Eraso's "bullying" and "abusive" leadership, the current work environment is "toxic." Employees fear retaliation for any action perceived as questioning the chairman or assisting other Board Members. Many employees believe they have faced retaliation, including being stripped of their responsibilities.

The attrition of experienced investigators has stalled major investigations involving fatalities for years. For example, in April 2010, a fire and explosion at a Tesoro refinery in Anacortes, Washington killed seven people. Then-CSB investigator Rob Hall traveled to the site, began investigating, and completed a draft report on the causes of the incident. When he left CSB in March 2011 because of the toxic work environment, the CSB restarted the investigation from square one. Apparently, there was no one at CSB who could pick up where Hall left off. Waste, redundancy, and lack of continuity are telltale signs of mismanagement. Now, four years later, the Tesoro investigation is finally closed. On May 1, 2014, CSB released the final report on the Tesoro tragedy.

As in the NRC investigation, the Committee uncovered a lack of collegiality among the Board members. The delay in the issuance of a final report on Tesoro is directly related to this issue. The CSB is made up of five board members. During the course of the investigation, the Board had only two members, with Moure-Eraso serving as Chairman. The other member was Mark Griffon. The three remaining seats were vacant. Dr. Beth Rosenberg resigned from the Board on May 31, 2014, after serving just over a year. Upon her departure, Dr. Rosenberg told *Bloomberg BNA*:

I feel I can do more good from outside the agency than within it . . . [a]s a board member, I expected the opportunities to influence the workings and priorities of the

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<sup>1271</sup> A more thorough discussion of the Committee's oversight of the CSB, see the report *Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board*, 113th Cong. (2014).

agency to be greater than they were. The ill-defined role of board members in relation to the chair, as well as in relation to the staff, made it difficult to have any meaningful influence. . . . I'm looking forward to going back to an academic environment where open debate is valued.<sup>1272</sup>

The mission of CSB is to investigate chemical accidents, make recommendations to prevent future accidents, and ensure that its recommendations are implemented. Chairman Moure-Eraso's leadership style—which includes an utter disregard for the collegial tradition of the Board—drove away all the experienced investigators, effectively rendering the CSB unable to issue any recommendations and fulfill its mission.

On June 19, 2014, the Oversight Committee, along with the Science Committee released a report and held a full Committee hearing entitled, *Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board*. Chairman Moure-Eraso, former Board Member Beth Rosenberg, and EPA IG Elkins were among the witnesses. Based on the staff report and hearing testimony, there were bipartisan calls for Chairman Moure-Eraso's resignation during the hearing. On July 7, 2014, Chairman Issa, Chairman Lamar Smith, and four other Members of Congress wrote President Obama requesting that he consider whether Chairman Moure-Eraso was fit to continue leading the CSB. To date, the President has not responded and Moure-Eraso continues to lead the beleaguered agency.

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<sup>1272</sup> Robert Iafolla, *CSB Member Resigns in Frustration: Chair Expects Vacancies to Be Filled Soon*, Bloomberg BNA, (May 27, 2014).

## IRS ETHICS OFFICE

The Office of Professional Responsibility (“OPR”) within the Internal Revenue Service (“IRS”) exists to ensure that all tax practitioners and tax preparers adhere to professional standards and follow the law.<sup>1273</sup> While OPR’s role is to be “the standard-bearer for integrity in tax practice,”<sup>1274</sup> the Committee’s oversight of the IRS exposed serious deficiencies in OPR’s commitment to ethical conduct. The Office is led by Karen Hawkins, an employee specifically recruited by former IRS Commissioner Douglas Shulman under the IRS’s streamlined critical pay authority, which allows the IRS to pay Hawkins above statutorily prescribed limits. Under current leadership, OPR is an unfortunate example of the Federal Government fails to live up to the expectations of the American people.

### *TAKISHA MCGEE: AN EXPERT ON ETHICS?*

In particular, according to information obtained by the Committee, Takisha McGee, an OPR section manager, faced disbarment from the District of Columbia Court of Appeals for allegedly stealing funds from a client and making false statements to a judicial tribunal.<sup>1275</sup> According to the Court’s Board of Professional Responsibility, which investigates attorney disciplinary actions, McGee represented a client in a personal injury case that settled in July 2008.<sup>1276</sup> The Board found that McGee misappropriated client funds in that case by failing to reimburse two medical providers for services provided to her client.<sup>1277</sup> Even more troubling, the Board found clear and convincing evidence that McGee provided false testimony to the Board’s hearing committee about her actions with respect to the settlement money.<sup>1278</sup> The Board adopted the conclusions of the hearing committee, which noted:

[W]e find clear and convincing evidence that Respondent provided false testimony during the hearing. As discussed above, we did not credit Respondent’s testimony on either of these points. With respect to the first, Respondent’s contemporaneous written communications with [her client] contradict her subsequent hearing testimony that she gave [her client] the funds owed to Dr. Randolph. . . . We also find that Respondent’s hearing testimony that she entrusted to her husband . . . the funds owed to Dr. Manderson, was deliberately false.<sup>1279</sup> As a consequence, McGee’s license to practice law in the District of Columbia was suspended as of March 25, 2014.<sup>1280</sup>

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<sup>1273</sup> Internal Revenue Serv., *Office of Professional Responsibility (OPR) At-A-Glance*, Available at: [http://www.irs.gov/Tax-Professionals/Enrolled-Agents/The-Office-of-Professional-Responsibility-\(OPR\)-At-a-Glance-1](http://www.irs.gov/Tax-Professionals/Enrolled-Agents/The-Office-of-Professional-Responsibility-(OPR)-At-a-Glance-1).

<sup>1274</sup> *Id.*

<sup>1275</sup> Jim McElhatton, *IRS ethics lawyer facing possible disbarment, accused of lying*, WASH. TIMES, Aug. 26, 2014.

<sup>1276</sup> In the Matter of: Takisha Brown, Docket No. 10-BD-128 (D. of Columbia Court of Appeals Board on Professional Responsibility. Filed Dec.30, 2013).

<sup>1277</sup> *Id.*

<sup>1278</sup> *Id.*

<sup>1279</sup> *Id.*

<sup>1280</sup> Joseph Perry, *Bar Counsel: The Martin Decision: A Lesson on Fees*, DCBAR, Jun. 2014, available at <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/june-2014-bar-counsel.cfm>.

Additionally, the Committee learned from an IRS whistleblower that McGee mishandled confidential taxpayer information and later lied to the inspector general’s investigators about the incident. According to the whistleblower, McGee left an IRS investigative file containing sensitive, nonpublic information on a “party bus” in route to Atlantic City, New Jersey in May 2011.<sup>1281</sup> A cleaning crew for the bus company allegedly found the IRS file and returned it to the IRS. According to the whistleblower, TIGTA agents contacted OPR and learned that the case file was assigned to McGee. When TIGTA interviewed McGee, she allegedly denied having possession of the case file and denied leaving the case file on the bus to Atlantic City.<sup>1282</sup> However, McGee apparently remarked to coworkers that even if TIGTA learned that she left the file on the bus, she would not be subject to disciplinary proceedings because Karen Hawkins, the OPR Director, “has [your] back.”<sup>1283</sup>

### *A VIOLATION OF TRUST*

The IRS’s mission of revenue collection is one of important to the proper functioning of government. Because this mission relies on voluntary compliance by every citizen, the IRS must have the broad trust of all Americans. McGee’s misconduct, regrettably, violates this trust. Her actions implicate several federal criminal statutes, including laws protecting the confidentiality of taxpayer records and requirements to be truthful with governmental bodies. The fact that an employee entrusted to be the standard-bearer of integrity could so willfully disregard laws about candor and taxpayer confidential epitomizes the failure of government.

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<sup>1281</sup> Letter to Darrell Issa, U.S. House of Reps. (June 18, 2014).

<sup>1282</sup> *Id.*

<sup>1283</sup> *Id.*

## BETTER MANAGEMENT OF THE U.S. CENSUS BUREAU

The U.S. Census Bureau is responsible for a number of household surveys—most notably the Population and Housing Census, known as the “Decennial Census.”<sup>1284</sup> The Decennial Census is a constitutionally required population survey conducted every ten years.<sup>1285</sup> While this happens only once per decade, the Census Bureau continually collects data on U.S. social and economic conditions through a variety of ongoing business and household surveys.<sup>1286</sup>

U.S. Census Bureau data plays an important role in the Federal Government. Indeed, federal departments and agencies trusted this data as a reliable source of statistical information.<sup>1287</sup> As the 2020 decennial census approaches, ensuring the integrity of the data the Census Bureau collects is a major priority. The Committee on Oversight and Government Reform is the House committee with legislative jurisdiction over the U.S. Census Bureau.<sup>1288</sup> The Committee conducts regular oversight of the Census Bureau. Much of the Committee’s work on the Census Bureau relates to the Committee’s legislative authority and general oversight functions.

In November 2013, however, the Committee launched a full-scale investigation into the Census Bureau. The investigation began in response to a *New York Post* report that Census Bureau employees at the Philadelphia Regional Office fabricated survey data—specifically, the data used to calculate the nation’s unemployment rate.<sup>1289</sup> According to the story, the data fabrication was a systematic effort to better the jobs numbers in the months leading up to the 2012 presidential election.<sup>1290</sup>

The allegations of deliberate data falsification during the Current Population Survey (CPS) were particularly serious because the U.S. Department of Labor uses CPS data to generate the national unemployment rate, one of the principal measures of the nation’s economic health. The integrity of this data is crucial, as both government and the private sector rely heavily on it. Census Bureau data plays an important role in determining how American taxpayer dollars are spent. Census Bureau data is used to distribute more than \$400 billion in federal funds to local, state, and tribal governments each year.<sup>1291</sup> The implications of unreliable data are serious and far-reaching. The Committee investigated the specific allegations, as well as whether the Census Bureau’s data collection and quality control procedures are vulnerable to data falsification.

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<sup>1284</sup> U.S. Census Bureau, *Decennial Census*, available at [https://www.census.gov/history/www/programs/demographic/decennial\\_census.html](https://www.census.gov/history/www/programs/demographic/decennial_census.html) (last visited June 9, 2014).

<sup>1285</sup> *Id.*

<sup>1286</sup> U.S. Census Bureau, *Surveys*, available at <http://www.census.gov/aboutus/surveys.html> (last visited June 9, 2014).

<sup>1287</sup> U.S. Census Bureau, *Current Population Survey (CPS)*, available at <https://www.census.gov/cps/> (last visited June 9, 2014) [hereinafter *Current Population Survey*].

<sup>1288</sup> House rule X, clause 1(n)(8).

<sup>1289</sup> See John Crudele, *Census ‘faked’ 2012 election jobs report*, N.Y. POST, Nov. 18, 2013 [hereinafter *Census ‘faked’ 2012 election jobs report*].

<sup>1290</sup> *Id.*

<sup>1291</sup> U.S. Census Bureau, *American Community Survey, Design and Methodology, Forward* (Jan. 30, 2014), available at [http://www.census.gov/acs/www/Downloads/survey\\_methodology/acs\\_design\\_methodology\\_forward\\_2014.pdf](http://www.census.gov/acs/www/Downloads/survey_methodology/acs_design_methodology_forward_2014.pdf) (last visited June 9, 2014).

Committee investigations follow the facts and rely on those facts for an accurate telling of what occurred. Often during the course of an investigation, the Committee discovers that the circumstances, unfortunately, are worse than originally thought. This was the case with the Committee's investigation into the Chemical Safety Board, the investigation into the Nuclear Regulatory Commission, and the investigation into the Bureau of Alcohol, Tobacco, Firearms and Explosives' Operation Fast and Furious. In the investigation into the Census Bureau, however, the Committee found the situation was not as bad as initially perceived. The Committee did not find any link between the data falsification that occurred in the Philadelphia Regional Office and the national unemployment rate. The documents and testimony did show, however, that the CPS is vulnerable to data falsification. The Committee identified common sense reforms for the Census Bureau to protect the integrity of survey data.

### *INITIATION OF INVESTIGATION*

On November 18, 2013, a *New York Post* story by John Crudele described how a Census Bureau employee falsified responses to a survey that measured the unemployment rate, among other things. According to the story, the fabricated data was "collected" by Census Bureau employees working on the CPS at the Philadelphia Regional Office.<sup>1292</sup> Crudele reported that the falsified data may have boosted the unemployment rate in advance of the 2012 presidential election, and that the falsification occurred with the knowledge of senior Census Bureau employees. Crudele wrote:

In the home stretch of the 2012 presidential campaign, from August to September, the unemployment rate fell sharply — raising eyebrows from Wall Street to Washington. The decline — from 8.1 percent in August to 7.8 percent in September — might not have been all it seemed. The numbers, according to a reliable source, were manipulated. And the Census Bureau, which does the unemployment survey, knew it.<sup>1293</sup>

The next day, House Oversight and Government Reform Committee Chairman Darrell Issa, Subcommittee on Federal Workforce, U.S. Postal Service, and the Census Chairman Blake Farenthold, and Joint Economic Committee Chairman Kevin Brady wrote a letter to U.S. Census Bureau Director John Thompson requesting documents and information that would shed light on allegations of data falsification at the Census Bureau.<sup>1294</sup>

The Committees worked diligently to obtain all available information. Committee staff reviewed thousands of pages of documents. The Committee conducted several transcribed interviews of both current and former Census Bureau employees well-positioned to shed light on the operations and processes at the Philadelphia Regional Office and on the facts and circumstances surrounding the allegations of data falsification. The Committees conducted the investigation with full cooperation from the Inspector General's office, which provided a host of useful and necessary information. Committee staff was privy to all IG records, as well as thorough briefings from IG officials.

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<sup>1292</sup> See John Crudele, *Census 'faked' 2012 election jobs report*, N.Y. POST, Nov. 18, 2013.

<sup>1293</sup> *Id.*

<sup>1294</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Blake Farenthold, Chairman, H. Subcomm. on Federal Workforce, U.S. Postal Service, & the Census, and Hon. Kevin Brady, Chairman, Joint Economic Committee to Hon. John Thompson, Director, U.S. Census Bureau (Nov. 19, 2013).

This investigation faced a series of unnecessary hurdles that damaged the extent to which the Committees could investigate this matter. The foremost challenge was lack of cooperation from Department of Commerce officials. The Department's obstruction made it difficult for the Committee to prove—or disprove—the allegations of widespread falsification and had significant impact on the length of the investigation. Additional factors prevented the Committees from obtaining all information necessary to determine the plausibility of the allegations, including lack of cooperation from one of the primary witnesses and insufficient record-keeping on the part of the Census Bureau.

#### *ALLEGATIONS OF SUPERVISORS ENCOURAGING DATA FALSIFICATION*

The allegations originated from a former CPS interviewer, who claimed that, in 2010, supervisors at the Philadelphia Regional Office encouraged falsification of data with the assurance that the scam would be covered during the quality review process. The Senior Field Representative (SFR) Stefani Butler alleged that supervisors tolerated and even encouraged falsification in an effort to reach the monthly 90 percent response rate goal set by the Bureau of Labor Statistics and the Census Bureau's Demographic Surveys Division.<sup>1295</sup>

Butler testified that one of her supervisors, Survey Statistician Timothy Maddaloni, asked that she instruct her team members to falsify data by sending in cases as completed, despite the fact that they had not completed the mandatory interview and were, thus, incomplete.<sup>1296</sup> When Butler refused to comply, she alleged that Maddaloni then contacted her subordinate Field Representative Julius Buckmon directly to request that he send in his cases as completed.<sup>1297</sup> Maddaloni reportedly stated that he would cover the cases during the quality control phase of the survey, known as the reinterview process.<sup>1298</sup>

Butler's story underlines the serious structural and systematic deficiencies within the Census Bureau's data collection processes, especially with respect to the Bureau's ability to detect data falsification. The Census Bureau must obtain a statistically significant survey response rate from sample households. The Census Bureau, therefore, expects field representatives (FR) to achieve a high interview completion rate, obtaining responses from a standard percentage of their assigned cases. There is no evidence that the data falsification problems that plagued the Philadelphia Regional Office were widespread; however, the Bureau's record-keeping weaknesses and data collection priorities created a vulnerability, which could be exploited to achieve the monthly response rate goal. Because the survey response rate is tied to employee pay rates, there may be temptation to falsify data.

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<sup>1295</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Stefani Butler, at 33 (Jan. 16, 2014) [hereinafter Butler Tr.]; H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Fernando Armstrong, at 131 (Jan. 28, 2014) [hereinafter Armstrong Tr.].

<sup>1296</sup> Butler Tr. at 33.

<sup>1297</sup> *Id.* at 33-34.

<sup>1298</sup> U.S. Dep't of Commerce, Office of Civil Rights, *Report of Investigation Equal Employment Opportunity Complaint of Julius Buckmon Complaint No. 10-63-03132*, at 7 (Oct. 7, 2010) [hereinafter *Buckmon EEO Complaint*].

While the Census Bureau has taken steps to help ensure data quality, deficiencies still exist. The Census Bureau must strive to prevent future incidents such as the one Ms. Butler brought to light. The Committees' investigation highlighted a number of vulnerabilities in the current survey collection structures and quality control practices, as well as recommendations to address these weaknesses.

### *STAFF REPORT*

The investigation culminated in a joint committee staff report, released September 18, 2014.<sup>1299</sup> The report, entitled, *U.S. Census Bureau: Addressing Data Collection Vulnerabilities*, detailed flaws in the current quality assurance process for the Census Bureau's data collection efforts nationwide and provided recommendations that would address these concerns.<sup>1300</sup> Chief among the findings was the data review process does little to discourage data falsification.

As the nation's, if not the world's, preeminent statistical agency, the Census Bureau's methods and data integrity must be above reproach. Unfortunately, the Bureau's current practices make it difficult to report or track potential data falsification and, in some cases, create clear incentives to disregard potential data falsification. Witnesses described circumstances in which it would be possible to circumvent the system and falsify data. Because these employees have highlighted the potential for abuse, the Census Bureau must implement changes that will eliminate these deficiencies and improve overall quality.

The report found that data quality-assurance efforts are fundamentally flawed. Census employees have limited means for reporting suspected falsification. If an interviewer observes irregularities during the course of an interview that raises suspicion of falsification, the interviewer is expected to report concerns by informal means up the chain of command. The Census Bureau relies on the reinterview process as a key quality assurance mechanism for CPS. Rather than acting as an immediate data quality check, however, the reinterview process serves as more of a deterrent for data falsification. The reinterview process is not independent of the data collection process, and supervisors in the original interviewer's chain of command are mostly responsible for conducting the reinterview. The performance evaluations of these same supervisors also depend, in part, on the response rate on the survey, which can create a conflict of interest.

If a reinterviewer flags a case as suspected falsification, the supervisors are responsible for initiating and conducting an investigation. Investigating suspected falsification is cumbersome, time-consuming, and often thankless. There is limited tracking of the suspected falsification process, and the investigative process, guided by paper-based forms, is dated and inefficient. Supervisors have no incentive to identify falsification, apart from moral principles and expected behavior. The current incentive structure rewards high response rates, which constitute the primary criteria for FR performance standards. Documents obtained by the Committees show that Philadelphia Regional Office supervisors pressured subordinates to obtain more interviews to

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<sup>1299</sup> H. Comm. on Oversight & Gov't Reform, Subcomm. on Fed Workforce, U.S. Postal Serv., & the Census, U.S. Cong. Joint Econ. Committee, Joint Staff Report: *U.S. Census Bureau: Addressing Data Collection Vulnerabilities*, 113th Cong. (Sept. 18, 2014).

<sup>1300</sup> *Id.*

boost the response rate. The Committees' investigation found heavy emphasis on completing more interviews, often at the expense of data quality.

The Census Bureau can minimize the potential for conflict of interest by separating reinterview from the regional chain of command and, thus, allowing quality control to function independently from data collection. Reinterview should not be the only opportunity for field-based falsification detection. As cases are sometimes assigned to different interviewers from month to month, interviewers in the field might come across an oddity worth further review. Currently, there is no mechanism, aside from e-mailing or calling a supervisor, whereby interviewers can simply flag oddities for further review. Adding a falsification-reporting tool accessible by all levels of Census Bureau staff would provide a badly needed additional quality check.

The insufficient records surrounding data collection demonstrate a lack of transparency and limited accountability. With no master data set attached to individual case files, it is difficult, and sometimes impossible, to determine the chain of custody. Each case has multiple data files that record case activity. Some of the records are difficult to read, and interpreting the information is a complicated and time-consuming process. It is impossible to match logged activity with the employee who performed it with certainty. Some records and case notes can also be edited or deleted with no record of the changes made. There is no streamlined data set to easily access a case's history and determine the chain of custody, limiting both transparency and accountability. Demands for higher response rates, limited means for reporting suspected falsification, and insufficient data management records create a disincentive for reporting falsification. The current structure actually discourages Census employees from reporting suspected falsification.

The Committees' joint staff report offered the following recommendations to address vulnerabilities:

- The Census Bureau must establish clear procedures for Field Representatives to report potential falsification.
- The reinterview process should occur independent of the chain of command.
- The Census Bureau must rapidly improve its case tracking systems.
- The Field Representative Data Falsification Followup and Quality Assurance Form (Form 11-163), a document the Survey Statistician Office uses to investigate the suspected instance and record pertinent information, must become electronic.
- Both the Census Bureau and the Department of Commerce need to improve their responsiveness to congressional oversight.

#### *RESULT OF COMMITTEES' INVESTIGATION*

On September 18, 2014, in conjunction with the release of the joint committee staff report, the Subcommittee on Federal Workforce, U.S. Postal Service, and the Census held a hearing on the

matter.<sup>1301</sup> Members heard testimony from Census Bureau Director John H. Thompson and Department of Commerce Inspector General Todd Zinser.<sup>1302</sup> Mr. Zinser discussed findings from the IG investigation and May 2014 report, which was largely in line with the Committees' joint staff report.<sup>1303</sup> Mr. Thompson agreed to implement several recommendations, from both the IG report and the Committees' staff report.<sup>1304</sup>

Mr. Thompson assured Members that the Census Bureau would implement changes to improve quality assurance.<sup>1305</sup> He testified that, as of the hearing, the Census Bureau already put into practice three of the IG's recommendations.<sup>1306</sup> Mr. Thompson committed to cooperate with the Committee moving forward, and he described a number of efforts currently underway to improve upon the Census Bureau's current systems.<sup>1307</sup>

This investigation resulted in substantive recommendations that will improve a government agency and its processes. The pace of the Committees' investigation was slowed because Commerce Department officials slow-rolled document productions and interfered with witness interviews. Despite the Department's obstruction, the Committees pushed forward with the investigation and allowed the opportunity for fundamental improvements to the Census Bureau. The Census Bureau was receptive of the Committees' recommendations and already began to make improvements. Implementing all of the recommendations outlined in the Committees' staff report will further affirm the Census Bureau's commitment to data integrity. The Committees will continue to assess whether the Census Bureau is taking all necessary steps to guarantee the quality of its surveys.

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<sup>1301</sup> H. Comm. on Oversight & Gov't Reform, Subcomm. on Fed. Workforce, U.S. Postal Serv., & the Census, *Hearing on U.S. Census Bureau: Addressing Data Collection Vulnerabilities*, 113th Cong. (Sept. 18, 2014).

<sup>1302</sup> *Id.*

<sup>1303</sup> *Id.* (statement of Todd Zinser, Inspector Gen., Dept. of Commerce).

<sup>1304</sup> *See id.*

<sup>1305</sup> *Id.* (statement of John H. Thompson, Director, U.S. Census Bureau).

<sup>1306</sup> *Id.*

<sup>1307</sup> *See id.*

## THE EPA'S SECRET AGENT

The Committee conducted oversight of time and attendance fraud perpetrated by John Beale, a senior-level EPA official, which was investigated by the U.S. Environmental Protecting Agency ("EPA") Office of Inspector General ("OIG"). On September 27, 2013, Beale pled guilty to fraud and theft charges brought by the Federal Government.<sup>1308</sup> Beale stole nearly \$900,000 in improper pay and bonuses by impersonating a covert CIA agent while on the EPA payroll, allowing him to do little to no official business at EPA but still be paid by the agency. Beale was sentenced to 32 months in federal prison and agreed to repay the government \$1.3 million.<sup>1309</sup>

The Committee found that Beale began the fraud that he was a covert CIA agent beginning in 1994. He duped many of his coworkers, including his eventual boss, Gina McCarthy, who now currently serves as the Administrator of EPA. The Committee's investigation showed that Beale took inappropriate travel, faked his retirement, received an inappropriate retention incentive bonus, and was paid in excess of the legal statutory limit in the later stages of his EPA employment.<sup>1310</sup> Under the current law, Beale is entitled to his full pension despite the fraud committed against the taxpayers. The Committee's investigation as well as the investigation of the EPA OIG revealed that EPA must address numerous internal control issues, which allowed this fraud to be perpetuated against the American people.

### *RED FLAGS FROM THE BEGINNING*

Beale began working at the EPA in 1988 as a temporary employee/consultant.<sup>1311</sup> He obtained this position with the assistance of his friend Robert Brenner, a high-ranking EPA official, with whom he owned property together on Cape Cod in Massachusetts.<sup>1312</sup> Beale was converted to a full-time EPA employee in 1989. He began his full-time employment as a GS-15 step 10, the maximum non-Senior Executive Service ("SES") pay level.<sup>1313</sup> Beale was employed in the EPA Office of Air and Radiation and it appears that he was instrumental in drafting regulations relating to the Clean Air Act Amendments of 1990.

In the early part of Beale's EPA career, he improperly received a retention incentive bonus – a special pay increase of 25 percent lasting for three years when an employee can prove they have a legitimate offer of employment in the private sector and the agency feels it necessary to retain their services. This incentive bonus allowed Beale to become one of the highest paid EPA employees. Beale began receiving the retention incentive bonus with the assistance of Brenner, in 1990. However, according to the EPA OIG, Beale failed to prove that he had a legitimate private sector

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<sup>1308</sup> Ann E. Marimow and Lenny Bernstein, *Ex-EPA Official Pleads Guilty to Theft, Pretended to Work for the CIA*, Wash. Post, Sept. 27, 2013, available at [http://www.washingtonpost.com/local/crime/ex-epa-official-expected-to-plead-guilty-of-theft/2013/09/26/2c95166e-2708-11e3-ad0d-b7c8d2a594b9\\_story.html](http://www.washingtonpost.com/local/crime/ex-epa-official-expected-to-plead-guilty-of-theft/2013/09/26/2c95166e-2708-11e3-ad0d-b7c8d2a594b9_story.html).

<sup>1309</sup> Ann E. Marimow, *EPA Official, Who Pretended to Work for CIA, Sentenced to 32 Months*, Wash. Post, Dec. 18, 2013, available at [http://www.washingtonpost.com/local/crime/epa-official-who-pretended-to-work-for-cia-sentenced-to-32-months/2013/12/18/176d6c6c-6805-11e3-a0b9-249bbb34602c\\_story.html](http://www.washingtonpost.com/local/crime/epa-official-who-pretended-to-work-for-cia-sentenced-to-32-months/2013/12/18/176d6c6c-6805-11e3-a0b9-249bbb34602c_story.html).

<sup>1310</sup> *Secret Agent Man? Oversight of EPA's IG Investigation of John Beale: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013).

<sup>1311</sup> Deposition of John C. Beale, in Wash., D.C. (Dec 19, 2013).

<sup>1312</sup> *Id.*

<sup>1313</sup> *Id.*

employment offer.<sup>1314</sup> Moreover, Beale received the retention incentive bonus until 2013, far beyond the three-year limitation of the bonus. In fact, in 2000, when Beale was promoted to the SES, another retention incentive bonus was approved by Bob Perciasepe, who retired in 2014 as the Deputy Administrator of the EPA. Due to this bonus pay, between 2009 and 2012, Beale was improperly paid above the legal statutory limit. Beale did not alert EPA to this overpayment and EPA failed to discover it until after the investigations into Beale's employment status was launched.

#### *THE DRAMA CONTINUES: EPA FUNDING OF "COVERT" ACTIVITIES*

The Committee learned that Beale began to assume the false identity of a covert CIA agent around 1994. He used this cover to commit various acts of fraud and deceit. However, at no time was Beale ever employed by the CIA in any capacity. Under the guise of a covert CIA agent, Beale took a number of domestic and international trips all of which were paid for by the EPA. Beale would often use this free travel to visit his parents in Bakersfield, CA; however, he would submit travel vouchers that would list another domestic destination, which would not match the receipts and plane tickets to California. EPA failed to notice the discrepancy between the vouchers submitted by Beale and the receipts and tickets that he turned in for reimbursement. Additionally, Beale usually flew first class on these trips, including one trip to London, costing taxpayers \$14,000. Beale claimed that he required first class travel because of a lingering back injury.

After 1994, Beale began spending large chunks of time away from his work at EPA. Eventually, Beale almost never came in to the EPA offices. Mr. Beale would tell his superior, current EPA Administrator Gina McCarthy (then the Assistant Administrator for Air and Radiation), that he had meetings at CIA headquarters in Langley, Virginia or was on CIA business in Afghanistan; meanwhile Mr. Beale was spending time at his home in Alexandria/Arlington, VA reading books or riding his bicycle.<sup>1315</sup>

In 2012, Beale appeared to have retired from EPA, throwing a retirement party for himself and two other retiring colleagues.<sup>1316</sup> However, Beale never officially retired at that time, instead using his false CIA cover to remain on the EPA payroll until he officially retired in 2013. Beale along with Brenner and another EPA employee coordinated a Potomac River boat cruise for their retirements.<sup>1317</sup> Current Administrator Gina McCarthy and other high-level EPA officials attended the retirement party but Beale never submitted his retirement paperwork. The only person who questioned Beale regarding his retirement was a co-worker in an administrative position who reviewed the Office of Air and Radiation payroll. When she contacted Beale, he explained that the CIA required that he stay on the EPA payroll in order to maintain his cover. He further asserted that the reason for staying on the payroll because his replacement at the CIA had been captured or killed by the Taliban in Pakistan.

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<sup>1314</sup> Staff Briefing with U.S. EPA Office of Inspector General.

<sup>1315</sup> Deposition of John C. Beale, in Wash., D.C. (Dec 19, 2013).

<sup>1316</sup> *Id.*

<sup>1317</sup> *Id.*

### *FINALLY: CREDIBILITY QUESTIONS*

Eventually, Administrator McCarthy became suspicious of Beale's existence on the payroll and his lack of attendance at EPA. She referred the situation to the EPA Office of General Counsel ("OGC"). In turn, the EPA OGC referred the issue on to the EPA Office of Homeland Security ("OHS"), a division within the EPA Office of the Administrator that "leads and coordinates homeland security activities and policy development across all EPA program areas."<sup>1318</sup> The EPA Office of Homeland Security does not have any investigative powers delegated to it for pursuing instances of employee misconduct. Despite this fact, EPA OHS conducted an investigation including interviewing Beale. When the EPA OIG finally learned of the case and began its proper investigation of the Beale matter it felt that its ability to investigate had been tainted by the actions of EPA OHS. EPA OIG interviewed Beale and determined that he was never a CIA agent and had defrauded the government out of potentially millions of dollars in improper pay. EPA OIG referred the case to the Department of Justice for prosecution.

On October 1, 2013, the Committee held a hearing entitled, *Secret Agent Man? Oversight of EPA's IG Investigation of John Beale*, in which Beale elected to assert his Fifth Amendment right to self-incrimination.<sup>1319</sup> The Committee heard testimony on this issue from EPA Inspector General Arthur Elkins and Assistant Inspector General for Investigations Patrick Sullivan as well as EPA Deputy Administrator Bob Perciasepe and former EPA employee and friend to Beale, Robert Brenner.<sup>1320</sup> Additionally, the Committee asked EPA to produce documents and communications referring or relating to Beale from various EPA officials. The Committee also asked Brenner to produce documents and communications from his personal email account between himself and Beale. Pursuant to a subpoena issued by the Committee, on December 19, 2013, a deposition of Beale was conducted by Committee staff in order to further determine the extent of the fraud conducted on the American people. The deposition was subsequently made public to provide more visibility into the nature of Beale's activities to prevent further occurrences of abuse of resources at federal agencies.

Beale's fraud at EPA exposed many issues within EPA relating to time and attendance fraud and how the agency handles these issues. Additionally, this investigation uncovered an ongoing dispute between the EPA OIG and the EPA OHS, in which OHS appears to unlawfully conduct investigations of EPA employee misconduct and may routinely withhold this information from the EPA OIG. The Committee continues to investigate instances of employee misconduct at EPA as well as the ongoing matter of impediments to OIG investigations by employees in the EPA OHS office. OIG has stated that its inability to gain visibility into the investigations by EPA OHS prevent the office from determining if there are other "John Beales" on the EPA payroll.<sup>1321</sup>

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<sup>1318</sup> U.S. Environmental Protection Agency, Office of Homeland Security, *available at* <http://www.epa.gov/homelandsecurity/> (last visited Oct. 14, 2014).

<sup>1319</sup> *Secret Agent Man? Oversight of EPA's IG Investigation of John Beale: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013).

<sup>1320</sup> *Id.*

<sup>1321</sup> *Is EPA Leadership Obstructing Its Own Inspector General?: Hearing Before H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013).

## THE B.P. OIL SPILL: AN ABDICATION OF RESPONSIBILITY

On April 20, 2010, just forty one miles from the coast of Louisiana, about the distance between Washington, D.C. and Baltimore, M.D., and about 5000 feet below the ocean floor, a surge of natural gas burst through a recently sealed well head and traveled up the rig riser (the pipe that connects the well head to the rig platform) and ignited when it reached the surface level.<sup>1322</sup> Eleven deaths, seventeen injuries, and 4.9 million barrels of leaked oil (200 million gallons) were all just part of the damage caused by the largest marine oil spill in human history.<sup>1323</sup> In total, 1,100 miles of the Gulf Coast shoreline were polluted.<sup>1324</sup>

The Deepwater Horizon oil spill was named after the rig stationed over the well: Deepwater Horizon. The leak itself took months to contain. Initial attempts to activate what should have been the fail safe failed.<sup>1325</sup> Different attempts at capping the leak were similarly unsuccessful until June when British Petroleum (“BP”) was able to place a cap that allowed a tanker to siphon off a large percentage of the leaking oil.<sup>1326</sup> The leak was officially closed on September 17, 2010.<sup>1327</sup>

### *MINERALS MANAGEMENT SERVICE*

On October 7, 2009, then-Ranking Member Darrell Issa and the staff of the Committee’s Minority stated in a report about the Minerals Management Service that “[i]t is time for Congress to overhaul the Minerals Management Service.” In January 2011, in its Report to the President on the BP Deepwater Horizon Oil Spill and Offshore Drilling, the National Commission explained that “[t]he rigs demise signals the conflicted evolution—and sever shortcomings—of federal regulation of offshore oil drilling in the United States, and particularly of MMS oversight of deepwater drilling in the United States.”<sup>1328</sup>

Unfortunately, the serious overhaul recommended by then-Ranking Member Issa was not heeded, and the Democrat-led Committee ignored multiple requests for hearings to look at proposed problems with MMS. But within just thirty days after the Deepwater Disaster and facing the intense scrutiny of MMS, it was officially eliminated by the Secretary of the Interior (“SOI”).

### **Foundations of Minerals Management Service**

Created in 1982 by an order from Secretary of the Interior James Watt,<sup>1329</sup> the Minerals Management Service represented an expansion of the oil industry into the Gulf of Mexico and Deep

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<sup>1322</sup> *Deepwater Horizon Oil Spill of 2010*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1698988/Deepwater-Horizon-oil-spill-of-2010> (last visited Nov. 19, 2014).

<sup>1323</sup> *Id.*

<sup>1324</sup> *Id.*

<sup>1325</sup> *Id.*

<sup>1326</sup> *Id.*

<sup>1327</sup> *Id.*

<sup>1328</sup> NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER The Gulf Oil Disaster and the Future of Offshore Drilling*, (Jan. 2011), <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

<sup>1329</sup> Secretarial Order No. 3017 on January 19, 1082 under the authority of 1978 Outer Continental Shelf Land Acts Amendment. *Id.* at 64

Water drilling.<sup>1330</sup> From its creation to the Deepwater Horizon disaster, the MMS was the chief regulatory agency “responsible for leasing, safety, environmental compliance, and royalty collection from offshore drilling.”<sup>1331</sup> Despite this authority, and other authority conferred to it by the National Environmental Policy Act, the Magnuson-Stevens Act, the Outer Continental Shelf Lands Act, the Oil Pollution Act, the Endangered Species Act and the Clean Water Act, MMS chose not to perform an on-site specific review of the Deepwater Horizon Maconda well.<sup>1332</sup> In a 398-page report to the President finished in January 2011, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (“BP Commission”) detailed what was a systematic breakdown within MMS - failures due to reasons such as “the cumulative lack of adequate resources, absence of a sustained agency mission, or sheer erosion of professional culture within some offices.”<sup>1333</sup>

Almost a year and a half before that report came out and seven months before the Deepwater Horizon oil spill, the Minority Staff of the House Committee on Oversight and Government Reform issued a report dated October 7, 2009, released a report titled *Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department*.<sup>1334</sup> The report’s simple but ignored conclusion: Congress and the Administration must reorganize MMS.<sup>1335</sup>

### **A Derelict Model**

The Interior Department receives over \$23.5 billion in revenues from the roughly 2.3 billion acres of land and water that it is charged with managing.<sup>1336</sup> When the Minority report came out, MMS was directly charged with collecting offshore oil and natural gas fees, which accounts for more than half of the revenues received.<sup>1337</sup> Since MMS had oversight of such high revenue amounts, any mistakes made could cost the American Taxpayer millions – and even billions – of dollars, as was the case in the late nineties when MMS made an error in a contract that will ultimately cost the American Taxpayer \$10 billion.<sup>1338</sup>

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<sup>1330</sup> *Id.*

<sup>1331</sup> *Id.* at 68.

<sup>1332</sup> *Id.* at 84.

<sup>1333</sup> *Id.* at 78.

<sup>1334</sup> H. Cmte. on Oversight & Gov’t Reform, *Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department*, 111th Cong. (2009). The Teapot Dome scandal was an issue from 1920-1923 involving an egregious example of fiduciary irresponsibility. The Secretary of the Interior, Albert Bacon Fall, secretly granted two different oil companies exclusive rights to the Teapot Dome, Elk Hills, and Buena Vista Hills. It was found that Fall had received large cash gifts and no-interest loans as compensation from the two oil companies to incentivize the grant. Teapot Dome became a catchphrase for government corruption, similar to Benedict Arnold and traitor. *Teapot Dome Scandal*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/585252/Teapot-Dome-Scandal> (last visited Nov. 20, 2014).

<sup>1335</sup> Minority Staff of H. Cmte. on Oversight & Gov’t Reform, *Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department*, 111th Cong. (2009).

<sup>1336</sup> *Id.* at 2.

<sup>1337</sup> *Id.* at 3.

<sup>1338</sup> When drafting offshore Gulf of Mexico leases in 1998 and 1999, government officials omitted critical price threshold terms required by the Deep Water Royalty Relief Act of 1995. The omission of these lease terms, which are required by law, has allowed leaseholders to drill royalty-free until volume suspensions are met and will cost the American Taxpayer about a billion dollars a year. *Id.* at 3.

Complementing the oversight work of the Committee were fifteen reports by the Government Accountability Office (“GAO”)<sup>1339</sup> and the Department of Interior Inspector General.<sup>1340</sup> These reports highlighted “management difficulties and programmatic shortcomings” in revenue collection; ethical violations such as senior MMS officials giving preferential treatment in awarding contracts, receiving improper gifts and kickbacks from industry personnel in exchange for lucrative contracts, abusing drugs with coworkers, and having sex with subordinates.<sup>1341</sup>

Beyond the internal ethical violations, the GAO found that MMS was being derelict in its external fiduciary duties to manage the resources that belong to the American Taxpayer. The mission of the MMS was to manage “the ocean energy and mineral resources on the Outer Continental Shelf and Federal and Indian mineral revenues to enhance public and trust benefits, promote responsible use, and realize fair value.”<sup>1342</sup>

However, in its report the Committee noted that multiple GAO reports dating from 2003 to 2009 had found that MMS did not know how much oil and gas was being produced.<sup>1343</sup> The GAO reports concluded that in some production numbers up to six percent of the data was inaccurate.<sup>1344</sup> Using

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<sup>1339</sup> “Mineral Revenues: MMS Could Do More to Improve the Accuracy of Key Data Used to Collect and Verify Oil and Gas Royalties.” Report No. GAO-09-549. Washington, D.C.: September 16, 2009; Royalty-In-Kind Program: MMS Does Not Provide Reasonable Assurance It Receives Its Share of Gas, Resulting in Millions in Forgone Revenue. Report No. GAO-09-744. Washington, D.C.: September 14, 2009; Oil and Gas Royalties: MMS’ Oversight of Its Royalty-in-Kind Program Can Be Improved through Additional Use of Production Verification Data and Enhanced Reporting of Financial Benefits and Costs. GAO-08-942R. Washington, D.C.: September 26, 2008; Mineral Revenues Data Management Problems and Reliance on Self-Reported Data for Compliance Efforts Put MMS Royalty Collections at Risk. GAO-08-893R. Washington, D.C.: September 12, 2008. Oil and Gas Royalties: The Federal System for Collecting Oil and Gas Revenues Needs Comprehensive Reassessment. GAO-08-691. Washington, D.C.: September 3, 2008; Oil and Gas Royalties: Litigation over Royalty Relief Could Cost the Federal Government Billions of Dollars. GAO-08-792R. Washington, D.C.: June 5, 2008. Oil and Gas Royalties: Royalty Relief Will Cost the Government Billions of Dollars but Uncertainty Over Future Energy Prices and Production Levels Make Precise Estimates Impossible at this Time. GAO-07-590R. Washington, D.C.: April 12, 2007; Mineral Revenues: A More Systematic Evaluation of the Royalty-in-Kind Pilots is Needed. GAO-03-296. Washington, D.C.: January, 2003.

<sup>1340</sup> Evaluation of Royalty Recommendations Made to the Department of the Interior Fiscal Year 2006 – February 2009. Report No. CR-EV-MOA-0003-2009, April 2009; Evaluation Report: Oil and Gas Production on Federal Leases: No Simple Answer. Report No. C-EV-MOA-0009-2008, February 2009; *Investigative Report of MMS Oil Marketing Group – Lakewood*. Case No. PI-CO-06-0271-I, August 19, 2008; *Investigative Report of Gregory W. Smith*. Case No. PI-PI-07-0120-I, August 7, 2008; Investigative Report of MMS – Federal Business Solutions Contracts. Case No. PI-PI-07-0218-I, September 4, 2008; Evaluation Report: Minerals Management Service Royalty-in-Kind Oil Sales Process. Report No. C-EV-MMS-0001-2008, May 2008; Investigative Report: Minerals Management Service False Claims Allegations. September 7, 2007; Investigative Report: On the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases. Spring, 2007; Audit Report: Minerals Management Service’s Compliance Review Process; Report No. C-IN-MMS-0006-2006, December 2006.

<sup>1341</sup> H. Cmte. on Oversight & Gov’t Reform, *Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department*, 111th Cong. 4 (2009) (Minority Staff Report) (citing Investigative Report of MMS Oil Marketing Group – Lakewood, Case No. PI-CO-06-0271-I, August 19, 2008; Investigative Report of Gregory W. Smith. Case No. PI-PI-07-0120-I, August 7, 2008; Investigative Report of MMS – Federal Business Solutions Contracts. Case No. PI-PI-07-0218-I, September 4, 2008).

<sup>1342</sup> *Workshop on the Outer Continental Shelf Renewable Energy Regulatory Framework*, MINERALS MANAGEMENT SERVICE (June 4, 2009), <http://www.boem.gov/DCworkshop/>.

<sup>1343</sup> H. Cmte. on Oversight & Gov’t Reform, *Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department*, 111th Cong. 5 (2009) (Minority Staff Report).

<sup>1344</sup> *Id.*

self-reported data from the producers, the MMS assessed the royalty payments that they were supposed to collect. By not knowing or verifying how much was actually produced, the inaccuracies directly affected how much money was received for the oil and gas that was being produced off shore, errors that were estimated to potentially cause the loss of up to \$160 million in just the fiscal year of 2006-2007.<sup>1345</sup> This was money owed to the American Taxpayer that was not being paid out because the MMS was not fulfilling its fiduciary duties.

Not only did the GAO report that MMS did not know how much oil and gas was being produced in order to appropriately charge the producers, but it also reported that MMS did not know whether it was receiving the right amount of royalties for the numbers that it did have.<sup>1346</sup> The GAO found that MMS lacks in critical auditing processes to test the accuracy of the payments as well as the production and sales data.<sup>1347</sup> On top of the verification process for monetary submissions, the MMS also lacked in the ability to accurately measure whether royalty-in-kind payments, payments in the form of oil or natural gas rather than monetary, are correct.<sup>1348</sup>

### *THE DEEPWATER HORIZON AFTERMATH*

The Mineral Management Service (“MMS”) was eliminated by Secretary Salazar within thirty days of the Deepwater Disaster.<sup>1349</sup> Despite six hearings held by Committee Republicans on the failures within MMS in 2006, as well as repeated requests by then-Ranking Member Issa in 2007, 2008 and 2009, Democrats held no hearings on the troubles facing the agency until after the explosion.<sup>1350</sup> As a result, factors that likely contributed to, or at a minimum exacerbated one of the worst environmental and economic disasters in American history escaped rigorous oversight for nearly four years.<sup>1351</sup>

### **Too Little, Too Late**

Upon entering office, Secretary Salazar was aware of systematic problems at MMS and indicated an early commitment to initiate meaningful reform at the agency. In January 2009, he told MMS employees that “[w]e will make sure you have the tools you need to hold special interests accountable, to protect taxpayers from getting fleeced, and to ensure that those who develop our natural resources follow the law of the land.”<sup>1352</sup> Despite this pledge, there is little to suggest what, if anything, the Secretary did over the past year to address the ongoing failures within MMS.

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<sup>1345</sup> *Id.*

<sup>1346</sup> *Id.* at 6 (emphasis added) (citing MMS Could Do More to Improve the Accuracy of Key Data Used to Collect and Verify Oil and Gas Royalties. Report No. GAO-09-549. U.S. Government Accountability Office, August, 2009. p. 13).

<sup>1347</sup> *Id.* at 6.

<sup>1348</sup> *Id.* at 6.

<sup>1349</sup> May 19, 2010 Secretarial Order 3299

<sup>1350</sup> H. Cmte. on Oversight & Gov’t Reform, *The BP Oil Spill Recovery Effort: The Legacy of Choices Made by the Obama Administration*, 112th Cong. 16 (2010).

<sup>1351</sup> *Id.*

<sup>1352</sup> Ken Salazar, Secretary, Dep’t of the Interior, Remarks to Employees at MMS Office in Denver, CO (Jan. 29, 2009), available at [http://www.doi.gov/news/speeches/2009\\_01\\_29\\_speech.cfm](http://www.doi.gov/news/speeches/2009_01_29_speech.cfm).

Even President Obama noted in May 2010 that “there wasn’t sufficient urgency in terms of the pace of how those changes [at MMS] needed to take place.”<sup>1353</sup>

In the wake of the April 20, 2010, Deepwater Horizon oil spill, the acute public scrutiny of MMS – and its historic shortcomings – drove Secretary Salazar to launch a hasty and massive reorganization of the United States’ offshore oil and gas operations. In a May 11, 2010, announcement, Secretary Salazar renewed calls to reorganize MMS operations, emphasizing the need to establish an independent safety and enforcement function.<sup>1354</sup> Two days later, on May 13, 2010, he tasked two political appointees – both with just approximately one year of experience at the Department of Interior (“DOI”) – to build on his May 11, 2010, announcement and develop and oversee a plan to restructure MMS.<sup>1355</sup>

It took just under one week for this handful of political appointees to evaluate and recommend a complete restructuring of offshore oil and gas management. On May 19, 2010, Secretary Salazar issued Secretarial Order 3299, eliminating MMS and transferring offshore oversight responsibilities to the established Bureau of Ocean Energy Management, Regulation, and Enforcement (“BOEMRE”) and revenue collection to a new Office of Natural Resources Revenue. BOEMRE is further divided into the Bureau of Ocean Energy Management (“BOEM”) and the Bureau of Safety and Environmental Enforcement (“BSEE”).<sup>1356</sup>

In interviews with Committee staff, political appointees from DOI charged with restructuring MMS professed that the only impetus for the reorganization was the April 20, 2010 accident on the Deepwater Horizon.<sup>1357</sup> Additionally, they stated that the public perception of an ongoing conflict of interest at MMS played an important role in their decision to split the agency into three entities.<sup>1358</sup> Only after the Secretary announced the new agency structure did DOI begin to assess how they would implement the reorganization, including, for the first time, outreach to current MMS employees. Even then, those who were afforded an opportunity to meet with the DOI team after the initial announcement noted that their meetings were limited to about one hour and they remained uncertain whether their concerns would be addressed.<sup>1359</sup>

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<sup>1353</sup> President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (May 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

<sup>1354</sup> Mike Soraghan, *Interior: Birnbaum’s Game of Telephone Ends in Firing*, ENERGY AND ENVIRONMENT DAILY, (May 28, 2010), available at <http://www.eenews.net/public/EEDaily/2010/05/28/2>.

<sup>1355</sup> *Id.*

<sup>1356</sup> Ken Salazar, Secretary, Department of the Interior, ORDER NO. 3299, Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resource Revenue (May 19, 2010).

<sup>1357</sup> Interview with Chris Henderson and Rhea Suh, Department of the Interior (July 15, 2010).

<sup>1358</sup> *Id.*

<sup>1359</sup> Interview with Lars Herbst, MMS Regional Director, Robert, in Louisiana (June 16, 2010); Interview with John Goll, MMS Regional Director – Alaska, Telephone Interview from Washington, D.C. (July 12, 2010); Interview with Chris Oynes, Former Associate Director of OMM, MMS, Department of the Interior, in Washington, DC (July 13, 2010); and Interview with Ellen Aronson, MMS Regional Director – Pacific, Telephone Interview from Washington, D.C. (July 14, 2010).

## Too Much, Too Early?

As it was preparing and organizing the new agencies to replace MMS, the GAO reported that the Department of the Interior, may not even have the “resources and skills” to both run its current programs and design the new ones that would be necessary for a new organization to be formed.<sup>1360</sup> Employees that had been at MMS for years even acknowledged that the reorganization appeared to be geared more towards political expediency than an attempt at legitimate reform.<sup>1361</sup> This was demonstrated, they noted, by a lack of understanding in the operational duties that were necessary in the field.<sup>1362</sup> For example, with the split of the Offshore Energy and Minerals Management section into two distinct entities, elements of the pre- and post-lease requirements for environmental compliance – aspects of the process that need to be seamless to run effectively – had been split and made fulfilling the necessary responsibilities of the task even more layered with bureaucratic tape than previously.

In addition to the complications of the organizational structure, creating new programs created an added tax on the hiring department. The new entities were tasked with hiring prospectively hundreds of new inspectors. However, due to the limited nature of people that had the requisite experience, often these new inspectors were tasked with taking a massive pay-cut and going through a long training program.<sup>1363</sup>

All of these challenges with the new entities reflect a general lack of understanding with the purpose and tasks that were necessary to appropriately administer the stated goals of the new organization. In addition to its hasty and haphazard reorganization of MMS, which ignored concerns raised by GAO, the Interior Inspector General and others, the Interior also moved forward without understanding the role the agency played in creating the circumstances which contributed to the accident. At the time the reorganization was announced, there were at least five separate official investigations and/or studies related to offshore oil and gas operations in the United States – many of which were launched in response to the incident.<sup>1364</sup> Even so, Secretary Salazar and DOI pushed an aggressive top-down approach to reforming MMS at the worst possible time—in the middle of a crisis and before obtaining key facts about what actually caused of the incident.

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<sup>1360</sup> GOVERNMENT ACCOUNTABILITY OFFICE, *Why It's High Risk*, available at [http://www.gao.gov/highrisk/risks/efficiency-effectiveness/management\\_federal\\_oil\\_gas.php](http://www.gao.gov/highrisk/risks/efficiency-effectiveness/management_federal_oil_gas.php).

<sup>1361</sup> Interview with MMS District and Regional Office Employees – Gulf of Mexico, Louisiana, (Jun. 15- 16, 2010); Interview with John Goll, MMS Regional Director – Alaska, Telephone Interview from Washington, D.C. (Jul. 12, 2010); Interview with Chris Oynes, Former Associate Director of OMM, MMS, Department of the Interior, Washington, DC (Jul. 13, 2010); and Interview with Ellen Aronson, MMS Regional Director – Pacific, Telephone Interview from Washington, DC (Jul. 14, 2010).

<sup>1362</sup> *Id.*

<sup>1363</sup> Interview with Chris Henderson and Rhea Suh, Department of the Interior, Washington, DC (July 15, 2010).

<sup>1364</sup> *See, e.g.*, The National Commission on the Deepwater Horizon Oil Spill and Offshore Drilling; BP's Deepwater Horizon Accident Investigation Report; The U.S. Coast Guard Deepwater Horizon Joint Investigation Team.

## WHO OWNS THE GOVERNMENT’S DATA? THE RELATIONSHIP WITH DUNS AND BRADSTREET

In recent years, government officials, transparency advocates, and prospective competitors have raised concerns about the General Services Administration (“GSA”) contract with Dun and Bradstreet (“D&B”) to provide the Federal Government with an entity identification system for contractors.<sup>1365</sup> The Government Accountability Office (“GAO”) described the contract as a “monopoly” on federal contractor identification numbers.<sup>1366</sup> The contract includes severely restrictive terms that may make it difficult to switch to new systems and the specific reference to a D&B’s proprietary product in the Federal Acquisition Regulation (“FAR”) creates the monopolistic environment that leads to unfavorable contract terms.<sup>1367</sup>

GSA contracts with D&B for use of the Data Universal Numbering System (“DUNS”) numbers in government wide procurement data systems and other related services. DUNS numbers are nine digit unique identification numbers used to identify and track business entities.<sup>1368</sup> All prospective contractors, grantees, and other federal award recipients must request a DUNS number from D&B. To obtain the number, the entity must provide D&B identifying information like name, address, email, and phone number.

In 1996, the FAR was amended to specifically require prospective contractors to obtain a DUNS number in order to contract with the Federal Government.<sup>1369</sup> According to senior GSA acquisition officials, specific mention of the DUNS identifier is likely the only such reference to a specific, proprietary product in the entire FAR.<sup>1370</sup> In the 2000s, the Office of Management and Budget (“OMB”) expanded the use of DUNS by requiring grant applicants and other recipients of federal assistance to obtain DUNS numbers.<sup>1371</sup>

The cost of the contract has increased dramatically over time. From 2002 to 2004, the cost of the contract was \$1 million per year and the price was tied to the total number of entity registrants. In 2007, the DUNS contract price rose to \$19 million per year when GSA switched to a fixed “enterprise” price and expanded the license to allow for public display of the DUNS number and

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<sup>1365</sup> Letter, from GAO to The Honorable E. Benjamin Nelson, Senator. “Government Is Analyzing Alternatives for Contractor Identification Numbers.” June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

<sup>1366</sup> *Id.*

<sup>1367</sup> *Id.*

<sup>1368</sup> About Us, Dun & Bradstreet website, available at <http://www.dnb.com/company.html>.

<sup>1369</sup> FAR § 4.605(b) *Data Universal Numbering System (DUNS)* and FAR § 4.1102; 52.204-7.

<sup>1370</sup> Briefing, GSA officials and Oversight Committee Staff, August 18, 2014.

<sup>1371</sup> Letter, from GAO to The Honorable E. Benjamin Nelson, Senator. “Government Is Analyzing Alternatives for Contractor Identification Numbers.” June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

other information, as required by newly enacted budget transparency legislation.<sup>1372</sup> The total cost for the current eight-year contract is approximately \$154 million.<sup>1373</sup>

The contract is also hampered by unfavorable and restrictive terms. Under the licensing agreement, the numbers and associated data may only be used for acquisition purposes, which means other agencies and Inspectors General Offices may not use the data without entering into an additional contract with D&B, and incurring additional costs. The contract requires that D&B data must be deleted from all federal databases upon termination of the contract.

The extent of damage a complete deletion of all D&B data might have on federal operations is hard to gauge, but senior GSA acquisition officials acknowledge it would be costly. However, recent difficulties associated with the Recovery Accountability and Transparency Board's ("Recovery Board") contract with Dun & Bradstreet provides some insight into the effects of these restrictive terms.

#### *RECOVERY.GOV: A MICROCOSM OF THE EFFECTS OF POOR FEDERAL CONTRACTING*

In the summer of 2014, the Recovery Board contacted Committee staff about the potential loss of valuable data publicly available on Recovery.gov.<sup>1374</sup> The data, collected in the course of implementing the American Recovery and Reinvestment Act ("Recovery Act"), details how Recovery Act funds were spent by award recipients. During implementation, Recovery.gov was heralded as model for federal accountability and transparency primarily due to access to the detailed award data and associated analytical tools made available to the public.<sup>1375</sup>

Public access to the data was in jeopardy because the data was tied to the DUNS contract. The Recovery Board posted this notice on Recovery.gov:<sup>1376</sup>

The Recovery Accountability and Transparency Board will sunset on September 30, 2015 and has decided for its last year not to renew the licensing agreement that allows for the display of certain recipient-related data. As of October 1, 2014, maps, charts, and graphs on the site will no longer reflect this information. This change will also include the removal of the recipient profiles as well as the cumulative national download file.

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<sup>1372</sup> Letter, from GAO to Hon. E. Benjamin Nelson, Senator. "Government Is Analyzing Alternatives for Contractor Identification Numbers." June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>. GAO notes that the 2006 Federal Funds Transparency and Accountability Act required the disclosure of corporate linkage information for grant awardees, further expanding the Federal Government's use of D&B information. GAO also cites the fact that as technology allows greater consolidation of award systems, the DUNS number has become an increasingly integral component in how government data systems operate. GAO report, page 5.

<sup>1373</sup> Letter, from GAO to Hon. E. Benjamin Nelson, Senator. "Government Is Analyzing Alternatives for Contractor Identification Numbers." June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

<sup>1374</sup> Meeting, Recovery Board staff and Oversight Committee staff, July 16, 2014.

<sup>1375</sup> Michael O'Connell, Recovery Board opens next frontier in financial accountability, FEDERAL NEWS RADIO, April 10, 2013, available at <http://www.federalnewsradio.com/513/3281091/Recovery-Board-opens-next-frontier-in-financial-accountability>.

<sup>1376</sup> Federal Spending Watchdog Pulls the Plug on DUNS, POGO BLOG, September 9, 2014, available at <http://www.pogo.org/blog/2014/09/federal-spending-watchdog-pulls-the-plug-on-duns.html>.

Committee staff was told that the Recovery Board collected data directly from award recipients, including DUNS numbers. The DUNS numbers were used to verify the data collected against the data contained in other federal acquisition systems. Because the GSA DUNS contract limited use of the data, which parties to the contract agreed did not include verification of the accuracy of data collected under the Recovery Act, the Recovery Board entered into a contract with Dun and Bradstreet as a modification to the core GSA contract.<sup>1377</sup>

Recently, as the contract was coming to an end, parties to the contract agreed that all D&B data must be removed from Recovery.gov under the terms of the contract. The Recovery Board could extend the contract for an additional year, potentially costing as much as \$1.4 million, but the Recovery Board felt that a one year fix was not worth the expenditure.<sup>1378</sup>

The Recovery Board informed Committee staff that under the licensing agreement recipient-related information which will be removed goes beyond DUNS identifiers or information directly obtained from Dun & Bradstreet and includes “any piece of data that was ever verified against” Dun & Bradstreet data contained with the System for Award Management or Central Contractor Registry maintained by GSA.<sup>1379</sup> In effect, the basic recipient identifier information, such as the name and address of an award recipient, which was directly reported by the recipient to the Federal Government, and verified against Dun & Bradstreet data only to comply with the government’s requirement that all awardees have a propriety DUNS identifier, has been entangled with the proprietary information by the restrictive terms of the contract.

#### *AN OPPORTUNITY FOR OVERSIGHT OF THE GSA’S D&B CONTRACT*

The Recovery Board’s predicament gave the Committee an opportunity to explore an issue that raised concerns which had been developing under multiple chairmen. D&B data restrictions became a public concern after the enactment of the Federal Financial Accountability and Transparency Act (“FFATA”), which required certain financial data to be made publicly available on USASpending.gov.<sup>1380</sup>

Restrictions in the DUNS contract prohibited GSA from making government wide procurement data publicly available. When GSA renegotiated the contract, to meet the requirements of the statute, costs jumped significantly.<sup>1381</sup> Also, D&B required that if the government was to make the data publicly available on the Internet, the website must include a legal disclaimer.<sup>1382</sup>

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<sup>1377</sup> Meeting, Recovery Board staff and Oversight Committee staff, July 16, 2014.

<sup>1378</sup> *Id.*

<sup>1379</sup> E-mail from Nancy K. DiPaolo, Chief, Congressional & Intergovernmental Affairs, Recovery & Accountability Transparency Board to House Committee on Oversight and Government Reform Staff. August 21, 2014.

<sup>1380</sup> Letter from Chairman Darrell Issa, H. Comm. on Oversight & Gov’t Reform, to Daniel M. Tangherlini, Administrator, GSA, August 6, 2014.

<sup>1381</sup> Letter, from GAO to Hon. E. Benjamin Nelson, Senator. “Government Is Analyzing Alternatives for Contractor Identification Numbers.” June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

<sup>1382</sup> *Id.*

The current disclaimer on USASpending states:

This website contains data supplied by third party information suppliers, one of which is D&B. The D&B data, which includes, but is not limited to, information related to the DUNS number, is provided for internal use only. By using this website you agree that the D&B data will be used for internal purposes only.<sup>1383</sup>

It is unclear what “internal use only” means when information is publicly available on the Internet, but the intent is clearly against the spirit of FFATA’s transparency requirements.

In 2012, GAO issued a report with several troubling findings about the GSA’s relationship with D&B and with federal procurement data.<sup>1384</sup> GAO found that D&B has an effective monopoly over government unique entity identifiers and that D&B placed significant restriction on how GSA can use the numbers. The restrictions may hamper the ability to switch to new systems. GAO also found that competitors believe that restrictions in the contract and federal acquisition regulation (“FAR”) requirements give D&B an unfair advantage in both the government and commercial markets for business data.<sup>1385</sup>

Another key concern for the Committee staff was the mystery surrounding some of the terms of the contract. GSA and D&B have reported different understandings of what constitutes “D&B data” that must be removed at the end of the contract. GSA and D&B also have different understandings of the restrictions in the contract. Committee staffs were frequently frustrated in speaking with the various parties to the contract because of these inconsistencies.

#### *THE CONTRACT AND THE PARTIES’ VARIOUS INTERPRETATIONS*

In order to better understand the terms and condition of the contract with Dun & Bradstreet, the Committee wrote GSA on August 6, 2014, to request the current contract.<sup>1386</sup> The contract file, including the contract, modifications, and other related contract documents was provided shortly thereafter. Signed in 2010, it is an eight-year sole-source contract, including a three-year base period and five one-year options.<sup>1387</sup>

The contract file showed that GSA officials themselves have identified the FAR requirement to use DUNS as a critical weakness in the Federal Government’s ability to negotiate better prices and terms. According to the “Limited Sources Justification and Approval” document contained within the contract file “Only after the FAR language is changed can the government initiate a competitive

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<sup>1383</sup> Limitations of Liability on the DUNS Number, USASpending.gov, last access on October 24, 2014.

<sup>1384</sup> Letter, from GAO to Hon. E. Benjamin Nelson, Senator. “Government Is Analyzing Alternatives for Contractor Identification Numbers.” June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

<sup>1385</sup> *Id.*

<sup>1386</sup> Letter from Chairman Darrell Issa and Ranking Members Elijah Cummings, H. Comm. on Oversight & Gov’t Reform, to Daniel M. Tangherlini, Administrator, GSA, September 4, 2014 and letter from Chairman Darrell Issa and Ranking Members Elijah Cummings, H. Comm. on Oversight & Gov’t Reform, to Anne Rung, Administrator, OFPP, September 4, 2014.

<sup>1387</sup> Letter, from GAO to Hon. E. Benjamin Nelson, Senator. “Government Is Analyzing Alternatives for Contractor Identification Numbers.” June 12, 2013, available at <http://www.gao.gov/assets/600/591551.pdf>.

award for a new contractor unique identifier number.”<sup>1388</sup> In 2010 market evaluation report, a GSA official wrote “D&B will never lower their costs unless they have a valid concern that they are going to lose the government business. Any sole source environment like the current one results in higher prices to the government.”<sup>1389</sup>

Interestingly, the market evaluation report found that there existed at least one viable competitor to Dun & Bradstreet.<sup>1390</sup> D&B’s monopoly, as required by the FAR, negates GSA’s ability to compete the contract openly. As its own contract with Dun & Bradstreet expired in 2008, the United States Postal Service chose to pursue open competition in order to reduce costs. Ultimately, a different contractor was determined to provide a better value. USPS estimates it saved \$6.4 million annually because of this competition.<sup>1391</sup>

After reviewing the contract documents and a couple of conversations with GSA regarding their relationship with D&B, the Committee sent bipartisan letters to the Office of Federal Procurement Policy (“OFPP”) and GSA detailing the Committee’s understanding of the DUNS contract and the FAR requirement to use DUNS.<sup>1392</sup> The Committee encouraged OFPP to change the FAR to remove the specific requirement to use a specific, privately owned proprietary product and requested documents relating to the inclusion of DUNS in the FAR.

Committee staff met with D&B on September 9, 2014. D&B was able to explain their perspective of the contract, which differed with GSA’s report at some key provisions. The most important difference was the parties’ understanding of what would happen if the contract ended and GSA was required to remove “D&B data.” GSA had told Committee staff that DUNS numbers needed to be removed, not just from databases, but from every email and any other reference to a specific DUNS number.<sup>1393</sup> While that would be a significant hurdle, D&B’s interpretation was much more significant. They asserted that any data that was in the government wide databases maintained by D&B would need to be removed because it was D&B data. That data included names, addresses, and other basic contact information for all federal contractors.<sup>1394</sup>

D&B also discussed the restrictions under the contract. GAO had recently reported that GSA attributed the failure to comply with FFATA’s requirement to post certain information on USASpending to restrictions in the contract.<sup>1395</sup> However, shortly after the report was released, D&B contacted GAO to clarify that the contract did not have any restrictions to complying with

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<sup>1388</sup> General Services Administration Justification and Approval for Other than Full and Open Competition Under the Authority of FAR 6.302-1. June 23, 2010.

<sup>1389</sup> GSA Evaluator’s Report On Contractor Identification Number (CIN) Response. August 7, 2009.

<sup>1390</sup> *Id.*

<sup>1391</sup> E-mail from Talaya S. Simpson, Manager, Government Liaison (Acting), United States Postal Service, to House Committee on Oversight and Government Reform Staff. August 22, 2014.

<sup>1392</sup> Meeting, D&B representatives and Committee Staff, September 14, 2014.

<sup>1393</sup> Briefing, GSA officials and Oversight Committee Staff, August 18, 2014.

<sup>1394</sup> Meeting, D&B representatives and Committee Staff, September 14, 2014.

<sup>1395</sup> GOV’T ACCOUNTABILITY OFFICE, GAO-14-476, DATA TRANSPARENCY: OVERSIGHT NEEDED TO ADDRESS UNDERREPORTING AND INCONSISTENCIES ON FEDERAL AWARD WEBSITE, 2014.

FFATA.<sup>1396</sup> In effect, GSA was in violation of federal law because the agency was unaware of the terms of its own contract.

#### *A FREE SOLUTION TO A MILLION DOLLAR PROBLEM*

Importantly, at the meeting D&B officials offered a simple and free solution to the Recovery Board data issue. Upon the termination of the Recovery Board's contract modification the government no longer had a license to publicly display the Recovery Act data on Recovery.gov. However, the government continued to have a license to publicly display D&B data on other specific federal websites. D&B explained to Committee staff that all the data that was no longer permitted to be displayed on Recovery.gov could simply be posted to a different website.<sup>1397</sup>

That solution is actually fairly clear from an initial reading of the contract. It remains unclear at this time why the agencies were unable to identify this solution themselves. However, Committee staff immediately communicated D&B's interpretation to both the Recovery Board and GSA. Committee staff also coordinated with other congressional staff with an interest in the issue, including the Senate Homeland Security and Government Affairs Committee, who also reached out to the relevant agencies.

On October 17, Committee staff received notice from the Recovery Board that the Recovery.gov data was now posted on the Federal Procurement Data System, FDPS.gov. This solution kept federal award data available without incurring an additional licensing cost to the taxpayer.

#### *A NECESSARY CHANGE TO THE FAR*

At a briefing on October 24, 2014, senior GSA Acquisition officials confirmed that GSA will be pursuing a change to the FAR to remove D&B references from regulation and will pursue corresponding changes to the language which governs grant awards. In addition, GSA confirmed that contract negotiations are currently underway with D&B to improve the terms and conditions of the contract.<sup>1398</sup>

#### *CONTINUED OVERSIGHT IS NEEDED TO FIX THE BIGGER PROBLEMS*

Many parties, including Committee staff, were pleased to find a quick and easy solution to the Recovery Board's predicament; however the larger problems with Federal Government entity identifiers, the ownership of federal procurement and award data persists. Throughout the process, GSA has asserted unfavorable interpretations of the contract provisions. Finally, GSA, in an effort to reduce the expected inflated costs of the contract, negotiated even more restrictive and potentially risky provisions to the government's data rights.

The restrictions to use of the data is particularly concerning because most people would reasonably believe that the data in federal procurement databases is owned by the government. The fact that the government contracts to limit rights, use, and access to federal procurement data at a time of increasing calls for transparency and public access to federal information is indicative of the disconnect between federal agencies and the American public.

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<sup>1396</sup> Meeting, D&B representatives and Committee Staff, September 14, 2014.

<sup>1397</sup> *Id.*

<sup>1398</sup> GSA Integrated Acquisition Environment Quarterly Update (October 24, 2014).

Congressional oversight staff need to continue to express to GSA and other federal agencies that, while their specific mission is important, they must remember that they are part of a larger system that is ultimately responsible to American citizens. In contracting, they must aggressively negotiate terms that are both fiscally responsible and reasonable, but also favorable to the needs of the public to understand and oversee what the government does.

Continued oversight of this specific issue will likely involve continued meetings and discussions with federal agencies. Committee staff will continue to follow up with OFPP to encourage a product-neutral amendment to the FAR. With GSA, Committee staff will need to regularly remind them of their obligations to foster contracting environments that encourage competition. If this more temperate approach proves ineffective to spark change, this Committee may consider a legislative solution.

## CHAPTER 7. THE GOOD, THE BAD, AND THE UGLY: AMERICA’S CITY ON A HILL

The District of Columbia was selected to be the permanent home for the United States Federal Government in 1790. The United States Constitution grants Congress the authority “[t]o exercise exclusive Legislation in all Cases Whatsoever over said District . . . .”<sup>1399</sup> As with other issues addressed by the Legislative Branch, jurisdiction over the District is divided between the House of Representatives and the Senate. On January 27, 1808, the U.S. House of Representatives created the Committee on the District of Columbia, which oversaw legislation regarding the administration and development of the District. In the 104th Congress, the then-titled Government Reform and Oversight Committee assumed the jurisdiction of the former Committee on the District of Columbia.<sup>1400</sup> Although the District is not represented by voting members in Congress, a non-voting delegate to the House of Representatives is elected by citizens of the District every two years – Representative Eleanor Holmes Norton has served in this role since 1991.<sup>1401</sup>

Under Chairman Darrell Issa’s leadership, the Committee on Oversight and Government Reform has largely avoided confrontation with the District, preferring instead to encourage its self-governance. However, Chairman Issa and Representative Norton have worked closely to pass federal legislation to address the needs of the city, including bills to promote economic development and to ensure fiscal stability. Although the complex relationship between the District and Congress will likely continue to create tension, the foundation laid through the work of the Committee on Oversight and Government Reform will foster sustained cooperation between the city and Congress in the future.

### AN ON-AGAIN, OFF-AGAIN RELATIONSHIP WITH CONGRESS

The Residence Act of 1790, officially titled “An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,” established the seat of the Federal Government at a site measuring 10 square miles within the borders of Virginia and Maryland on the Potomac River and tasked the President with appointing three commissioners to oversee the construction of the new capital city.<sup>1402</sup> In 1801, Congress passed the District of Columbia Organic Act, which organized the city and surrounding counties.<sup>1403</sup> In the following year, the city’s first municipal government was created and the position of mayor would be created; initially the mayor was appointed by the President and a 12-member council,<sup>1404</sup> but over time the power to fill this office would rest with the council alone<sup>1405</sup> before moving into the hands of the city’s eligible voters in

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<sup>1399</sup> U.S. CONST. art. 1, § 8, cl. 17.

<sup>1400</sup> RULES OF THE HOUSE OF REPRESENTATIVES (104th Cong.) Rule X, cl. 1(g).

<sup>1401</sup> During the 113th Congress, Representative Norton and Chairman Issa worked closely for the benefit of the District, and Representative Norton passed more legislation than any other Democrat in the House.

<sup>1402</sup> Residence Act of 1790, 1 Stat. 130.

<sup>1403</sup> District of Columbia Organic Act of 1801, ch. 15, 2 Stat. 103.

<sup>1404</sup> Act of May 3, 1802, 2 Stat. 195.

<sup>1405</sup> Act of May 4, 1812, 2 Stat. 721.

1820.<sup>1406</sup> In 1846, a portion of the city's designated land was returned to Virginia, which has given the city its current shape.<sup>1407</sup>

The autonomy the District gained in 1820 would not last. On June 1, 1871, Congress abolished the mayor and council and replaced the positions with a governor and council appointed by the president. In addition, an elected House of Delegates for the city and a federal position for a non-voting delegate to the United States Congress were created.<sup>1408</sup>

By 1878, the territorial government of the District of Columbia had again been abolished and replaced with three temporary commissioners appointed by the president.<sup>1409</sup> Although this form of government lasted 89 years, like the previous reorganizations it would be temporary; in 1967 the system was replaced with a mayor and council appointed by the president.<sup>1410</sup>

In 1973, Congress granted D.C. greater freedom and empowered citizens of the District to elect their own mayor and city council through the Home Rule Act, which allowed locally-elected officials to manage day to day operations of the City. However, Congress retained the authority to review and approve all District laws.<sup>1411</sup>

In the early 1990's the District was facing serious insolvency issues, which led to legislation in 1995 that stripped away the city's control of fiscal matters. The District of Columbia Financial Responsibility and Management Assistance Act<sup>1412</sup> established a five member "Control Board" to oversee the city's financial matters; the Control Board served as the *de facto* government for the city. The law required the Control Board to suspend activities once the following four specific pre-conditions had been met:

1. all obligations arising from the issuance by the Authority of bonds, notes, or other obligations have been discharged;
2. all borrowings by and on behalf of the District of Columbia from the U.S. Treasury have been repaid;
3. the District Government has adequate access to both short-term and long-term credit markets at reasonable rates to meet its borrowing needs; and
4. for four consecutive fiscal years the District has achieved a balanced budget as determined in accordance with generally accepted accounting principles.<sup>1413</sup>

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<sup>1406</sup> Act of May 15, 1820, 3 Stat. 583.

<sup>1407</sup> Act of July 9, 1846, ch. 35, § 3, 9 Stat. 35.

<sup>1408</sup> District of Columbia Organic Act of 1871, 16 Stat. 419 (1871).

<sup>1409</sup> Act of June 11, 1878, 20 Stat. 102.

<sup>1410</sup> Reorganization Plan No. 3 of 1967, 81 Stat. 948.

<sup>1411</sup> District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

<sup>1412</sup> The District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, 109 Stat. 97 (1995).

<sup>1413</sup> *Id.*

The last of the pre-conditions was achieved in February, 2001, when the fiscal year 2000 Comprehensive Annual Financial Report certified that the city had achieved its fourth consecutive balanced budget. All Authority operations were suspended at the end of that fiscal year – at midnight on September 30, 2001.<sup>1414</sup>

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<sup>1414</sup> The District of Columbia Financial Responsibility and Management Assistance Act, Pub. L.104-8, 109 Stat. 97 (1995).

## A DESIRE FOR GREATER INDEPENDENCE: LOCAL BUDGET AUTONOMY

### *BACKGROUND: WHAT MAKES D.C.'S BUDGET PROCESS DIFFERENT?*

Even after the passage of the Home Rule Act, Congress continues to review and approve the District's annual budget. As required by the Home Rule Act, the city council must approve a budget within 56 days after receiving a budget proposal from the mayor. The approved budget must then be sent to the President who forwards it to Congress for review, modification, and approval. The District's entire budget is included as part of one of Congress's annual appropriations measures; currently it is included in the Financial Services and General Government Appropriations Act. This can be a cumbersome and arduous process for City officials who in recent years have had to deal with Congresses that cannot pass the bulk of individual spending bills, including the Financial Services and General Government Appropriations bill. The result has left D.C. in fiscal limbo for weeks and months at a time as they are unsure what their actual budget may be.

It is important to note that when discussing D.C.'s budget, there are different terms that describe various revenue streams that fund the city's fiscal responsibilities. "Local funds" describe those dollars being spent by the District through its own revenue-gaining measures – such as income generated through the collection of fees from parking tickets or the issuance of municipal bonds. "Gross funds" describe all funding streams, including local funds, federal grants, federal appropriations, and other dollars.

The city's budget is roughly \$10 billion. The District also receives federal dollars for certain programs and services. Generally speaking, federal funds to the District are allocated in two ways. The first is a funding stream unique to DC ("Federal Payments"). The second is funding that DC receives in much the same way that the states and territories receive funds from the Federal Government ("Federal Grant Expenditures").

Federal Payments. These are payments made directly to the District from the U.S. Treasury by the Federal Government. They are determined through the annual appropriations process.

Federal Grants Expenditures. The District also receives dozens of grants each year from various federal agencies. This includes both formula and non-formula grants, and both mandatory and discretionary grants. The majority of this federal grant aid is currently provided by a single source - the Medicaid program.

The total request of federal contributions to the District, which includes both above-mentioned funding streams, is around \$2.7 billion annually. The largest single expenditure for the city is its Medicaid liability, which is \$1.9 billion for fiscal year 2014. Generally speaking, the Federal Government contributes 70% of this total, while D.C. covers the other 30%.<sup>1415</sup> Finally, included in

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<sup>1415</sup> The cost-share is different for administrative costs (50%-50%).

these federal payments, the city's approved budget includes \$94 million in federal appropriations.<sup>1416</sup>

### *THE PUSH FOR BUDGET AUTONOMY*

Local elected leaders and D.C. residents are always seeking increased autonomy for the city – for example, many cars in the District, including the automobiles in President Barack Obama's motorcade, bear license plates with the slogan "Taxation without Representation" across the bottom. Soon after taking leadership of the Committee on Oversight and Government Reform, Chairman Darrell Issa recognized the difficulties faced by the District given its lack of budget autonomy – when Congress and the President are unable to agree on funding measures, a city government shutdown becomes a very real possibility. Government shutdowns – and even the threat of a shutdown – strain the city's budget. Because Congress approves the District's annual budget, D.C. would be in violation of the Anti-Deficiency Act should it try and spend even locally-raised revenue without the consent of Congress.<sup>1417</sup>

As such, Chairman Issa and the Committee have worked to enact legislation that would grant the city control over its locally-generated dollars so shutdowns and Congress's recent inability to enact individual spending measures would no longer tie the hands of the city. While Chairman Issa successfully shepherded legislation out of the Committee to grant the city this autonomy, the full House and Senate have yet to take the measure up.<sup>1418</sup>

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<sup>1416</sup> REQUESTED BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014, *available at* [http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/Federal\\_Payment\\_Deltas-June\\_book\\_to\\_2014\\_Approved.pdf](http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/Federal_Payment_Deltas-June_book_to_2014_Approved.pdf).

<sup>1417</sup> Antideficiency Act, Pub. L. No. 97-258, 96 Stat. 877 (1982) (prohibiting the outlay of funds without Congressional appropriations).

<sup>1418</sup> District of Columbia Financial Efficiency Act of 2013, H.R. 2793, 113th Cong. (as reported by H. Cmte. on Oversight & Gov't Reform, July 24, 2013). The Council also attempted to grant the city budget autonomy by attempting to amend the city's charter via a referendum. The referendum was approved by the voters on April 23, 2013. On May 19, 2014, a federal judge struck down the referendum stating, "Congress has plenary authority over the District, and it is the only entity that can provide budget autonomy." *Council of the District of Columbia v. Gray*, No. 14-655 (EGS) (D.D.C. May 19, 2014).

THE NEED FOR CONGRESSIONAL OVERSIGHT: THE SORDID CASE OF SULAIMON BROWN Under District of Columbia Code, the mayor has the legal authority to hire up to 220 Excepted Service Positions.<sup>1419</sup> At the time Mayor Vincent Gray took office in 2011, the Code stated those employees must “meet the minimum standards prescribed for the position to which he or she is appointed.”<sup>1420</sup> In the aftermath of Mayor Gray hiring a highly controversial mayoral opponent shortly after taking office in 2011, this section of the D.C. code came under heavy scrutiny.

### *A CORRUPT DEAL?*

Although it is not uncommon for politicians to hire opponents after an election, offering a candidate a position in exchange for attacking another candidate may violate a D.C. law barring corrupt influence.<sup>1421</sup> When reports surfaced on February 23, 2011, that Sulaimon Brown, who had recently been fired from his position within D.C.’s Department of Health Care Finance, had benefited from a *quid pro quo* arrangement with newly-elected D.C. Mayor Vincent Gray, questions of corruption soon followed. The alleged arrangement called for Mr. Brown to discredit mayoral candidate Adrian M. Fenty and solicit support for Mayor Gray; in exchange, Mr. Brown would receive an expected service position within Mayor Gray’s administration.

Acknowledging what he called “missteps,” on March 7, 2011, shortly after Mr. Brown’s allegations became public, Mayor Gray asked D.C. Attorney General Irvin B. Nathan to investigate the claims made by Mr. Brown, and “welcomed other external reviews,” including ones by the Office of Inspector General.<sup>1422</sup> Several Council members called into question the independence of the Attorney General, as he had been appointed by the mayor, and instead asked the D.C. Inspector General alone to investigate.<sup>1423</sup> However, both the Inspector General and the D.C. Attorney General eventually decided to recues themselves from the investigation.

### *A VACUUM IN OVERSIGHT*

On March 7, 2011, the D.C. Inspector General told the Committee that he had informed the D.C. Attorney General that the Inspector General would recues himself from the investigation into Mr.

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<sup>1419</sup> D.C. CODE § 1-610.3(2) (2001).

<sup>1420</sup> *Id.* § 1-609.01 (2001). However, as a result of the scandal outlined in this section, the D.C. Council rewrote the law to require that Excepted Service employees “must be well qualified” for the positions to which they are appointed. *Id.* § 1-609.01 (2001 & Supp. 2014) (effective May 19, 2014), *available at* <http://dcode.org/simple/sections/1-609.01.html>.

<sup>1421</sup> D.C. CODE § 22-704 (2001). The legislation provides: “Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation . . . in consideration that such official has nominated or appointed any person to any office or exercised any power in such official vested, or performed any duty of such official required, with partiality or favor, or otherwise contrary to law; and whosoever, being such an official, shall receive any such money, bribe, present, or reward, promise, contract, obligation, or security, with intent or for the purpose or consideration aforesaid shall be deemed guilty of bribery and upon conviction thereof [shall be punished by imprisonment for a term not less than 6 months nor more than 5 years].” *Id.*

<sup>1422</sup> See Press Release, Mayor Vincent C. Gray, Mayor Gray Calls for Swift and Thorough Investigations Into Allegations Made by Sulaimon Brown (Mar. 7, 2011), <http://www.tbd.com/articles/2011/03/gray-calls-for-investigations-into-allegations-by-sulaimon-brown-55886.html>.

<sup>1423</sup> Tim Craig, Nikita Stewart & Mike DeBonis, *Gray Acknowledges ‘Missteps’: Calls for Investigation*, WASH. POST, Mar. 7, 2011, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/06/AR2011030603934.html>.

Brown's charges.<sup>1424</sup> Nonetheless, around the same time, the D.C. Attorney General publicly stated that the role of his office would be "to help facilitate the investigations by the Inspector General's office."<sup>1425</sup> The Inspector General formally recused his entire office from the matter on March 8, 2011 and the Attorney General ultimately recused his entire office from the matter, citing a conflict of interest.

The inability of the D.C. Attorney General and the D.C. Inspector General to investigate the matter led to congressional intervention into the scandal. Because the Oversight and Government Reform Committee's jurisdiction includes "municipal affairs of the District of Columbia in general,"<sup>1426</sup> the allegations of corrupt actions by the D.C. mayor fell squarely within the purview of the Committee. While under Chairman Darrell Issa's leadership the Committee has generally supported greater D.C. autonomy, the Committee was forced to undertake the investigation after it became clear other local investigative bodies would be unable to pursue sufficiently independent investigations.

### *THE 2010 D.C. MAYORAL ELECTION*

In 2010, Sulaimon Brown, an auditor, was the first declared candidate to challenge District of Columbia Mayor Adrian M. Fenty in the Democratic primary. As of February 2010, Mr. Brown had raised a total of \$13,765 and had less than \$570 cash-on-hand.<sup>1427</sup> Mr. Brown's fundraising prowess did not improve over the next four months. By June 2010, Mr. Brown had raised an additional \$1,198, spent \$1,502 and was \$277 in debt.<sup>1428</sup> In addition to floundering financially, Mr. Brown found it difficult to attract attention. In fact, he was excluded from the first mayoral forum for not being a "viable" candidate due to his poor fundraising.<sup>1429</sup> During the campaign, Mr. Brown stated, he and Councilman Gray had reached an agreement: "Vince [Gray] was to stay on message, while [I] stayed on the attack [against Fenty]."<sup>1430</sup> In addition, his slogan turned to instructing voters: "If you don't vote Brown, vote Gray."<sup>1431</sup>

Mr. Brown came in dead-last in the primary, even behind the write-in candidates. Less than a month after Mayor Gray took office in January 2011, Mr. Brown was hired as an Excepted Service special assistant in the city's Department of Health Care Finance ("HCF"), receiving an annual salary of \$110,000. Although it is not unusual for new mayors to hire campaign workers for such positions, the D.C. Code required that employee must "meet the minimum standards prescribed for

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<sup>1424</sup> Interview by Committee on Oversight and Government Reform with Charles Willoughby, Inspector General, District of Columbia (Mar. 7, 2011).

<sup>1425</sup> Freeman Klopott, *D.C. Attorney General to 'Facilitate' Investigations into Allegations against Gray*, WASH. EXAM'R, Mar. 8, 2011, at 5.

<sup>1426</sup> RULES OF THE HOUSE OF REPRESENTATIVES (113th Cong.) Rule X, cl. 1(n)(2).

<sup>1427</sup> *How They're Faring in the Money Race*, WASH. POST., Feb. 3, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020203595.html>.

<sup>1428</sup> Mike DeBonis, *Candidates for Offices in D.C. File Finance Reports*, WASH. POST, Jun. 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061005346.html>.

<sup>1429</sup> Martin Austermuhle, *First Mayoral Forum Announced, But Not Everyone Is Invited*, DCIST, Apr. 22, 2010, available at [http://dcist.com/2010/04/mayoral\\_forum\\_announced\\_but\\_not\\_eve.php](http://dcist.com/2010/04/mayoral_forum_announced_but_not_eve.php).

<sup>1430</sup> Interview by Committee on Oversight and Government Reform with Sulaimon Brown (Mar. 8, 2011).

<sup>1431</sup> Alan Suderman, *The Curious Case of Sulaimon Brown*, WASH. CITY PAPER LOOSELIPS BLOG (FEB. 24, 2011, 6:40 PM), available at [www.washingtoncitypaper.com/blogs/looselips/2010/09/12.html](http://www.washingtoncitypaper.com/blogs/looselips/2010/09/12.html).

the position to which he or she is appointed.”<sup>1432</sup> At the time Mr. Brown was appointed to the position, there was no clear guidance on how this section of the D.C. Code should be interpreted.

On February 23, 2011, the news media reported:

Brown’s also run into legal trouble here in the District. Court records show gun charges against Brown were dropped in 1991 in exchange for Brown going into a diversion program, and a jury found Brown guilty in 1995 for unlawful entry. More recently, a restraining order against Brown was signed by a judge in 2007, court records show.<sup>1433</sup>

Officials in Mayor Gray's administration became alarmed when they later learned that the restraining order involved allegations of stalking a 13-year-old girl.<sup>1434</sup> On the following day, Mr. Brown was fired from his position at HCF.<sup>1435</sup> Mayor Gray, defending his appointment of Mr. Brown to the position, said he thought Mr. Brown was "qualified" and continued by saying he thought Mr. Brown’s resume “speaks for itself.”<sup>1436</sup>

Within days of his firing, Mr. Brown charged that he had previously struck a deal with the campaign of Mayor Gray. In exchange for continuing his attacks on Candidate Gray’s chief rival, then-Mayor Fenty, Mr. Brown alleged that Mr. Gray had promised him a city job if Mr. Gray won. According to Mr. Brown, Mr. Gray’s campaign chairwoman, Lorraine Green, and campaign consultant, Howard Brooks,<sup>1437</sup> gave Mr. Brown a series of cash payments to help finance his campaign so that he could continue his attacks on Mayor Fenty.<sup>1438</sup>

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<sup>1432</sup> D.C. CODE § 1-609.01 (2001). However, there is apparently no legal definitions of the “minimum standards” that Excepted Service personnel must meet. *See id.*

<sup>1433</sup> Alan Suderman, *The Bigger Scandal (Updated)*, WASH. CITY PAPER LOOSELIPS BLOG (Feb. 23, 2011, 12:22 PM), available at [www.washingtoncitypaper.com/blogs/looselips/2011/02/23](http://www.washingtoncitypaper.com/blogs/looselips/2011/02/23).

<sup>1434</sup> Nikita Stewart & Tim Craig, *Sulaimon Brown, Aide to D.C. Mayor, Is Fired After Allegations of Criminal Record*, WASH. POST, Feb. 24, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/24/AR2011022407597.html>. Documents produced by the District during the Committee’s investigation show the various allegations of criminal activity reported in the media were accurate. The records show that “[I]n March 2007, [FEMALE NAME REDACTED] obtained a Temporary Restraining Order from the Domestic Violence Unit of the Superior Court of the District of Columbia” against Brown. In addition to the allegations outlined above, the documents produced to the Committee by the D.C. Attorney General show that in the gun case, Mr. Brown was ordered to stay away from a woman. In 1995, he received one-year unsupervised probation and was ordered to stay away from the Howard University campus due to a charge of unlawful entry. Staff of H. Cmte. on Oversight & Gov’t Reform, *Investigative Report on Allegations of Improper Payments and Promises of Employment for Sulaimon Brown*, 112th Cong. 41 (2011).

<sup>1435</sup> Nikita Stewart & Tim Craig, *Sulaimon Brown, Aide to D.C. Mayor, Is Fired After Allegations of Criminal Record*, WASH. POST, Feb. 24, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/24/AR2011022407597.html>.

<sup>1436</sup> *Id.*

<sup>1437</sup> During the course of its probe, Committee investigators interviewed six key witnesses including Mr. Brown and Mrs. Green. Mr. Brooks, however, declined to be interviewed citing his Fifth Amendment privilege.

<sup>1438</sup> Nikita Stewart, *Former Mayoral Candidate Sulaimon Brown Says He Struck a Job Deal with Vincent Gray Campaign*, WASH. POST, Mar. 6, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2011030504378.html>.

### *THE COMMITTEE'S INVESTIGATION*

The Committee launched its inquiry into Mr. Brown's allegations of corruption soon after they surfaced in early 2011. The Committee requested and obtained thousands of documents from the Executive Office of the Mayor, from the Department of Health Care Finance ("HCF"), and the Metropolitan Police Department ("MPD"). The Committee received text messages and cell phone records from Mr. Brown, who also allowed Committee investigators to photograph envelopes in which he claimed to have received cash from Mr. Gray's campaign, and a related money order receipt.

Committee investigators also obtained several money orders that appear to have come from Mr. Gray's campaign consultant, Mr. Howard Brooks, as well as from persons related to Mr. Brooks – Mr. Brooks, claiming his Fifth Amendment privilege against self-incrimination, declined to testify before the Committee.<sup>1439</sup> One money order was purchased the same day that Mr. Brown first met Ms. Green, one of the investigations key witnesses and chairwoman of Mr. Gray's campaign.<sup>1440</sup>

However, Ms. Gerri Mason Hall, Mayor Gray's chief of staff, along with Ms. Green and Mayor Gray, denied a *quid pro quo* arrangement for employment. Each stated that Mr. Brown was merely promised an interview. During the course of the Committee's investigation, some circumstantial evidence was discovered that may support Brown's allegations, including cell phone records, internal city e-mails, and copies of text messages between Mr. Brown, the Mayor, Ms. Green, and Ms. Hall.<sup>1441</sup> However, the Committee's investigation, which was completed in October 2011, found no independent facts to corroborate Mr. Brown's charges relating to the promise of employment.

### *REPERCUSSIONS OF THE SCANDAL*

In addition to the Committee's investigation, there were two other inquiries into Mr. Brown's allegations: The first, by the U.S. Attorney for the District of Columbia, resulted in Mr. Brooks' guilty plea, and was continued by an investigation into the 2010 District mayoral election; and another by the D.C. Council Committee on Government Operations and the Environment, which resulted in a report. As a result of the scandal outlined in this section, the D.C. Council rewrote the law to require that Excepted Service employees "must be well qualified" for the positions to which they are appointed.<sup>1442</sup>

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<sup>1439</sup> A year after the Committee completed its investigation, Mr. Brooks was sentenced to 24 months of probation for lying to the FBI when he claimed he had not given Mr. Brown a series of money orders totaling \$2,810. Andrea Noble, *Gray campaign aide gets probation; Lied about '10 campaign payments*, WASH. TIMES, Oct. 11, 2012.

<sup>1440</sup> Staff of H. Cmte. on. Oversight & Gov't Reform, *Investigative Report on Allegations of Improper Payments and Promises of Employment for Sulaimon Brown*, 112th Cong. 19 (2011).

<sup>1441</sup> *Id.* at 3, 26-35.

<sup>1442</sup> D.C. CODE § 1-609.01 (2001 & Supp. 2014) (effective May 19, 2014), available at <http://dccode.org/simple/sections/1-609.01.html>.

## NATIONAL CAPITAL PLANNING COMMISSION

As Chairman of the House Committee that oversees the District, Mr. Issa is one of two members of Congress who have voting membership in the National Capital Planning Commission (“NCPC”), which is the Federal Government’s board of zoning for the District of Columbia. NCPC “protects and enhances the extraordinary historical, cultural, and natural resources of the National Capital Region by crafting long-range plans, analyzing emergent planning issues, reviewing site development and building proposals, and monitoring federal capital investment.”<sup>1443</sup>

During Chairman Issa’s tenure on the Commission, two major issues within the NCPC’s jurisdiction have garnered most of his attention: 1) Amending the DC Height of Buildings Act; 2) the Dwight Eisenhower Memorial.

### *D.C. HEIGHT OF BUILDINGS ACT*

#### **The Origin of the Limitation**

Limitations on building heights within the District date as far back as the origins of the capital city. In 1791, President Washington promulgated the first regulations on buildings in the city, which included “that the wall of no house [is] to be higher than forty feet to the roof, in any part of the city; nor shall any be lower than thirty-five feet on any of the avenues.”<sup>1444</sup>

In 1894, following the construction of the 164-foot Cairo Hotel in Northwest Washington,<sup>1445</sup> the DC Board of Commissioners approved new regulations restricting building heights in the city. These regulations generally prohibited buildings from being erected whose height exceeded the width of the street in front, and limited the height of residential buildings to less than 90 feet and commercial buildings to less than 110 feet.

In 1899 and again in 1910, the Congress superseded the Board of Commissioners by enacting federal legislation to restrict building heights in the District of Columbia.<sup>1446</sup> The 1899 law slightly modified and codified the regulations the Board of Commissioners set five years earlier. The law also allowed for certain architectural elements to be built higher than the limitations.<sup>1447</sup> Although the popular belief is that Congress enacted the legislation to preserve and protect views of the monuments, memorials and other significant national landmarks in the city, it is more likely that the primary cause for the legislation was to address environmental and public safety concerns, as the concept of “skyscrapers” was still new to the country. In fact, the Committee report accompanying the bill cited these concerns.

The 1910 federal law, titled the Height of Buildings Act, modified the maximum heights for buildings, added enforcement measures and for the first time highlighted congressional interest in maintaining certain characteristics of federal architectural interests. Under the law, no building could be erected higher than the width of the adjoining street plus 20 feet; in residential areas, no

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<sup>1443</sup> *About Us*, NATIONAL CAPITAL PLANNING COMMISSION, [http://www.ncpc.gov/ncpc/Main%28T2%29/About\\_Us%28tr2%29/AboutUs.html](http://www.ncpc.gov/ncpc/Main%28T2%29/About_Us%28tr2%29/AboutUs.html) (last accessed Nov. 24, 2014).

<sup>1444</sup> Staff of H. Cmte. on the Dist. Of Columbia, *Building Height Limitations*, 94th Cong. (1976).

<sup>1445</sup> The Cairo Hotel was considered the city’s first residential “skyscraper.”

<sup>1446</sup> Height of Buildings Act of 1910, Pub.L. No. 61-196, 36 Stat. 452.

<sup>1447</sup> Such as spires, towers, and domes.

building could be constructed higher than 85 feet;<sup>1448</sup> in commercial areas, no building could be erected greater than 130 feet; and between First Street and 15th Street NW on the north side of Pennsylvania Avenue, the height restriction was capped at 160 feet.

These laws paralleled limitations in many U.S. cities during that time. However, unlike other cities that began modifying height restrictions in 1915, the District of Columbia's law has been largely unchanged in over 100 years – with the exception that residential buildings are currently permitted to go up to 90 feet.<sup>1449</sup> However, in many instances, specific construction projects have been granted exemptions to law.<sup>1450</sup>

### **The Need for Revision**

On July 19, 2012, the Oversight and Government Reform Subcommittee on Health Care, District of Columbia, Census and the National Archives, held a hearing on the Height Act.<sup>1451</sup> The Subcommittee heard differing testimony from a cross section of experts. Following this hearing, Chairman Issa sent letters to the NCPC and the city asking them to work jointly to examine the extent to which the Height Act continues to serve federal and local interests, and how changes to the law could affect the future of the city. In his October 3, 2012, letter, Chairman Issa wrote:

The character of Washington's historic L'Enfant City – particularly the monumental core – establishes the city's iconic image as our capital. Any changes to the Height of Buildings Act that affect the historic L'Enfant City should be carefully studied to ensure that the iconic, horizontal skyline and the visual preeminence of the U.S. Capitol and related national monuments are retained. The Committee encourages the exploration of strategic changes to the law in those areas outside the L'Enfant City that support local economic development goals while taking into account the impact on federal interests, compatibility to the surrounding neighborhoods, national security concerns, input from local residents, and other related factors that were discussed at the July 19 hearing.<sup>1452</sup>

After receiving the Chairman's request letter, the NCPC and the city held several public hearings in 2013 on the issue of building heights.<sup>1453</sup> On November 19, 2013, NCPC approved its recommendations regarding amending the Height Act. They recommended:

- To protect the integrity of the form and character of the nation's capital, the Federal Height Act should remain in place and no changes should be made to the formula or approach for calculating allowable building height.

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<sup>1448</sup> It appears as though there was some concern regarding fighting fires in buildings that reached 90 feet, so Congress scaled back the maximum height. These concerns would later be alleviated with better technology and Congress amended the law back to the original 90 foot maximum.

<sup>1449</sup> House Report No. 68-1192; Height of Buildings Act of 1910. Pub.L. No. 61-196 (amended 1915).

<sup>1450</sup> E.g. The National Press Club building; the United Masonic Temple building.

<sup>1451</sup> *Changes to the Heights Act: Shaping Washington, D.C. for the Future Before the Subcomm. on Health Care, Dist. of Columbia, Census and the Nat'l Archives*, 112th Cong. (2012).

<sup>1452</sup> Letter from Chairman Darrell Issa, Committee on Oversight and Gov't Reform, to Preston Bryant and Mayor Gray (Oct 3, 2012) (on file with author).

<sup>1453</sup> More information on these meetings is available at: <http://www.ncpc.gov/heightstudy/>.

- There may be some opportunities for strategic change in the areas outside of the L'Enfant City where there is less concentration of federal interests. However, additional study is required to understand whether strategic changes to the Height Act would impact federal interests within this area.
- The city's most significant view sheds, to include without limitation, those to and from the U.S. Capitol and the White House, should be further evaluated and federal and local protections established, which include policies in the Federal and District Elements of the Comprehensive Plan.
- Amend the Height Act to allow for human occupancy in existing and future penthouses, with the following restrictions:
  - Include specific protections related to sightlines for select federal buildings including but not limited to, the U.S. Capitol and White House.
  - Support communal recreation space on rooftops by allowing human occupancy in roof structures, where use of those structures is currently restricted under the Height Act to mechanical equipment, so long as the façade of these structures continue to be set back from exterior building walls at a 1:1 ratio.
  - Impose an absolute 20-foot maximum height and a limitation of one story for penthouse structures above the level of the roof, which must contain within all mechanical equipment and elevator, stair other enclosures, with no additional construction allowed above the penthouse roof for any purpose.
- Delete certain sections of the Act which solely relate to fireproof construction. These proposed deletions are antiquated fire and safety requirements that have been updated and incorporated into modern day codes by the District of Columbia.<sup>1454</sup>

On November 20, 2013, D.C. Mayor Vincent Gray transmitted to the Committee the City's recommendation on modifications to the law:

- Apply the approach of reinforcing the relationship between building height and street width within the L'Enfant City. The District recommends using a ratio of 1:1.25 for street width to building height, resulting in a new maximum building height of 200 feet for 160-foot wide streets in the L'Enfant City. To ensure that the tops of any future taller buildings contribute to the use of and views from rooftops, mechanical penthouses would be required to be enclosed within the upper floors and within the new height cap.
- The limits currently established in the Federal Height Act should remain in place unless and until the District completes an update to the District elements of the comprehensive plan where targeted area(s) that meet specific planning goals and also do not impact federal interests are identified. Under this recommendation, building heights in targeted areas may

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<sup>1454</sup> NCPC, Commission Action, Nov. 19, 2013.

be proposed to exceed the maximums under federal law; and these may be authorized through the existing comprehensive plan process, pending congressional approval. Should such targeted exceptions be authorized through the comprehensive plan, the Height Act would remain in place for all other areas both inside and outside of the L'Enfant City.

- Amend the Height Act to remove any federal restrictions on the human occupancy of penthouses and set a maximum height of 20 feet and one story. To ensure that the tops of any future taller buildings contribute to the use of and views from rooftops, mechanical penthouses also would be required to be enclosed within the upper floors and within the new height cap for areas inside the L'Enfant City where the ratio approach is applied.
- View shed protection is a foundational component of both of the District's draft recommendations for changes to the Height Act. Civic structures and related views contribute to the unique character and attractiveness of Washington, DC. The protection of view sheds is not only a federal but also a local interest. The District is firmly committed to protecting the majestic views to nationally significant buildings and monuments. In fact, the District already has local protections in place to protect important view sheds. The District's zoning code, for example, limits height on 16th Street, NW to 90 feet, lower than what is permitted under the Height Act. This local limit is specifically intended to protect the view corridor south on 16th Street towards the White House. As noted previously, federal interests in the District are already protected by other means in addition to the Height Act.<sup>1455</sup>

The city's report explained that an "Economic Feasibility Analysis" had "developed a preliminary projection that from \$62 million to \$115 million in incremental annual tax revenues could be generated from property and sales taxes paid by workers and residents occupying new higher-rise office and apartment buildings developed over the twenty years."<sup>1456</sup>

### **Overcoming Opposition from Within**

The D.C. Council has a resolution signed by 12 of the 13 council members in opposition to the Office of Planning's recommendations.<sup>1457</sup> What was shocking about the Council's opposition to the Mayor's proposal was that it was essentially the Council rejecting additional autonomy to make a decision about what was best for the future of the city and its residents. Eventually, after difficult negotiations with many elected leaders in the city, Chairman Issa brokered a deal and introduced legislation to amend the D.C. Height of Buildings Act.<sup>1458</sup>

Under existing law, "mechanical penthouses" – structures that cover elevator shafts or mechanical equipment – can be built on rooftops even if the penthouse height exceeds Height Act limitations when 1) the one-to-one setback ratio is maintained between the penthouse height and the distance

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<sup>1455</sup> DISTRICT OF COLUMBIA OFFICE OF PLANNING, HEIGHT MASTER PLAN FOR THE DISTRICT OF COLUMBIA, FINAL EVALUATION AND RECOMMENDATIONS (2013) *available at* [http://www.npc.gov/heightstudy/docs/District%27s%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report\\_Nov%2020%202013.pdf](http://www.npc.gov/heightstudy/docs/District%27s%20Height%20Master%20Plan%20FINAL%20Recommendations%20Report_Nov%2020%202013.pdf).

<sup>1456</sup> *Id.* at 11.

<sup>1457</sup> Sense of the Council Against Amending the 1910 Height Act Resolution of 2013.

<sup>1458</sup> H.R. Res. 4192, 113th Cong. (2013).

from the side of the penthouse to the edge of the roof, and 2) the city approves the structure. NCPC recommended that human occupancy be allowed in such rooftop penthouses, so long as 1) the setback ratio is maintained, 2) the penthouse does not exceed one story that is no more than twenty feet high – and, again, 3) so long as the city approves the structure. Chairman Issa’s legislation simply gave the city a little more latitude to allow attractive, human occupancy penthouses where ugly mechanical penthouses are already allowed. On May 16, 2014 – with significant bipartisan and bicameral support – the amendment to the D.C. Height of Building Act was enacted into law.<sup>1459</sup>

### *THE DWIGHT D. EISENHOWER MEMORIAL*

In 1999, Congress created the Dwight D. Eisenhower Memorial Commission to help create a memorial dedicated to the 34th President, Dwight D. Eisenhower in DC.<sup>1460</sup> On March 25, 2010, the 12 member Commission unanimously selected architect Frank Gehry’s design concept for the Memorial, which was then approved by the U.S. Commission on Fine Arts. The plan calls for construction of the memorial on the land directly in front of the U.S. Department of Education. Total anticipated cost is \$112 million – although the bulk will be funded through congressional appropriations, 20 percent must be raised privately. The National Capital Planning Commission must also approve memorial designs.

Shortly thereafter, members of the Eisenhower family began to vocalize objections to the Gehry design, specifically the 80 foot stainless steel tapestries and the columns. For several years, Chairman Issa used his influence on NCPC and his Chairmanship of the Committee to try and find a compromise solution. Ultimately, the Chairman supported NCPC staff’s recommendation to preliminarily approve the design on October 2, 2014. Construction of the memorial as currently designed is far from certain. The funding resolution that reopened the government in October 2013<sup>1461</sup> contained a provision that prohibited additional construction funds for the Memorial to be appropriated due to the design concerns and the potential for an overall cost increase.

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<sup>1459</sup> Act to Amend the Act entitled, “An Act to Regulate the Height of Buildings in the District of Columbia”, Pub.L. No. 113-103, 128 Stat. 11555 (2014).

<sup>1460</sup> Department of Defense Appropriations Act, Pub. L. No. 106-79 § 8162, 113 Stat. 1212, 1274 (2000).

<sup>1461</sup> Continuing Appropriations Act, Pub.L. No. 113-46 § 138, 127 Stat. 558, 564 (2014).

## WORKING TOGETHER FOR THE GOOD OF THE CITY

### *SOUTHWEST WATERFRONT ECONOMIC DEVELOPMENT*

On June 22, 2011, D.C. Delegate Eleanor Holmes Norton introduced H.R. 2297, which would promote the development of the Southwest waterfront in the District of Columbia.<sup>1462</sup> The legislation was needed to update current zoning laws to allow the District the flexibility to lease or sell the real property on the 27 acre parcel of land to a private-sector developer,<sup>1463</sup> in order for the redevelopment to begin. After both chambers passed H.R. 2297, it was signed into law on July 9, 2012.<sup>1464</sup> On March 19, 2014, the official groundbreaking took place and the estimated \$2 billion redevelopment project began.<sup>1465</sup>

### *OCCUPY DC*

In October 2011, members of the “Occupy DC” movement set up a campsite in McPherson Square complete with tents and restroom facilities to house demonstrators indefinitely as part of their protest movement. McPherson Square is administered by the National Park Service (“NPS”).<sup>1466</sup> The statute controlling activities in the Square prohibits camping unless it is specifically allowed by the NPS. After Occupy DC took up residence, the NPS posted flyers throughout McPherson Square citing the statute and stating in writing that camping is not permitted in McPherson Square.<sup>1467</sup> However, despite clear evidence that protestors have been camping in McPherson Square for more than three months, the NPS made no attempt to enforce the ban on camping.

The failure of the National Park Service to enforce the law caused significant problems for the District. For example, the campsite caused a serious rodent infestation in McPherson Square,<sup>1468</sup> and it negatively impacted local businesses in the area.<sup>1469</sup> On one occasion, an infant was found alone in one of the tents during a period of cold weather and rain.<sup>1470</sup> The occupation by the

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<sup>1462</sup> An Act to promote the development of the Southwest waterfront in the District of Columbia, and for other purposes, H.R. 2297, 112th Cong. (as introduced, June 22, 2011). Pub. L. 112-143, 49 Stat. 1028 (2012).

<sup>1463</sup> In September 2006, PN Hoffman and Struever Brothers Eccles & Rouse jointly submitted a development plan and beat out 17 other companies to redevelop the Southwest Waterfront.

<sup>1464</sup> Pub. L. 112-143, 49 Stat. 1028 (2012).

<sup>1465</sup> “The Wharf Breaks Ground in DC’s Southwest Waterfront,” *Washingtonian*, Benjamin Freed, March 19, 2014.

<sup>1466</sup> Section 7.96 of Title 36 of the Code of Federal Regulations, found: <http://www.gpo.gov/fdsys/pkg/CFR-2011-title36-vol1/pdf/CFR-2011-title36-vol1-sec7-96.pdf>

<sup>1467</sup> *Help Us Preserve McPherson Square*, NAT’L PARK SERVICE, <http://media.nbcwashington.com/documents/McPherson+Education+Handout.pdf>.

<sup>1468</sup> “Health officials say rats are a concern at Occupy DC encampment,” *WASH. POST*, Jan. 9, 2012, [http://www.washingtonpost.com/local/health-officials-say-rats-are-a-concern-at-occupy-dc-encampment/2012/01/09/gIQAbB9QmP\\_story.html](http://www.washingtonpost.com/local/health-officials-say-rats-are-a-concern-at-occupy-dc-encampment/2012/01/09/gIQAbB9QmP_story.html).

<sup>1469</sup> Aubrey Whelan, *McPherson Square businesses getting fed up with Occupy D.C.*, *EXAMINER*, Dec. 6, 2011, available at <http://washingtonexaminer.com/local/dc/2011/12/mcpherson-businesses-getting-fed-occupy-dc/1980756>

<sup>1470</sup> Theola Labbé-DeBose and Annie Gowen, *Child cruelty charge after baby found alone in Occupy camp*, *WASH. POST*, Jan. 11, 2012.

protestors caused substantial damage to McPherson Square, which was recently rehabilitated using \$400,000 of federal stimulus money.<sup>1471</sup>

On December 16, 2011, District of Columbia Mayor Vincent Gray sent a letter to National Park Service Director Jonathan Jarvis expressing concerns about the two tent sites on federal property<sup>1472</sup> within the District's boundaries. The Mayor stated, "in neither case was the District Government consulted on the legality or appropriateness of long-term protestors inhabiting these respective locations."<sup>1473</sup> The Mayor's letter also stated that, as of December 1, 2011, the District had spent over \$1.65 million in costs associated with the campsite. These costs included overtime for law enforcement personnel, payment for public sanitation services, and payment for additional street maintenance and cleaning.<sup>1474</sup> After the Mayor's request in December, health and sanitation issues in McPherson Square continued to deteriorate, causing Mayor Gray to request that the NPS remove the campsite.<sup>1475</sup> In January, Mayor Gray asked the NPS to "at a minimum" consolidate the two protest sites "to allow for elimination of the rat infestation, clean up, and restoration of McPherson Square."<sup>1476</sup>

On January 24, 2012, the Subcommittee on Health Care, District of Columbia, Census and the National Archives held a hearing on Occupy D.C. and the public health and safety issues raised by Mayor Gray. On February 4, 2012, the U.S. Park Police raided McPherson Square to crack down more severely on the no camping policy.<sup>1477</sup>

#### *OPPORTUNITY SCHOLARSHIP PROGRAM*

In 1996, due to the long-standing educational failures of the District of Columbia Public Schools ("DCPS"), the D.C. School Reform Act<sup>1478</sup> was passed creating charter schools in the District. At that time DCPS was failing students, especially the poorer areas of the city, and this new law increased educational options for students to transfer out of those schools that were consistently under-performing.<sup>1479</sup> Today, there are 112 public charter schools within the District.<sup>1480</sup>

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<sup>1471</sup> "Contracts-Award Summary: Award Number C3400100099," Recovery.Gov. Available at: <http://www.recovery.gov/Transparency/RecipientReportedData/Pages/RecipientProjectSummary508.aspx?AwardID SUR=103676&qtr=2010Q4>.

<sup>1472</sup> Freedom Plaza and McPherson Square

<sup>1473</sup> Letter from Mayor Vincent Gray to the Honorable Jonathan Jarvis (Dec. 16, 2011).

<sup>1474</sup> *Id.*

<sup>1475</sup> Mayor Vincent Gray letter to the Honorable Jonathan Jarvis, January 12, 2012.

<sup>1476</sup> *Id.*

<sup>1477</sup> Annie Gowen, *Occupy D.C. Camp Raided by Police*, WASH. POST, Feb. 4, 2012.

<sup>1478</sup> District of Columbia School Reform Act of 1995, Pub.L. 104-134 tit. II, 110 Stat. 1321, 1321-107.

<sup>1479</sup> DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, CHILDREN IN CRISIS: EXECUTIVE SUMMARY (1996). In addition, the Control Board made this assessment of DCPS: "The deplorable record of the District's public schools by every important educational and management measure has left one of the city's most important public responsibilities in a state of crisis, creating an emergency which can no longer be ignored or excused. DCPS is failing in its mission to educate the children of the District of Columbia. In virtually every area, and for every grade level, the system has failed to provide our children with a quality education and safe environment in which to learn." *Id.*

<sup>1480</sup> *About Us*, THE DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD <http://www.dcpsb.org/about-us> (last accessed Nov. 24, 2014).

## **A Program with Positive Results**

In 2003, as part of continuing education reform efforts in D.C., Congress created the first federally-funded, private school voucher program in the country. Congress initially authorized and appropriated \$40 million in additional federal funding for District of Columbia school improvement distributed to three groups: \$13 million went to DCPS; \$13 million went to the State Education Office to expand charter schools in the District; and \$14 million went to the Secretary of the Department of Education to provide opportunity scholarships to low-income students in the city.

Distribution of opportunity scholarships, through what became known officially as the D.C. Opportunity Scholarship Program (“OSP” or the “Program”), were intended to enable students attending consistently under-performing public schools to choose to attend private schools within the District of Columbia instead. The Program was offered only to District students entering grades K through 12 whose family income was a certain percent of the federal poverty line, depending on family size. Eligible students received a scholarship of up to \$7,500 for tuition, transportation to the school and payment of other school fees. Scholarships were renewable for up to 5 years (subject to federal appropriations), as long as the student remained eligible for the program and in good academic standing.<sup>1481</sup>

If in any given year there were more eligible applicants than available funds for scholarships or open slots in private schools, applicants were awarded scholarships by random selection through a lottery. Priority was given to students attending public schools designated as a school in need of improvement (“SINI”) under No Child Left Behind (“NCLB”)<sup>1482</sup> and to families that lacked the resources to take advantage of school choice options. Private schools participating in the Program had to agree to specified requirements regarding nondiscrimination in admissions, fiscal accountability and cooperation with the federally-mandated evaluation of the program.<sup>1483</sup>

The law mandated that the Secretary of Education enter into a Memorandum of Understanding (“MOU”) with the D.C. Mayor with respect to the OSP. The MOU included, but was not limited to, the following criteria:

- strong accountability measures and program performance evaluations;
- specifications for a lottery system which will provide fair and unbiased acceptance of students into the scholarship program, and allow participating schools to consider a sibling preference;
- joint oversight by the Mayor of the District of Columbia and the Secretary of Education of the program's operations;
- the evaluation and methodology for the selection of participating schools which have met the District of Columbia's current licensure requirements;

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<sup>1481</sup> Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3, 117 (2004).

<sup>1482</sup> As defined in No Child Left Behind Act, Pub. L. No. 107-110 § 1116, 115 Stat. 1425, 1478 (2002).

<sup>1483</sup> Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004).

- the methodology for determining the tuition and fees of participating schools, including the actual cost;
- the development of appropriate oversight and accountability measures; and
- teacher quality criteria.<sup>1484</sup>

The law also included a mandate for annual reports back to Congress on the effectiveness of the program.

In June 2010, according to a contract through the Department of Education’s Institute for Education Sciences, a congressionally-mandated final report was issued through a contract through the Department of Education’s Institute for Education Sciences entitled, *Evaluation of the DC Opportunity Scholarship Program*.<sup>1485</sup> This report highlighted the long-term effects of the OSP on students and parents who were given the opportunity to transfer from a local public school to a participating private school; it also compared those students who did not have the chance to use a scholarship to those who did. The findings focused on three important areas: graduation rates, student achievement, and school satisfaction and safety. According to Dr. Patrick Wolf, the lead investigator of the study:

The most important outcome we examined in our evaluation of the OSP was the program’s impact on student educational attainment, as measured by the rate of high school graduation...Based on parent reports, the students in our study graduated from high school at significantly higher rates as a result of the OSP. The treatment group students graduated from high school at a rate of 82 percent which was 12 percentage points higher than the control group rate of 70 percent. Adjusting for students who never used their scholarship, the impact of using an Opportunity Scholarship was to increase the probability of graduating from 70 percent to 91 percent -- a positive impact of 21 percentage points. We can be more than 99 percent confident that access to school choice through the Opportunity Scholarship Program...was the reason why OSP students graduated at these higher rates.<sup>1486</sup>

In addition, the study concluded that the OSP had a positive impact on high school graduation for those students who attended a school in need of improvement (“SINI”):

Access to the OSP increased the graduation rate for SINI students from 66 percent to 79 percent. The impact of using an Opportunity Scholarship on the likelihood of high

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<sup>1484</sup> *Id.*

<sup>1485</sup> DR. PATRICK WOLF ET AL., DEP’T OF EDUCATION, EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM: FINAL REPORT (2010), *available at* <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

<sup>1486</sup> Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004).

school graduation was to increase it by 20 percentage points, from 66 percent to 86 percent.<sup>1487</sup>

The report examined student achievement through reading and math scores. While it was determined that math scores were not significantly improved as a result of the OSP, the analysis of the data suggests that students' reading scores did improve, most likely because of the program.<sup>1488</sup>

Finally, research showed parents' overall satisfaction with the schools their children attended increased as a result of the OSP; however, students' overall satisfaction did not increase at a statistically significant level.<sup>1489</sup> "[T]he research evidence and testimonials of parents confirm that the District of Columbia is a better place because of the Opportunity Scholarship Program."<sup>1490</sup>

### **Rescinding Scholarships and Denying New Students Access**

Initial appropriations for the OSP were authorized through fiscal year 2008, which ended in September 2008. The 111th Congress provided additional appropriations for the program for fiscal years 2009 and 2010 as part of an omnibus appropriations bill.<sup>1491</sup>

Through a two-step process, the Department of Education in conjunction with Congress ended the program for new enrollees. In March of 2009, U.S. Education Secretary Arne Duncan rescinded 216 scholarships that had been promised to students; however, students who were currently participating in the program continued to receive scholarships until they graduated.<sup>1492</sup> Also that month, Congress passed the previously mentioned omnibus appropriations bill that specified that the use of any funds in any act for Opportunity Scholarships after the 2009-2010 school year would only be available if the program was reauthorized and the District of Columbia adopted legislation that approved that reauthorization.

### **Reinstating a Beneficial Program**

In January 2011 Speaker of the House of Representatives John Boehner introduced legislation to reauthorize the D.C. Opportunity Scholarship Program ("OSP"). Specifically, Speaker Boehner's legislation authorized funding for improvement of DC public schools and DC public charter schools, continuing the three-sector approach to school reform begun by the original OSP legislation. Funding under the legislation would be divided equally between the OSP, the DC public schools and the DC public charter schools.

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<sup>1487</sup> *Id.*

<sup>1488</sup> DR. PATRICK WOLF ET AL., DEP'T OF EDUCATION, EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM: FINAL REPORT (2010), *available at* <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

<sup>1489</sup> *Id.*

<sup>1490</sup> *The Value of Education Choices: Saving the DC Opportunity Scholarship Program: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. (2011) (written testimony of Dr. Patrick Wolf).

<sup>1491</sup> Omnibus Appropriations Act Pub. L. No. 111-8, div. D, tit. IV, 123 Stat. 524, 653 (2009).

<sup>1492</sup> *Id.*

Among other provisions, the reauthorization made several improvements to the existing program to help address findings by the Government Accountability Office;<sup>1493</sup> improvements to the program included a requirement that an administrating entity has financial controls in place; an increase in the scholarship award amount of up to \$8,000 per year for students in elementary school and up to \$12,000 per year for students attending high school; a requirement that schools participating in the OSP maintain a valid certificate of occupancy issued by the District of Columbia; and a requirement that each teacher of core subject matter classes has a bachelor's or equivalent degree.<sup>1494</sup>

The legislation also continued the existing requirement of a rigorous evaluation of the program, including a comparison of the academic achievement of students who use the scholarships with the achievement of students who applied for scholarships but were not offered one. These evaluations must also include a comparison of retention rates, dropout rates and graduation and college admission rates of students who used the scholarships against those same rates among students of similar backgrounds who do not participate in the program. The evaluations must also include a measurement of school safety.

Shortly after the program was reauthorized, the new grantee, the DC Children and Youth Investment Trust Corporation ("DC Trust"), ran into operating issues with a semi-hostile Department of Education that strongly opposed it. The Department, to its credit, frequently met with Congress in hopes of having a better working relationship with the grantee. Eventually it became obvious that the DC Trust could and should have been doing more to elevate the program, including taking the Department up on its offer to assist them in recruiting eligible students. While progress has been made, Chairman Issa believes this program could be stronger still, particularly in increasing the number of enrolled students. There currently are only 1,442 students using a scholarship for the 2014-15 school year.<sup>1495</sup> By comparison, the height of enrollment was 1,930 students in 2007; however, it is important to note that the total annual federal appropriation for the program at this time was \$14 million, thus there was less money for scholarships than there is today.<sup>1496</sup>

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<sup>1493</sup> In 2007 the Government Accountability Office released a report evaluating and recommending updates to the District of Columbia Opportunity Scholarship Program. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-9, DISTRICT OF COLUMBIA OPPORTUNITY SCHOLARSHIP PROGRAM: ADDITIONAL POLICIES AND PROCEDURES WOULD IMPROVE INTERNAL CONTROLS AND PROGRAM OPERATIONS (2007).

<sup>1494</sup> Dep't of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

<sup>1495</sup> Email from Children and Youth Investment Trust to Committee on Oversight and Government Reform (Nov. 14, 2014) (on file with author).

<sup>1496</sup> DR. PATRICK WOLF ET AL., DEP'T OF EDUCATION, EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM: FINAL REPORT (2010), *available at* <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

## CHAPTER 8. GROWTH OF THE ADMINISTRATIVE STATE

In his 2011 State of the Union Address, President Barack Obama made a commitment to job growth. He told American Taxpayers that government regulations would be reviewed, and where they imposed unnecessary burdens on businesses he pledged: “we will fix them.”<sup>1497</sup> In the weeks leading into the 2010 elections, the President solicited input from American job creators, seeking suggestions for jumpstarting an economy that was still sluggish after the worst recession in American history since the Great Depression. Responding to complaints from businesses that “too many regulations raise the cost of doing business and put a brake on expansion and hiring,” the President committed to addressing the issue, explaining his intent to “go through very systematically to see where we can eliminate unnecessary red tape, unnecessary bureaucracy, regulations that have outlived their usefulness.”<sup>1498</sup>

At the end of 2010, the total number of pages in the Code of Federal Regulations (“CFR”),<sup>1499</sup> a book that contains every federal regulation in force during a given year, was 165,494. By the end of 2013, the number of pages in the CFR had risen to 175,496.<sup>1500</sup> Despite the Administration’s commitment to improving the regulatory environment so that businesses can grow and create more jobs in America, the Federal Government added more than 10,000 pages of red tape in three years, and 2014 is on track to be another record-breaking year.

Tracking this growth, law schools and colleges now offer more courses that study the workings of this Fourth Branch. Georgetown University Law Center, for example, offers a course in “Administrative Law, Legislation, and Governance and Its Application to Legal Practice.” Describing the importance of the course, the school’s curriculum guide notes: “The reach of the modern administrative state is vast and involves areas such as the regulation of financial institutions, health and safety regulation, the administration of disability and welfare programs, discrimination law, workplace regulation, food and drug law, and immigration policy, just to name a few.”<sup>1501</sup> The University of California at Los Angeles School of Law offers a course titled “Redesigning the Administrative State” which examines opportunities to improve upon the traditional administrative state, especially through the privatization of some public services (such as national security).<sup>1502</sup> Philip Hamburger, Professor of Law at Columbia Law School, has published the book *Is*

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<sup>1497</sup> President Barack Obama, State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

<sup>1498</sup> Alister Bull & Caren Bohan, *Obama Pledges Cooperation in Outreach to Business*, REUTERS (Oct. 4, 2010), <http://www.reuters.com/article/2010/10/04/us-obama-business-idUSTRE6935SS20101004>.

<sup>1499</sup> The Code of Federal Regulations (“CFR”) is an annual compilation of all regulations implemented by federal agencies. It is published electronically and in print, and is available at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

<sup>1500</sup> Clyde Wayne Crews, *New Data: Code of Federal Regulations Expanding, Faster Pace Under Obama*, COMPETITIVE ENTERPRISE INSTITUTE OPENMARKET BLOG (Mar. 17, 2014, 10:03 AM), <https://cei.org/blog/new-data-code-federal-regulations-expanding-faster-pace-under-obama>.

<sup>1501</sup> *Curriculum Guide*, GEORGETOWN LAW, [http://apps.law.georgetown.edu/curriculum/tab\\_clusters.cfm?Status=Cluster&Detail=1](http://apps.law.georgetown.edu/curriculum/tab_clusters.cfm?Status=Cluster&Detail=1) (last accessed Dec. 19, 2014).

<sup>1502</sup> *Law 515 – Redesigning the Administrative State*, UCLA LAW, <https://curriculum.law.ucla.edu/Guide/Course/144> (last accessed Dec. 19, 2014).

*Administrative Law Unlawful?*<sup>1503</sup> Answering that question “in the affirmative,” Prof. Hamburger argues that “administrative law has returned American government and society to precisely the sort of consolidated power that the US Constitution – and constitutions in general – were designed to prevent.”<sup>1504</sup>

The Committee on Oversight and Government Reform, with its broad jurisdiction and a variety of tools at its disposal, is in a unique position to conduct a broad-based, economy-wide examination of the barriers that stand in the way of job growth and economic recovery. Unfortunately for American Taxpayers, while the absolute number of pages of regulations has gotten smaller in recent years, the compliance burden imposed by those pages has grown.<sup>1505</sup> In the following pages, this report will provide background for understanding the threat that this expansion poses and highlights the Committee’s efforts to bring transparency to the Administrative State. While under the leadership of Chairman Darrell Issa, the Committee on Oversight and Government Reform has worked diligently to uncover the opaque administrative process that has placed unreasonable strain and stress on legitimate, hard-working American Taxpayers.

#### A FOURTH BRANCH OF GOVERNMENT?

The scope and power of federal agencies seems to contradict the intentions of the founders of our nation:

The framers of the United States Constitution envisioned three branches of government each with a distinct task. Yet... administrative agencies confound this vision. Although the Constitution provides that ‘[a]ll legislative Powers... shall be vested in a Congress of the United States...,’<sup>1506</sup> agencies promulgate regulations that have the force and effect of legislative enactments. Although the Constitution provides that ‘[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,’<sup>1507</sup> agencies routinely engage in adjudication. Agency government has another constitutional anomaly. The Constitution provides that ‘[t]he executive Power shall be vested in a President of the United States of America.’<sup>1508</sup> The President’s responsibility to implement the laws would seem to be hindered if the President can not fire an administrator who fails to adopt policies

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<sup>1503</sup> PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

<sup>1504</sup> Prof. Hamburger’s book is published by The University of Chicago Press, which provides a summary of its contents and several review comments from a number of legal scholars. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014), reviewed by THE UNIVERSITY OF CHICAGO PRESS, available at <http://www.press.uchicago.edu/ucp/books/book/chicago/I/bo17436684.html> (last accessed Dec. 19, 2014).

<sup>1505</sup> Patrick McLaughlin, *Measuring the Content, Not Just the Number, of Executive Orders and Proclamations*, MERCATUS CTR., Oct. 16, 2014, available at <http://mercatus.org/publication/measuring-content-not-just-number-executive-orders-and-proclamations>.

<sup>1506</sup> U.S. Const. art. I, § 1.

<sup>1507</sup> U.S. Const. art. III, § 1.

<sup>1508</sup> U.S. Const. art. II, § 1.

avored by the President. Nevertheless, Congress has forbidden the President from firing some administrators because of a policy disagreement.<sup>1509</sup>

However, federal agencies serve a necessary function within our constitutional republic. The scope and function of the Administrative State in America is defined by an “agency” relationship: Congress, as the Legislative Branch, expresses a mandate for action through a statute (also referred to as authorizing or enabling legislation), and the Executive Branch, including the President, executive departments and agencies, implements (or executes) the legislation by bringing it into force. During the Great Depression, President Franklin Roosevelt helped to usher in a period of tremendous growth in the activities of the Federal Government, overseeing the creation of over 30 agencies to implement New Deal legislation. Many of those agencies are still in existence today – the Securities and Exchange Commission (“SEC”), the Federal Deposit Insurance Corporation (“FDIC”), the Federal Communications Commission (“FCC”) and the Social Security Board (“SSB”), for example.<sup>1510</sup> Because agency rules typically have the force and effect of law,<sup>1511</sup> the Administrative State exists in conflict with both the Legislative and the Executive Branches.

The Judicial Branch provides a check on this relationship in two important ways. First, the Supreme Court has held that Congress may not abdicate its constitutional duty to legislate by instructing the Executive Branch to make law; therefore, the powers vested in the Executive Branch by the enabling legislation must be consistent with a general theory of “nondelegation.”<sup>1512</sup> Second, the Court has also required that enabling legislation provide some constraints on how the Executive Branch may execute its mandate. According to the “intelligible principle” doctrine, the Legislative Branch may grant certain powers to the Executive Branch without violating the nondelegation doctrine as long as the enabling statute defines the boundaries of the Executive’s authority.<sup>1513</sup>

### *THE ADMINISTRATIVE PROCEDURES ACT: CREATING ORDER*

Aside from the constitutional, separation of powers issues just discussed, the functioning of the Administrative State is subject to additional procedural constraints imposed by the Congress and the President. The Administrative Procedures Act (“APA”) was enacted in 1946 to establish the

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<sup>1509</sup> WILLIAM F. FUNK, SIDNEY A. SHAPIRO, & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 520 (Thomson/West 2006) (internal citations omitted).

<sup>1510</sup> The Social Security Board was created in 1935 by the Social Security Act, the SEC was created in 1934 by the Securities Exchange Act, the FCC was created by the Communications Act of 1934, the Banking Act of 1933 created the FDIC. *See id.*

<sup>1511</sup> Included with a grant of authority to execute legislation through the promulgation of regulations, Congress often provides agencies with the authority to enforce the regulations issued. Sometimes the regulations are referred to as “administrative laws.” *See* SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 26 (2d ed. 2012).

<sup>1512</sup> The Constitution authorizes Congress “[t]o make all Laws which shall be necessary and proper” to carry into execution the powers vested in the Federal Government. U.S. Const. art. I, § 8. The “nondelegation” doctrine provides that Congress may not simply “delegate” the powers expressly granted to it by the Constitution. *See* FUNK, ET AL., *supra* note 1509 at 522-31. Over time, the Supreme Court has used the nondelegation doctrine infrequently to strike down legislation as unconstitutional, but it has used the doctrine to support a narrow or limited interpretation of an agency’s authority under a statute. *See id.* at 523.

<sup>1513</sup> FUNK, ET AL., *supra* note 1509 at 524. *See also* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such [railway] rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

fundamental principles by which agency decisions are made – it acts as “a rule book generally applicable to agencies exercising congressionally delegated legislative, executive, and judicial power,” and it has undergone few substantive revisions since its passage.<sup>1514</sup> By providing the procedures by which “rules” are promulgated and “adjudications” are conducted, the APA gives interested parties in the private sector a voice and provides structural limits on the discretion exercised by the agency’s unelected officials.<sup>1515</sup>

“Legislative rules” issued by an agency have the force of law as long as the agency satisfied the requirements of the relevant APA provisions, which are mainly concerned with providing interested parties sufficient time and opportunity to provide input before the rule becomes binding. However, “nonlegislative rules” – namely interpretive or guidance documents or policy statements – are exempt from the “notice and comment” rulemaking process. Although they do not have the force of law, these materials exert significant influence as a practical matter.

In a serious threat to the transparency required by the APA, the use of “sue and settle” practices has become an increasingly common way for agencies to “regulate behind closed doors.”<sup>1516</sup> As discussed in more detail below, executive agencies – especially the Environmental Protection Agency – have entered into settlements with advocacy groups using the courts to compel the agencies to promulgate rules under a certain statute.

These settlements result in the agencies having a legally binding obligation to promulgate certain rules according to the conditions defined in the settlement. Because the negotiations often take place behind closed doors, groups that have an interest in the regulation but are not parties to the lawsuit are denied the opportunity to provide meaningful input. This secretive process circumvents the clear intent of the APA – and threatens the ability of American job creators to build our economy.

#### *OIRA: AN AGENCY FOR THE AGENCIES*

Congress provided additional direction for agency practice in the Paperwork Reduction Act (“PRA”) in 1980,<sup>1517</sup> signed into law under President Carter. In addition to setting guidelines intended to reduce the information requests made by government agencies, the PRA established within the Office of Management and Budget (“OMB”) the Office of Information and Regulatory Affairs (“OIRA”).

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<sup>1514</sup> Steven P. Croley, *Symposium on the 50th Anniversary of the APA: The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 Admin. L.J. Am. U. 35, 36-38 (1996).

<sup>1515</sup> See FUNK, ET AL., *supra* note 1509 at 22. The procedures which govern agency rulemaking and adjudication vary in level of “formality” depending upon the type of rule at issue – however, they all have the force of law. The legal authority of other agency publications is questionable.

<sup>1516</sup> The Committee’s oversight of sue-and-settle practices is discussed in more detail later in this chapter. For an excellent in-depth discussion of the practice and the threat it poses to American job creators, see *U.S. Chamber of Commerce, Sue and Settle: The Truth About Regulating Behind Closed Doors* (2014), available at <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

<sup>1517</sup> Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501-3521).

OIRA was created with the instructions to:

- 1) develop and implement Federal information policies, principles, standards, and guidelines; and
- 2) oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy of records, interagency sharing of information, and acquisition and use of automatic data processing, telecommunications, and other technology for managing information resources.<sup>1518</sup>

Together, the APA and OIRA review under the PRA demonstrate the basic expectation of Americans that agency practice should reflect “themes of democratic accountability” as well as “technical competence.” Regulators are expected to take actions consistent with the intent of Congress – the legislation crafted by Congress expresses the will of the people, and therefore it is the best representation of the people’s voice. However, regulators are also expected to maintain expertise in their assigned areas, “to the proper use of scientific, engineering, and economic information, including the expectation that rules will accomplish their statutory objectives while, whenever feasible and lawful, meeting basic standards of economic efficiency.”<sup>1519</sup>

#### *THE IMPACT OF EXECUTIVE ORDERS*

Shortly after OIRA’s creation, President Ronald Reagan amended the role of the agency through an “executive order,” another feature of the Administrative State that is not specifically outlined in the Constitution. Executive orders are directives issued by the President, as head of the Executive Branch, to the heads of departments and agencies that fall under his direction. The type and effects of executive orders vary greatly: “Some are quite forceful, making dramatic change to policy. Others are more routine, housekeeping issues.”<sup>1520</sup> However, the President’s executive orders are probably not legally enforceable; instead they provide guidance, and it is unlikely the head of an agency could be removed for failing to comply therewith.<sup>1521</sup> Two executive orders have been struck down as unconstitutionally encroaching upon the powers of the Legislative Branch.<sup>1522</sup>

According to President Reagan’s Executive Order 12291,<sup>1523</sup> agencies<sup>1524</sup> are to consider regulatory action only if the “benefits to society outweighed the costs.” As part of the rulemaking process,

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<sup>1518</sup> Paperwork Reduction Act of 1980, Pub. L. 96-511, § 3504(a), 94 Stat. 2812, 2815 (1980).

<sup>1519</sup> John D. Graham & James Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 30 HARV. J.L. & PUB. POL’Y: FEDERALIST ED (forthcoming 2014).

<sup>1520</sup> Patrick McLaughlin, *Measuring the Content, Not Just the Number, of Executive Orders and Proclamations*, MERCATUS CTR., Oct. 16, 2014, available at <http://mercatus.org/publication/measuring-content-not-just-number-executive-orders-and-proclamations>.

<sup>1521</sup> *Id.*

<sup>1522</sup> See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President exceeded his executive authority by ordering the Secretary of Commerce to seize control of the steel mills in the midst of a strike); *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1323 (D.C. Cir. 1996) (holding that the National Labor Relations Act and its provisions governing federal contracting preempted the President’s executive order barring federal contracts from being awarded to businesses that hire permanent workers as replacements during lawful strikes).

<sup>1523</sup> Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

agencies must prepare a “regulatory impact analysis” (“RIA”) for any regulation determined to be a “major rule,”<sup>1525</sup> and they must send proposed and final rules to the Office of Management and Budget (“OMB”) for review.<sup>1526</sup> Due to its responsibilities within OMB – generally, to develop and oversee the implementation of information gathering, analysis and distribution procedures applicable to the rulemaking process – OIRA soon became responsible for the substantive review of most all federal agency regulations. With Executive Order 12498, President Reagan gave OIRA even greater oversight authority, allowing the overseer to reject draft rules submitted untimely.<sup>1527</sup> The Executive Orders implemented by President Reagan were continued throughout the administration of President George H.W. Bush.

President Bill Clinton revoked the Regan-era executive Orders and replaced them with Executive Order 12866 in 1993.<sup>1528</sup> This Executive Order, which is still in effect, continued President Reagan’s practice of requiring agencies<sup>1529</sup> to submit rules to OMB prior to publication. It also continued the practice of requiring the agencies to perform a cost-benefit analysis. However, instead of requiring OIRA to review any “major rule,” review was restricted to only those actions determined to be “significant.”<sup>1530</sup> Moreover, Executive Order 12866 encouraged agencies to recognize that in some cases, the best action would be to take no action at all: “[i]n deciding whether and how to regulate, **agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.**”<sup>1531</sup> In 2003, OMB published *Circular A-4*, a document providing “guidance” as to how agencies should conduct this analysis. It defines standardized methods by

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<sup>1524</sup> Certain agencies and departments are excluded from this restriction, such as the Government Accountability Office. *See id.*

<sup>1525</sup> “Major rule” is defined to include “any regulation that is likely to result in: 1) an annual effect on the economy of \$100 million or more; 2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.” Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>1526</sup> Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). The regulatory review authority granted to OMB through the Executive Order was integrated with the responsibilities given to OMB by the PRA – which ultimately resulted in OIRA overseeing Federal information policies as well as reviewing the cost-benefit analysis conducted by agencies in accordance with the issuance of any major rule. *See* CURTIS W. COPELAND, CONGRESSIONAL RESEARCH SERVICE, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs* 3-4 (2009).

<sup>1527</sup> Exec. Order no. 12498, 50 Fed. Reg. 1,036 (Jan. 8, 1985).

<sup>1528</sup> Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>1529</sup> Consistent with the Executive Orders issued by President Reagan, President Clinton’s Executive Order applied to all federal agencies except independent regulatory agencies. Exec. Order No. 12866 § 3(b), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>1530</sup> Exec. Order No. 12866 § 3(f), 58 Fed. Reg. 51,735 (Sept. 30, 1993). “Significant regulatory action” is defined as “any regulatory action that is likely to result in a rule that may: 1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; 2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; 3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or 4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” *Id.*

<sup>1531</sup> Exec. Order No. 12866 § 1(a), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (emphasis added).

which the costs and benefits of regulatory alternatives should be calculated.<sup>1532</sup> While *Circular A-4* should be understood to bind agencies in the Executive Branch, it does not have the force of law.<sup>1533</sup>

Executive Order 12866 continues to govern the actions of agencies under President Barack Obama, as amended by Executive Order 13,563.<sup>1534</sup> Given the statements he made during the *State of the Union* – promises to “fix” broken regulations and “eliminate unnecessary red tape,” recognizing that “too many regulations raise the cost of doing business”<sup>1535</sup> – and his appointment of Cass Sunstein as the Administrator of OIRA, President Obama seemed committed to bringing true reform to the Administrative State. A law review article co-authored by Mr. Sunstein in 2002 noted that “[e]xpensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty)” and suggested a new Executive Order that would rely more heavily on the RIA.<sup>1536</sup>

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<sup>1532</sup> Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4 (Sept. 17, 2003).

<sup>1533</sup> See Cass R. Sunstein, Essay, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 172 (2014).

<sup>1534</sup> Jerry Ellig & Richard Williams, *Reforming Regulatory Analysis, Review, and Oversight: A Guide for the Perplexed* 4 (Mercatus Ctr., Working Paper No. 14-23, 2014).

<sup>1535</sup> President Barack Obama, State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

<sup>1536</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

## REGULATING OUT OF BUSINESS: THE IMPACT OF REGULATIONS ON JOB GROWTH

In a study released in early 2013, economists John Dawson and Jon Seater analyzed more than 50 years of government data and concluded that, according to their estimates, “annual output by 2005 is about 28 percent of what it would have been had regulation remained at its 1949 level.”<sup>1537</sup> The study examined the relationship between growth in regulation as measured by pages in the Code of Federal Regulations<sup>1538</sup> and economic performance measured by growth in real output.<sup>1539</sup> Although the estimated impact of regulation on growth is staggering, it is not without support – the pair cite a number of studies analyzing similar sets of regulation data, finding that almost all agree with the conclusion that “regulation has deleterious effects on economic activity.”<sup>1540</sup>

There are, however, some signs that there may be success in rolling back at least some aspects of the job-killing regulations agencies have issued in recent years. For example, the Supreme Court has decided to hear a case challenging the EPA’s promulgation of the Utility MACT rule,<sup>1541</sup> discussed in more detail below. The rule, one of the most costly ever issued, is being challenged over the sufficiency of EPA’s impact analysis, and the outcome of the case could have significant implications for the rulemaking process – “[i]f the court strikes the rule, the precedent is very favorable for industry to challenge air rules based on how costs were taken into consideration.”<sup>1542</sup> However, a more favorable ruling for the EPA could reinforce agency’s efforts to promulgate strict emissions control regulations without regard to the burdens placed on American job creators.

The findings of numerous economists are supported by statements from America’s own job creators – over-regulation costs American Taxpayers, whether in the form of increased compliance costs imposed on job creators or in the form of higher prices for consumers when those costs are

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<sup>1537</sup> JOHN W. DAWSON & JOHN J. SEATER, FEDERAL REGULATION AND AGGREGATE ECONOMIC GROWTH 2 (2013), available at <http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf>.

<sup>1538</sup> The Code of Federal Regulations (“CFR”) is an annual compilation of all regulations implemented by federal agencies. It is published electronically and in print, and is available at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>. In their report, Dawson and Seater explain why using the number of pages in the CFR as a proxy for growth in regulation for a given year is the most appropriate measure, “[a]lthough other researchers have proposed related measures, ours is more precise and covers a much longer time span. The CFR contains literally every federal regulation in existence during a given year, and it has a time span of more than 50 years. It thus is much more comprehensive and covers a much longer time span than previous measures of regulation. Because all federal regulations must be published in the CFR, our page count measure must have at least a rough correlation with the ‘true’ amount of regulation that should enter an economic model.” JOHN W. DAWSON & JOHN J. SEATER, FEDERAL REGULATION AND AGGREGATE ECONOMIC GROWTH 4 (2013), available at <http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf>.

<sup>1539</sup> “Real output” is calculated by starting with gross domestic product (“GDP”) for the United States and then subtracting output produced by government, private households, and non-profit institutions. GDP is calculated by the Bureau of Economic Analysis within the Department of Commerce. For more information on GDP, visit <http://www.bea.gov/national/index.htm#gdp>.

<sup>1540</sup> JOHN W. DAWSON & JOHN J. SEATER, FEDERAL REGULATION AND AGGREGATE ECONOMIC GROWTH 1 (2013), available at <http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf>.

<sup>1541</sup> See Robert Barnes, *Supreme Court to hear challenge to EPA’s power-plant emissions rule*, WASH. POST (Nov. 25, 2014), available at [http://www.washingtonpost.com/politics/courts\\_law/supreme-court-to-hear-challenge-to-epa-power-plant-mercury-pollution-rule/2014/11/25/3086fad8-74d9-11e4-a755-e32227229e7b\\_story.html](http://www.washingtonpost.com/politics/courts_law/supreme-court-to-hear-challenge-to-epa-power-plant-mercury-pollution-rule/2014/11/25/3086fad8-74d9-11e4-a755-e32227229e7b_story.html).

<sup>1542</sup> Greg Stohr, *EPA Power Plant Mercury Rule Gets U.S. Supreme Court Review*, BLOOMBERG (Nov. 25, 2014) (quoting Brandon Barnes, a Bloomberg Intelligence analyst), available at <http://www.bloomberg.com/news/2014-11-25/epa-s-power-plant-mercury-rule-gets-review-by-u-s-supreme-court.html>.

passed on. Through hearings, reports and volumes of letters to regulatory agencies, the Committee on Oversight and Government Reform has given small businesses and large corporations alike the opportunity to explain how regulations are restricting their opportunities for economic growth, thereby limiting for all Americans the freedom to work, earn and achieve. In spite of this well-documented reality, the regulatory state continues to grow, adding billions of dollars in compliance costs to businesses and job creators – costs which are ultimately passed on to hardworking taxpayers every day in the form of higher prices. Given this reality, the Committee has demanded accountability from federal agencies by directing them to prove their rules are based on legitimate needs identified after a fact-based review of the situation, and that they are implemented in a way that satisfies common sense.

#### *AFFORDABLE CARE ACT: EMPLOYER MANDATE*

The Committee conducted oversight of the impact of the Patient Protection and Affordable Care Act's ("PPACA" or "ACA") provisions on job creators throughout the country. The following section highlights the Committee's findings in this area.

For our nation's job creators, the Affordable Care Act's burdensome tax penalties and regulations directly impact their everyday business decisions, including determining whether to hire new employees. The vast number of regulations, currently over tens of thousands of pages, has created uncertainty among business owners as they anticipate the implementation of the employer mandate in the next two years.<sup>1543</sup> This uncertainty has prevented businesses from hiring new employees, taking investment risks, and the like. The largest impact of the Affordable Care Act's mandates and regulations can be felt by small businesses. Based upon the regulations implemented under the PPACA, the CMS Office of the Actuary estimates 65 percent of small firms will experience increases in their premium rates while the remaining 35 percent are expected to experience rate reductions.<sup>1544</sup> Overall, the average monthly insurance cost for small businesses has risen from \$590 per employee in 2009 up to \$1,121 in 2014.<sup>1545</sup>

In 2010, the Patient Protection and Affordable Care Act passed as an effort to ensure all United States citizens are covered by health insurance. The legislation created an employer and an individual mandate in order to ensure all individuals are able to receive "affordable" health care. Both mandates have created adverse effects to individuals and employers. The employer mandate imposes penalties on employers with more than 50 full-time equivalent employees that do not provide healthcare to employees.<sup>1546</sup> The mandate, which was initially supposed to take effect in 2014<sup>1547</sup>, begins to phase in implementation in 2015.<sup>1548</sup> The mandate will explicitly raise taxes on

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<sup>1543</sup> Impact of President Obama's Health Care Law on Jobs Committee Report.

<sup>1544</sup> J.D. Harrison, *Obama administration: Health law's new rules will increase costs for most small businesses*, WASH. POST, Feb. 25, 2014, available at [http://www.washingtonpost.com/business/on-small-business/obama-administration-health-laws-new-rules-will-increase-costs-for-most-small-businesses/2014/02/24/0623d01e-9d9c-11e3-9ba6-800d1192d08b\\_story.html](http://www.washingtonpost.com/business/on-small-business/obama-administration-health-laws-new-rules-will-increase-costs-for-most-small-businesses/2014/02/24/0623d01e-9d9c-11e3-9ba6-800d1192d08b_story.html)

<sup>1545</sup> *Id.*

<sup>1546</sup> 26 U.S.C. § 4980H (2012).

<sup>1547</sup> Elise Viebeck and Benjamin Goad, *What will Obama do on employer mandate?*, THE HILL, Jul. 18, 2014.

<sup>1548</sup> U.S. DEP'T OF TREASURY, FACT SHEET: FINAL REGULATIONS IMPLEMENTING EMPLOYER SHARED RESPONSIBILITY UNDER THE AFFORDABLE CARE ACT (ACA) FOR 2015 (The employer responsibility provision [employer mandate] will generally apply to larger firms with 100 or more full-time

businesses not in compliance with Washington mandates and implicitly raises the administrative costs<sup>1549</sup> on businesses. The estimated cost of penalty payments by employers over the 2015-2024 period totals \$139 billion.<sup>1550</sup> Furthermore, the mandate will force businesses to take money away from employees' paychecks as a way of mitigating the rising health insurance costs.<sup>1551</sup>

There are two main tax penalties on businesses under the employer mandate. The first is a \$2,000 tax penalty per full-time worker (exempting the first 30 workers) on every large business that fails to offer health insurance that complies with the requirements of the PPACA.<sup>1552</sup> The second tax penalty costs businesses that offer health insurance \$3,000 for every employee who receives one of the law's health insurance tax subsidies.<sup>1553</sup> Businesses that are not grandfathered<sup>1554</sup> from the PPACA will be vulnerable to every requirement that the Obama Administration believes should be included in employer sponsored health insurance. One such requirement is the law's essential benefit package, the package of benefits and services that federal regulators have determined must be included within health insurance plans comparable to a typical employer plan. Complying with the essential benefits package will raise the price of insurance for many companies since many employers current plans do not include all ten categories of coverage required by PPACA's minimum essential benefits package.

Economic theory and empirical evidence suggests that the burden of paying this tax will primarily fall on workers in the form of lower wages and fewer jobs, and on consumers in the form of higher prices.<sup>1555</sup> Additionally shareholders will absorb some of the penalty in the form of lower profits. Lower profits mean fewer resources are available for the business to reinvest in the company, expand operations, and hire more workers. The business will no longer have as much discretion in how to compensate employees. Instead of raising salaries, investing in long time profitable ventures, or providing bonuses, much of a business's resources will be directed towards compliance with the employer mandate and paying tax penalties imposed under the mandate. A CEO of a Restaurant testified before our Committee stating:

Benefits have costs. The money to pay for those benefits has to come from somewhere. Our business makes a profit. All of that profit is reinvested in the

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employees starting in 2015 and employers with 50 or more full-time employees starting in 2016) (available at <http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf>).

<sup>1549</sup> The employer mandate, by requiring insurance to be offered to each employee, will require businesses to track and report how many employees are receiving coverage.

<sup>1550</sup> [http://www.cbo.gov/sites/default/files/45231-ACA\\_Estimates.pdf](http://www.cbo.gov/sites/default/files/45231-ACA_Estimates.pdf)

<sup>1551</sup> Avik Roy, *Two Obamacare Mandates That Dramatically Expand the Internal Revenue Service's Power*, FORBES, May 17, 2013.

<sup>1552</sup> Hinda Chaikind and Chris L. Peterson, "Summary of Potential Employer Penalties Under PPACA (P.L. 111-148)," Congressional Research Service, Apr. 5, 2010.

<sup>1553</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. L. 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. L. 111-152.

<sup>1554</sup> The Administration has estimated that 49 to 80 percent of small employer plans and 34 to 64 percent of large employer plans will not be grandfathered meaning the employer health plans will be subject to all requirements under the health care law. *Federal Register* Vol. 75, p. 34, 553.

<sup>1555</sup> Stephen Entin, *A Report of the Heritage Center for Data Analysis: Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays the Tax?*, HERITAGE FOUNDATION, Nov. 5, 2004, [http://s3.amazonaws.com/thf\\_media/2004/pdf/cda04-12.pdf](http://s3.amazonaws.com/thf_media/2004/pdf/cda04-12.pdf).

business. When the profit is reduced, you invest less in the business. If the profit is eliminated, you have nothing to invest in the business. If you don't have anything to invest, you can't grow and you can't create jobs. So there is a benefit, and I am not here to argue about that. I just want you to know that there is a cost associated with the benefit, and I think the businesses that are at this table here are telling you in some instances it might put them out of business.<sup>1556</sup>

This is arguably among the most important testimony that Congress has heard regarding the employer mandate because it is a reminder that all public policies generate both benefits and costs. In order to best serve the American people, Congress must carefully weigh both the benefits and the costs of legislative ideas. The PPACA is not without benefit, as some people gain health insurance at cheaper rates than they would have been able to otherwise. It is becoming increasingly clear, however, that the costs of the PPACA – fewer jobs, lower wages, higher taxes, and reduced consumer choice – will overwhelm these benefits.

The implementation of the employer mandate requires the creation of various new reporting systems, guidelines, and various administrative procedures. The employer mandate, which is regulated by the IRS, will include compliance burdens for both the government regulators as well as the individual employers. The employer mandate, which was originally set to begin enforcement this past year, was pushed back because of the complexities in constructing an adequate reporting system.<sup>1557</sup>

Many businesses, specifically the large business<sup>1558</sup>, have started cutting costs in a number of ways to prepare for the expense of transitioning into compliance with Obamacare. For example, UPS stated they expect the cost of transition to be around \$100 million for 2014 alone.<sup>1559</sup> In preparation for these expenses UPS no longer provides coverage on their insurance plan to spouses or non-union part-time employees.<sup>1560</sup> In addition, other companies are cutting costs by withholding insurance coverage from part-time employees, cutting the hours of full-time employees to place them below the 30 hour threshold, and withholding spousal coverage.

Moreover, the IRS did not release their first round of draft instructions relating to the employer mandates reporting requirements until the end of August, just five months away from the first implementation cycle.<sup>1561</sup> Under the Employer mandate businesses are now required to: withhold and report an additional 0.9 percent on employee wages or compensation exceeding \$200,000,

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<sup>1556</sup> Andrew Puzder, CEO of CKE Restaurants Inc., Hearing Transcript for “Impact of Obamacare on Job Creators and Their Decision to Offer Health Insurance,” Committee on Oversight and Government Reform Subcommittee on Health Care, District of Columbia, Census and the National Archives, July 28, 2011.

<sup>1557</sup> Mark J. Manzur, *Continuing to Implement The ACA in a Careful, Thoughtful Manner*, DEP’T OF TREASURY, Jul. 2, 2013, <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> (The Administration stated the delay was to meet two goals. First, it will allow us to consider ways to simplify the new reporting requirements consistent with the law. Second, it will provide time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees).

<sup>1558</sup> The employer mandate for large businesses, those with more than 100 employees, takes effect in 2015.

<sup>1559</sup> <http://www.foxbusiness.com/industries/2013/10/28/employers-grapple-with-cost-obamacare/>

<sup>1560</sup> *Id.*

<sup>1561</sup> Elise Viebeck, *IRS releases O-Care employer mandate guidance after long wait*, HILL, Aug. 28, 2014.

report the value of the health insurance coverage, file an annual return reporting whether and what health insurance was offered to employees, and if the employer provides self-insured health coverage they must file an annual return reporting certain information.<sup>1562</sup> Each of these reporting requirements is accompanied with a laundry list of details and information required. Businesses, in addition to paying for expansive coverage, must also expend large amounts of money and resources complying with reporting requirements. The administrative burdens on companies further constrict an employer's discretion.

### *EPA: IMPOSING UNREASONABLE BURDENS ON BUSINESS*

The EPA's regulations have been identified time and again as a significant impediment to economic growth. The sections below document the Committee's activities related to specific regulations that have threatened material harm to American job creators.

### **Greenhouse Gas ("GHG") Regulations**

One of the most significant regulatory undertakings by the EPA is its series of greenhouse gas ("GHG") regulations stemming from the *Massachusetts v. EPA*<sup>1563</sup> U.S. Supreme Court decision. In that decision, the Court held that EPA must determine whether GHGs endanger human health and safety.<sup>1564</sup> After this ruling, EPA ultimately determined that GHGs from mobile sources are "pollutants," automatically triggering sections of the Clean Air Act ("CAA"). Therefore, the law required EPA to regulate GHG emissions from stationary sources under Prevention of Significant Deterioration ("PSD") and Title V sections of the CAA.

Under the CAA, emissions thresholds for criteria pollutants are 100 and 250 tons per year ("tpy"). EPA estimates that 82,000 PSD permits would be required each year and six million facilities would need Title V permits in order to operate, proving compliance with the thresholds.<sup>1565</sup> Therefore, many commercial establishments, apartment buildings, hospitals and schools could find themselves subject to EPA regulations. In an effort to avoid this result, EPA finalized its tailoring rule for GHG emissions on May 13, 2010.<sup>1566</sup> Following a challenge of all of EPA's GHG rules, the U.S. Court of Appeals for the District of Columbia Circuit upheld the tailoring rule on June 26, 2012.<sup>1567</sup> However, the court did not reach the merits of the rule; instead, the court denied petitioners standing asserting that they were not harmed.<sup>1568</sup>

Under the tailoring rule as in force, EPA requires sources that are already subject to Prevention of Significant Deterioration ("PSD") requirements for other sources of pollution to implement GHG

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<sup>1562</sup> <http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions-for-Large-Employers>

<sup>1563</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>1564</sup> *Id.*

<sup>1565</sup> Business Roundtable, Background Paper on Significant EPA Regulations Pending or Proposed, March 24, 2011, available at [http://businessroundtable.org/uploads/studies-reports/downloads/20110324\\_Background\\_on\\_Regulation\\_of\\_GHG\\_Under\\_the\\_CAA.pdf](http://businessroundtable.org/uploads/studies-reports/downloads/20110324_Background_on_Regulation_of_GHG_Under_the_CAA.pdf).

<sup>1566</sup> H. Comm. on Oversight & Gov't Reform Preliminary Staff Report, *Assessing Regulatory Impediments to Job Creation*, 112th Cong. (2011) available at [http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary\\_Staff\\_Report\\_Regulatory\\_Impediments\\_to\\_Job\\_Creation.pdf](http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary_Staff_Report_Regulatory_Impediments_to_Job_Creation.pdf).

<sup>1567</sup> Tiffany Stecker, *Appeals Court Gives EPA a Big Win on Greenhouse Gas Rules*, ClimateWire, June 27, 2012, available at <http://www.eenews.net/climatewire/2012/06/27/archive/4?terms=tailoring+rule>.

<sup>1568</sup> *Id.*

Best Available Control Technology (“BACT”) requirements.<sup>1569</sup> On July 1, 2011, EPA activated “step two” of the tailoring rule. Under this phase of the regulation, new projects that emit at least 100,000 tpy are subject to PSD permitting requirements – meaning these projects would be required to comply with the BACT requirements. EPA indicated in its final rule that it would revisit the emissions threshold and make future determinations that could increase the number of businesses subject to the onerous permitting requirements.<sup>1570</sup>

The uncertainty of the tailoring rule continues to generate concern among job creators who are unclear whether or not their industries will be included in GHG regulations. For example, members of the Agricultural Retailers Association “fear that their farmer customers and their businesses will eventually be brought into the rule.”<sup>1571</sup> The rule would increase electricity costs for farms, which in turn could cause farms to shut down, depleting the customer base for the Agricultural Retailers Association’s members.<sup>1572</sup> Furthermore, the National Federation of Independent Businesses raised concerns about the uncertainty that the tailoring rule provides small business because the “small business protections provided in this rule could be thrown out by a court at any time.”<sup>1573</sup> The Associated Builders and Contractors are similarly concerned that an expanded application of the GHG rules could increase energy costs.<sup>1574</sup> It is clear that the changing nature of the tailoring rule, as well as the uncertainty as to whether it will apply to more sources, is of great concern to job creators.

### **Boiler MACT**

The “Boiler MACT” rule, pursuant to authority delegated to the EPA through the Clean Air Act, regulates emissions of area source boilers and process heaters and requires that Maximum Achievable Control Technology (“MACT”) be implemented by regulated entities.<sup>1575</sup> EPA proposed the initial rule in June 2010, issued a final rule in March 2011, and on the same day, in an unprecedented action, also issued a notice of reconsideration.<sup>1576</sup> On May 18, 2012, EPA submitted a revised rule to the Office of Management and Budget signaling that the reconsidered rule should

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<sup>1569</sup> H. Comm. on Oversight & Gov’t Reform Preliminary Staff Report, *Assessing Regulatory Impediments to Job Creation*, 112th Cong. (2011) available at [http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary\\_Staff\\_Report\\_Regulatory\\_Impediments\\_to\\_Job\\_Creation.pdf](http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary_Staff_Report_Regulatory_Impediments_to_Job_Creation.pdf).

<sup>1570</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts 51, 52, 70, 71).

<sup>1571</sup> Letter from Daren Coppack, Agricultural Retailers Association, the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 7, 2012 (on file with author).

<sup>1572</sup> *Id.*

<sup>1573</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, May 31, 2012 (on file with author).

<sup>1574</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, May 31, 2012 (on file with author).

<sup>1575</sup> <http://www.epa.gov/airtoxics/boiler/boilerpg.html>.

<sup>1576</sup> Environmental Protection Agency, Emissions Standards for Boilers and Process Heaters and Commercial / Industrial Solid Waste Incinerators, Regulatory Actions, available at <http://epa.gov/airquality/combustion/actions.html>.

be finalized within 90 days.<sup>1577</sup> The final rule was published on January 31, 2013. Perhaps unsurprising given the regulation's conflicted past, the rule has been highly criticized for setting unattainable emission standards. On December 1, 2014, EPA announced it "proposes reconsideration of, and requests public comment on, clean air standards for industrial boilers, and certain incinerators."<sup>1578</sup>

While industry groups acknowledged that EPA has made Boiler MACT less stringent than the initial final rule published in March 2011, the costs and burdens of the reconsidered rule are still substantial. According to a study performed by the Council of Industrial Boiler Owners ("CIBO"), job creators will be on the hook for up to \$15 billion in regulatory compliance costs under the reconsidered rule.<sup>1579</sup> The Anthracite Region Independent Power Producers Association ("ARIPPA"), the trade association that represents electric generating plants that use stockpiled coal refuse, sees Boiler MACT as a clear threat to existing jobs, stating, "the emission standards identified in the proposed Boiler MACT rule are not reflective of achievable emissions for ARIPPA plants."<sup>1580</sup> Furthermore, CF Industries informed the Committee that "the primary concern with the rule . . . is the proposed timetable for boiler inspections, which would interrupt established inspection schedules, leading to extended production outages."<sup>1581</sup> Accordingly, Boiler MACT continues to be a rule whose uncertainty and high cost cause concerns amongst job creators.

### **Brick MACT**

According to the Brick Industry Association, businesses in their trade create approximately 200,000 jobs in America.<sup>1582</sup> However, since the construction downturn began in 2006, approximately 9,000 direct manufacturing jobs, and approximately 86,000 indirect brick jobs in distribution, design, installation and related fields, have been lost.<sup>1583</sup> In addition to this hardship, brick makers are facing onerous industry-specific regulations. The first is a re-issuing of a Maximum Achievable Control Technology rule for clay brick and tile ("Brick MACT"). EPA finalized the original Brick MACT in 2003 to regulate emissions that might be produced when the raw brick materials are fired in kilns to make bricks. The industry spent over \$100 million to install and operate required control devices to meet the 2006 compliance date.<sup>1584</sup> In 2007, more than a year after enforcement of Brick MACT began; a federal court vacated the rule and the standards in their entirety and sent them back to EPA to be rewritten.

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<sup>1577</sup> Jeremy P. Jacobs, *EPA Sends Boiler Rules to White House*, Greenwire, May 18, 2012 available at <http://www.eenews.net/Greenwire/2012/05/18/archive/3?terms=boiler+mact>.

<sup>1578</sup> Announcement, EPA, Industrial/Commercial/Institutional Boilers and Process Heaters (Dec. 1, 2014), available at [www.epa.gov/ttn/atw/boiler/boilerpg.html](http://www.epa.gov/ttn/atw/boiler/boilerpg.html).

<sup>1579</sup> Letter from Jay Timmons, President and CEO, National Association of Manufacturers to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't Reform, June 4, 2012 (on file with author).

<sup>1580</sup> Letter from Jeff McNelly, Executive Director, ARIPPA to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't Reform, May 31, 2012 (on file with author).

<sup>1581</sup> Letter from Stephen R. Wilson, Chairman & CEO, CF Industries to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't Reform, June 15, 2012 (on file with author).

<sup>1582</sup> Letter from J. Gregg Borchelt, President & CEO, Brick Industry Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 1 (Jan. 10, 2011) (on file with author).

<sup>1583</sup> *Id.*

<sup>1584</sup> *Id.*

EPA is now developing a new Brick MACT but is using the achievements of brick manufacturers under the remanded rule against them as a basis for even more stringent standards. The EPA estimated the revised Brick MACT would cost the industry \$188 million per year.<sup>1585</sup> Based on figures cited by the Brick Industry Association, brick manufacturers' total revenue in 2009 was approximately \$940 million.<sup>1586</sup> According to EPA's own estimates, Brick MACT will impose a compliance cost of approximately 20 percent of the industry's revenue, endangering the viability of brick making, and its corresponding jobs, across the United States. A finalized rule is projected to be published in December of this year.<sup>1587</sup>

### **OSHA Injury Illness and Prevention Program (“I2P2”)**

Business groups have been concerned about OSHA's Injury Illness and Prevention Program (“I2P2”) for some time; the rule would mandate how companies, both large and small, plan, implement, evaluate and improve processes and activities that protect employee safety and health.<sup>1588</sup> I2P2 is a high priority for OSHA; yet, OSHA has not formally proposed a rule. When it was reported that Assistant Secretary of Labor for Occupational Safety and Health, David Michaels, was asked if OSHA would propose the rule before the 2012 elections, and he responded that it was a possibility, but added “but I'm not allowed to say that.”<sup>1589</sup> Since then, the rule has been moved to the Administration's “long-term” action list.<sup>1590</sup>

Employers support improvements to safety and health management; however, they do not believe that government mandates are necessary to achieve these goals. In particular, business groups “have voiced concerns about OSHA's decision to take a regulatory approach, rather than utilize cooperative tactics to better proliferate . . . useful programs.”<sup>1591</sup> Further, many employers voluntarily conduct programs similar to I2P2 to improve health and safety.<sup>1592</sup> Member companies of the Associated Builders and Contractors and the American Forest and Paper Association (“AFPA”) fear that “the proposal could negatively impact employers that already have effective I2P2 programs in place”<sup>1593</sup> and believe “it does not make sense for the Federal Government to . . . add an

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<sup>1585</sup> *Id.*

<sup>1586</sup> *Id.* at 2.

<sup>1587</sup> [http://yosemite.epa.gov/opei/RuleGate.nsf/\(LookupRIN\)/2060-AP69#1](http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2060-AP69#1).

<sup>1588</sup> Injury and Illness Prevention Program, 75 Fed. Reg. 23637 (May 4, 2010).

<sup>1589</sup> MSDS Online, OSHA's Injury and Illness Prevention Program (I2P2) Rising (June 11, 2012), *available at* <http://blog.msds-online.com/2012/06/osha%E2%80%99s-injury-and-illness-prevention-program-i2p2-rising/>.

<sup>1590</sup> Stephen Lee, et al., *OSHA Demotes I2P2 Rule to Long-Term Action List in Spring Regulatory Agenda*, BLOOMBERG BNA, May 29, 2014, *available at* <http://www.bna.com/osha-demotes-i2p2-n17179890840/>.

<sup>1591</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author).

<sup>1592</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author); Letter from Donna Harman, President and CEO, American Forest & Paper Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 6, 2012 (on file with author).

<sup>1593</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author).

additional layer of bureaucracy and command-and-control.”<sup>1594</sup> AFPA emphasizes that “each company’s workplace environment is unique and in many respects the employer is in the best position to understand what types of programs would meet the needs of its employees.”<sup>1595</sup> Therefore, a collaborative approach between OSHA and employers may be a more effective method to improving health and safety.

The cost of the I2P2, especially to small businesses, is also a concern. The Associated Builders and Contractors worries that “significant cost and compliance burdens could be imposed on businesses, and the proposal could lead to ‘double dip’ citations for infractions (once under existing rules, and once under the new I2P2 requirements).”<sup>1596</sup> The National Federation of Independent Business believes that “[d]eveloping a formal program could be a costly exercise for small businesses and become a paperwork nightmare.”<sup>1597</sup> Moreover, I2P2 “would likely require small businesses to address all ‘foreseeable’ hazards – meaning that any workplace accident, no matter how unlikely, could be interpreted as foreseeable and expose small firms to fines and penalties.”<sup>1598</sup> The uncertainty of the cost appears to be a legitimate concern as the Associated Builders and Contractors notes that “OSHA has been known to significantly underestimate employer costs.”<sup>1599</sup>

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<sup>1594</sup> Letter from Donna Harman, President and CEO, American Forest & Paper Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, June 6, 2012 (on file with author).

<sup>1595</sup> *Id.*

<sup>1596</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, May 31, 2012 (on file with author).

<sup>1597</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, May 31, 2012 (on file with author).

<sup>1598</sup> *Id.*

<sup>1599</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, May 31, 2012 (on file with author).

## UNPRECEDENTED EXPANSION OF REGULATORY STATE

Although the departments and agencies of the Federal Government play an important role in facilitating the execution of laws passed by the Legislative Branch, the scope of their authority should be interpreted narrowly. According to President Bill Clinton's Executive Order, as adopted by President Obama:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve health and safety of the public, the environment, or the well-being of the American people.<sup>1600</sup>

The Committee on Oversight and Government Reform has conducted extensive oversight of the unprecedented expansion of the Administrative State in recent years. As the economy continues to slowly recover from the financial crisis, EPA's continued use of the "sue and settle" practice and its attempts to redefine the Clean Water Act permitting process, the steps taken by the National Labor Relations Board to encourage unionization through rules, and enhanced government regulation of activities in the financial and banking sectors are just a few examples of regulatory overreach that threaten continued economic growth.

### *SUE AND SETTLE*

"Sue and settle" is a term coined by Minnesota Democratic Representative Colin Peterson that refers to the questionable practice by regulatory agencies to include regulatory mandates in voluntary settlement agreements.<sup>1601</sup> Sue and settle settlement agreements are often the result of "friendly" lawsuits brought by special interest groups against federal agencies. The settlements mandate subsequent regulatory action, usually under a compressed timeline – and generally, the attorneys' fees of the party initiating the lawsuit are paid by the government.<sup>1602</sup> In doing so, agencies bypass the proper rulemaking process and avoid basic principles of transparency and accountability.

Rules issued in this manner are often unfair to job creators and other stakeholders because they are denied a seat at the table, while the agency ties its hands at the behest of certain special interest groups. For example, an EPA lawsuit in California brought by a number of environmental groups questioned North Dakota's Regional Haze implementation plan. Even though the settlement could have stifling effects on power and cement plants in North Dakota, the State of North Dakota was only informed of the lawsuit after settlement terms were reached.<sup>1603</sup>

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<sup>1600</sup> Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

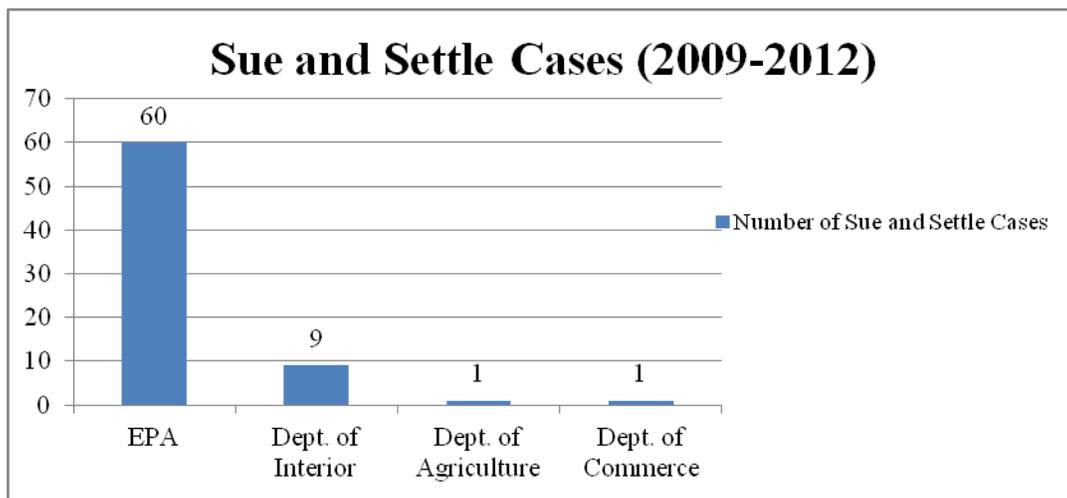
<sup>1601</sup> See Press Release, Committee on Oversight and Government Reform, Issa: EPA Using "Sue and Settle" to Regulate Job Creators (Apr. 19, 2011).

<sup>1602</sup> The U.S. Chamber of Commerce reviewed a number of sue and settle cases in 2013, finding that "attorney's fees were awarded [to the advocacy groups filing the lawsuits] in at least 65 % (49 or 71) of the cases." U.S. CHAMBER OF COMMERCE, *SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS* 12-13, note 14 (2013) [hereinafter *REGULATING BEHIND CLOSED DOORS*].

<sup>1603</sup> U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*, (2012), available at [https://www.uschamber.com/sites/default/files/legacy/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf).

Sue and settle has been used to create many of the “most controversial, economically significant regulations that have plagued the business community for the past few years.”<sup>1604</sup> The agencies voluntarily enter into a settlement in which it agrees to be legally obligated to comply with terms for regulatory action that were negotiated with a single interest group, effectively creating rules without going through the notice and comment process. The settlement agreements establish strict deadlines that force the agency to act aggressively without first conducting proper research and studies.

The rulemaking process is designed to incorporate the public into the lawmaking process and protect against agency overreach by holding agencies accountable. Agencies have engaged in sue and settle as a way of escaping accountability and pursuing administrative agendas. According to an article in the Harvard Journal of Law and Public Policy, “Sue and Settle does not reflect a careful weighing of priorities by expert bureaucrats.”<sup>1605</sup> Rather, sue and settle is used to bypass required compliance with the Administrative Procedure Act, which is a key component and safeguard of delegating legislative authority to administrative agencies within the Executive Branch. Moreover, in many cases sue and settle expands federal authority by effectively cutting States out of their regulatory role, effectively diminishing the role of federalism. Regulations that have historically been left up to the States to decide and implement are frequently being usurped by federal agencies, specifically the EPA<sup>1606</sup>, by “effectively shut[ting] the States out of the decision-making process and forc[ing] them into a subservient role as enforcers of federal court orders.”<sup>1607</sup>



From 2009-2012, a total of 71 sue and settle cases led to over 100 new regulations, many with annual compliance costs around \$100 million.<sup>1608</sup> During the Administration’s first term, the EPA

<sup>1604</sup> *Id.*

<sup>1605</sup> Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL’Y 579 (2014).

<sup>1606</sup> The Regional Haze Rule settlement resulted in EPA taking over the States role in setting compliance standards.

<sup>1607</sup> Butler, *supra* note 1605.

<sup>1608</sup> See REGULATING BEHIND CLOSED DOORS, *supra* note 1602.

used sue and settle **nearly six times more**<sup>1609</sup> often than all other agency departments combined. EPA’s actions accounted for **84.5%** of all sue and settlement cases. The Obama Administration settled twice as many Clean Air Act lawsuits as previous administrations.<sup>1610</sup> “The concern is that settlements can impose significant costs and expand the regulatory burden on industries while contravening statutory and regulatory review procedures.”<sup>1611</sup> An example of these costs can be seen in the chart below depicting ten costly sue and settle regulations.

Ten Costly Regulations Resulting From Sue & Settle		
1	Utility MACT Rule	Up to \$9.6 billion annually
2	Lead Renovation, Repair and Painting Rule	Up to \$500 million in first-year
3	Oil and Natural Gas MACT rule	Up to \$738 million annually
4	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to \$632 million annually
5	Regional Haze Implementation Rules	\$2.16 billion cost to comply
6	Chesapeake Bay Clean Water Act Rules	Up to \$18 billion cost to comply
7	Boiler MACT Rules	Up to \$3 billion cost to comply
8	Standards for Cooling Water Intake Structures	Up to \$384 million annually
9	Revision to the NAAQS PM	Up to \$350 million annually
10	Reconsideration of 2008 Ozone NAAQS	Up to \$90 billion annually

### Lead Renovation, Repair and Painting Rule

On August 26, 2009, the EPA voluntarily entered into a settlement agreement that legally obligated the agency to issue regulations that met certain requirements specified in the agreement. The new regulations would amend an existing regulation that had been developed in full compliance of the regulatory process notice and comment requirements. The settlement agreement, which dictated the content of the new regulations, was negotiated behind closed doors between the EPA and two similarly situated interest groups. Essentially, the settlement required EPA to replace a rule promulgated with public participation and full transparency with regulations predetermined in a secret deal.

EPA issued the initial Lead Renovation, Repair and Painting (“LRRP”) rule in 2008, pursuant to the Toxic Substances Control Act.<sup>1612</sup> The rule requires that renovations to a home built before 1978 follow certain work practices supervised by an EPA-certified renovator and performed by an EPA-certified firm.<sup>1613</sup> After a review of the science and consultation with small businesses, EPA determined that an opt-out provision in the rule, exercised at the election of a homeowner, could

<sup>1609</sup> If a regulation issued as a result of a sue and settle case was promulgated by two agencies, it was counted toward the total for the agency with the higher number of cases to prevent double counting regulations.

<sup>1610</sup> REGULATING BEHIND CLOSED DOORS, *supra* note 1602. In President Clinton’s second term there were 27 sue and settle cases, in President George W. Bush’s first term there were 38 sue and settle cases, in President Bush’s second term there were 28 sue and settle cases, and in Obama’s first term there were 71 sue and settle cases. *Id.*

<sup>1611</sup> Scott W. Harngren and Shay S. Scott, *Consent Decree Cannot Circumvent the Statutory Public Review Process to Change Federal Management Plans*, 45 ABA TRENDS 21 (2014).

<sup>1612</sup> Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).

<sup>1613</sup> *Id.*

still protect from the dangers of lead paint.<sup>1614</sup> The opt-out provision allowed contractors to forgo the training and work practice requirements if they obtained a certificate from the homeowner stating that no children under age six or a pregnant woman resided in the home.<sup>1615</sup>

When special interest groups challenged this balanced approach, EPA declined to defend the rule and opted to enter into a settlement agreement. In reaching the settlement, EPA did not provide notice or solicit comments from the public. The settlement agreement required EPA to propose and finalize a new rule that removed the opt-out provision.<sup>1616</sup> On October 28, 2009, EPA proposed the rule, and it was finalized on May 6, 2010.<sup>1617</sup>

The removal of the opt-out provision is likely not the end of changes to the LRRP rule. The settlement agreement also mandated that additional lead paint rules be considered.<sup>1618</sup> EPA issued an Advance Notice of Proposed Rulemaking to require that exterior renovations to public and commercial buildings, other than those that are child-occupied, adhere to the same lead paint practices as residential buildings.<sup>1619</sup> Another proposed rule requires these practices be applied to the interior renovations of non-residential buildings, such as certain public and commercial buildings as well.<sup>1620</sup> This rule is expected to be finalized in 2015.<sup>1621</sup>

While sharing EPA's objective of protecting children and pregnant women from lead paint hazards, a broad array of groups continue to identify problems associated with the well-intentioned LRRP rule. In particular, the rule requires the use of lead testing kits but many groups attest that EPA has not yet recognized an accurate test. The National Lumber and Building Material Dealers Association and the National Association of Home Builders, among others, emphasize that no test kit is currently available that meets EPA's requirements. Instead, "[c]urrent test kits can produce up to 60 percent false positives, meaning that in many cases, consumers are needlessly paying additional costs for work practices that are unnecessary."<sup>1622</sup>

The National Federation of Independent Business ("NFIB") adds that the removal of the opt-out provision "ha[s] led homeowners to explore using 'underground' contractors that do not comply with the EPA's requirements at all."<sup>1623</sup> Indeed, a survey conducted by the National Association of the Remodeling Industry shows that 77 percent of homeowners are avoiding the rule by doing

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<sup>1614</sup> Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Env'tl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, EPA (Nov. 27, 2009).

<sup>1615</sup> Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).

<sup>1616</sup> Motion to Sever and Hold in Abeyance Nos. 08-1235 and 08-1258, *Nat'l Assoc. of Homebuilders v. Env'tl Prot. Agency*, No. 08-1193 (D.C. Cir. Aug. 26, 2009) (settlement agreement between the EPA and public interest groups).

<sup>1617</sup> EPA, Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program Final Rule, 75 Fed. Reg. 24802, May 6, 2010.

<sup>1618</sup> Public Interest Petitioners (Sierra Club and New York City Coalition to End Lead Poisoning), et. al. v. Environmental Protection Agency, Settlement Agreement, Case No. 08-1193.

<sup>1619</sup> <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0001;oldLink=false>.

<sup>1620</sup> Settlement Agreement, Sierra Club, et al. v. EPA, No. 08-1193 (9th Cir. 2009).

<sup>1621</sup> <http://fas.org/sgp/crs/misc/R41561.pdf>.

<sup>1622</sup> Letter from James W. Tobin III, Senior Vice President and Chief Lobbyist, Ntl. Assn. of Home Builders to Chairman Darrell Issa, H. Comm. on Oversight & Gov't Reform, June 13, 2012 (on file with author).

<sup>1623</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, May 31, 2012 (on file with author).

remodeling work on their own, or hiring a non-certified contractor to perform the work.<sup>1624</sup> In these instances the rule actually leads to an increased risk of lead paint exposure, while also negatively affecting certified contractors' ability to compete. The National Lumber and Building Material Dealers Association states that "legitimate businesses complying with the LRRP rule cannot compete for much needed work against non-compliant contractors that, ironically, lack the training to actually perform lead-safe renovations and prevent lead hazard exposures."<sup>1625</sup> The Small Business Administration Office of Advocacy comments that "[r]eform of the expensive requirements of the current LRRP rule continues to be one of the highest priorities of the small business community."<sup>1626</sup> This is unsurprising as the opt-out provision had saved the industry approximately \$500 million in compliance costs.<sup>1627</sup>

### **Utility MACT**

Utility MACT, also known as the Mercury Air Toxic Standards, is one of the most expensive rules ever promulgated by the EPA and it is an excellent example of how secret backroom deals produce poor quality regulations supported by strained analysis to meet self-imposed deadlines. Utility MACT regulations were a direct result of a consent decree reached between the EPA and various environmental groups pushing for a stronger regulatory hand. The result was a regulation that, by EPA's estimates, includes nearly \$9.6 billion in annual compliance costs.

In 1990, amendments to the Clean Air Act ("CAA") delegated authority to the EPA to regulate hazardous air pollutants. Due to the importance of maintaining reliable electricity, the statute required EPA to conduct a study about Electric Generating Utilities ("EGUs") to determine "the hazards to public health reasonably anticipated to occur as a result of emissions" and to develop "alternative control strategies for emissions."<sup>1628</sup> In 2000, EPA published the study stating it was "appropriate and necessary after considering the results" to regulate emissions of EGUs.<sup>1629</sup> EPA promulgated a rule in 2005 that regulated hazardous air pollutants while balancing the costs of implementation, considering the sensitive nature of ensuring electricity reliability. However, the rule was vacated in 2008 for failing to comply with certain statutory requirements.

After the Obama Administration took office in 2009, the EPA entered into a settlement agreement with special interests groups to promulgate a rule to replace the vacated rule. EPA issued the proposed rule in 2011 and the final rule in early 2012.<sup>1630</sup> According to the Chamber of Commerce Utility MACT, "as currently issued could threaten America's electricity reliability, global

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<sup>1624</sup> National Association of the Remodeling Industry, Summary of Survey about the EPA's Lead Renovation, Repair, Painting (LRRP) Rule (June 2011).

<sup>1625</sup> Letter from Ben Gann, Director of Legislative Affairs, Ntl. Lumber and Building Material Dealers Association to Chairman Issa and Subcommittee Chairman Jim Jordan, June 1, 2012 (on file with author).

<sup>1626</sup> SBA Office of Advocacy, Report on the Regulatory Flexibility Act FY 2011: Annual Report of the Chief Counsel of Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272 (Feb. 2012) available at [http://www.sba.gov/sites/default/files/11regflx\\_0.pdf](http://www.sba.gov/sites/default/files/11regflx_0.pdf)

<sup>1627</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, May 31, 2012 (on file with author).

<sup>1628</sup> Clean Air Act Amend. of 1990, Pub. L. No. 101-549 § 112(n)(1).

<sup>1629</sup> The study is available at <http://www.epa.gov/ttn/oarpg/t3/reports/eurtc1.pdf> (last accessed Dec. 19, 2014).

<sup>1630</sup> The Committee held two hearings in 2011 addressing the potentially stifling effects of the Utility MACT regulations.

competitiveness, and job creation.”<sup>1631</sup> The Chamber of Commerce estimates the economy will lose 180,000 to 215,000 jobs by 2015 as a direct result of the settlement.<sup>1632</sup> The regulations combined with other new EPA regulations on the electric power sector will increase the total number of jobs lost to approximately 1.65 million by 2020.<sup>1633</sup>

However, EPA was quickly back in court to address inadequacies in the new rule. The case will be heard by the Supreme Court in the next term. While EPA claimed tens of billions of dollars in benefits, few monetized benefits were actually attributable to reducing hazardous air pollutants that the statute authorized EPA to regulate. The vast majority of benefits were associated with the reduction in emissions of fine particulate matter, which is not considered hazardous air pollutants. According to EPA, fine particulate matter is “made up of a number of components, including acids (such as nitrates and sulfates), organic chemicals, metals, and soil or dust particles.”<sup>1634</sup> It is not, however, a substance for which EPA has statutory authority to regulate under the CAA. Despite the \$9.6 billion price tag and the lack of benefits associated with regulating the air pollutants, EPA argues that it was not required to consider costs.<sup>1635</sup>

EPA also failed to consider feasibility. In 2013, EPA modified the standards for mercury emissions by new coal-fired power plants because the original standard was significantly lower than what the current technology can test. The change came as a response to comments from the Institute of Clean Air Companies, a trade association that represents manufacturers of pollution control and monitoring equipment. In the fall of 2014, the Supreme Court agreed to review the EPA’s method of promulgating this regulation, consolidating four cases brought by state and local governments and industry representatives. The question the Court will consider is “whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.”<sup>1636</sup>

#### *EPA CLEAN WATER ACT 404(C) PERMITTING*

The Clean Water Act was passed in 1972 to regulate the discharge of pollutants into the “waters of the United States” and create quality standards for surface water.<sup>1637</sup> As part of the Clean Water Act, the EPA and the Army Corps of Engineers are tasked with reviewing and approving discharge permits, also known as “404” permits.<sup>1638</sup> The 404 permitting process vests the authority to issue permits within the Army Corps of Engineers, through approval of disposal sites by the EPA. The

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<sup>1631</sup> Press Release, U.S. Chamber of Commerce, U.S. Chamber Disappointed with EPA Issuing Another Job-Killing Rule (Dec. 21, 2011), available at <https://www.uschamber.com/press-release/us-chamber-disappointed-epa-issuing-another-job-killing-rule>.

<sup>1632</sup> ‘Sue and Settle’: Secret backroom deals by bureaucrats and environmentalists hurt the American economy, CAPITAL RESEARCH CTR. GREEN WATCH BLOG (Jul. 5, 2013, 11:49 AM), available at <http://capitalresearch.org/2013/07/sue-and-settle-secret-backroom-deals-by-bureaucrats-and-environmentalists-hurt-the-american-economy/>.

<sup>1633</sup> *Id.*

<sup>1634</sup> Particulate Matter, EPA, <http://www.epa.gov/pm/> (last accessed Dec. 19, 2014).

<sup>1635</sup> See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

<sup>1636</sup> The Supreme Court granted petitions of certiorari from three appellants, agreeing to address the EPA’s consideration of the costs imposed by the EPA regulation in a consolidated action limited to the question cited on November 25, 2014. [http://www.supremecourt.gov/orders/courtorders/112514zr\\_32q3.pdf](http://www.supremecourt.gov/orders/courtorders/112514zr_32q3.pdf).

<sup>1637</sup> 33 U.S.C. § 1251 et seq.

<sup>1638</sup> 33 U.S.C. § 1344.

EPA has a final decision to veto disposal sites as well as a final veto power if they find the discharge will cause “unacceptable adverse effects” on the environment.<sup>1639</sup>

EPA’s veto authority, up until the past several years, has only been invoked during the permitting process, not before or after. Discharge permits have become vital for those involved in various industries, including building, agriculture, mining, transportation, and energy projects in order to run their businesses. Invoking an EPA 404(c) veto is an extremely rare occurrence, only twelve 404(c) actions have been filed since 1981.<sup>1640</sup> Notably, in each of these twelve cases the veto occurred prior to the issuance of a 404 permit.

### **Mingo Logan’s permit for Spruce Mine – Retroactive Veto**

In 2011 the EPA, in a completely unprecedented action<sup>1641</sup>, revoked a duly issued Army Corps of Engineers 404(c) discharge permit three years after the permit had taken affect. Prior to Army Corps’ issuance of the permit the EPA had the ability to raise any concerns regarding the environmental impact of the proposed discharge material.<sup>1642</sup> The EPA refrained from acting on previously stated concerns and in 2007 the Army Corps issued Mingo Logan a permit for its Spruce Mine set to expire in December of 2031.

The permit allowed Spruce Mine to initiate a surface coal mining project. However, three years after issuance of the permit, the EPA unilaterally acted in revoking Spruce Mine’s permit.<sup>1643</sup> EPA’s final determination withdrawing the Spruce Mine permit was done by withdrawing specification sites outlined within the permit.

The authority to revoke dully issued permits has drawn heavy criticism for the potential adverse effects of such administrative authority. Extremely concerning is Chamber of Commerce’s estimate that “over \$220 billion of investment annually is conditioned on the issuance of these discharge permits.”<sup>1644</sup> Uncertainties now surround 404(c) permits, which are a vital part to numerous undertakings and projects. Investors, businesses and industry wide participants are now vulnerable to government agencies even if they are fully complying with the terms set out within their 404(c) permits. This vulnerability leaves permit holders with no assurances upon which to substantially invest resources into projects due to the fear of regulatory interference.<sup>1645</sup>

### **Pebble Mine – Preemptive Veto**

The EPA continues to attempt to expand its statutory authority under section 404 of the Clean Water Act (“CWA”) to regulate mining operations. In 2011, the EPA received petitions from anti-

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<sup>1639</sup> 33 U.S.C. §1344.

<sup>1640</sup> Deidre G. Duncan and Karma B. Brown, *EPA’s Unprecedented Exercise of Authority Under Clean Water Act Section 404(c)*, ABA IN-HOUSE COUNSEL COMM. NEWSLETTER, Vol. 12 No. 2, Jun. 2011.

<sup>1641</sup> The Committee held a hearing titled “The Green Agenda and the War on Coal: Perspective from the Ohio Valley” to examine the effects of federal regulation on the economy and job creators.

<sup>1642</sup> The Army Corps is required to draft and issue an Environmental Impact Statement prior to approving a permit.

<sup>1643</sup> Important to note is Army Corps’ refusal to revoke or suspend the Mingo Logan permit prior to EPA’s revocation.

<sup>1644</sup> Brief of the Chamber of Commerce of the United States of America, et al. as Amicus Curiae Supporting Petitioner, *Mingo Local Coal Co. v. EPA*, No. 13-599 (U.S. Dec. 16, 2013).

<sup>1645</sup> See Duncan and Brown, *supra*, note 1640.

mining activists calling for a preemptive veto of a permit for the Pebble Mine Project under Section 404 of the Clean Water Act. EPA appears poised to strike down the project before it has even applied for CWA permits and discussed a Pebble Project veto as early as January 2010, a year prior to any assessment taking place.<sup>1646</sup>

The Pebble Mine project is a copper and other mineral extraction project that would be located in Southwest Alaska near Bristol Bay. The Pebble Mine would create 1,000 permanent jobs and 2,000 construction jobs in an area of Alaska with high unemployment and low job growth and opportunity.<sup>1647</sup> These jobs would pay an average of \$90,000 per year.<sup>1648</sup> Pebble Mine would represent an investment of billions of dollars into the economy of Alaska. Currently, the project is undertaking environmental studies focusing on environmental impacts and exploratory drilling. The Pebble Project has not yet applied to EPA for a CWA permit, nor has it begun the National Environmental Policy Act (“NEPA”) process.

EPA is considering using an unprecedented and legally questionable interpretation of the CWA to preemptively veto permits for the Pebble Mine. EPA released a draft Watershed Assessment on May 18, 2012, which may be used as justification to deny permits to the Pebble Mine before a plan is even submitted to the agency. In February 2014, the EPA sent a letter to Pebble Partnership asserting that it was beginning the process to review potential adverse environmental effects.<sup>1649</sup> In fact, EPA believes that it possesses the authority to deny a permit before a sponsor even applies under Section 404(c) of the CWA, as indicated in a letter sent by EPA in response to Chairmen Issa and Jordan.<sup>1650</sup>

The Pebble Partnership has spent over \$500 million in studying the environmental impacts of a potential mine and in preparing for the 404 permitting process.<sup>1651</sup> However, the Pebble Project has “encountered an EPA that has seemingly embraced the actions sought by our organized opposition and is now helping them to build a justification (through a flawed watershed assessment) for EPA to expand their jurisdiction using a legally questionable interpretation of the Clean Water Act.”<sup>1652</sup> Moreover, the Pebble Partnership wrote that “[i]f a 404(c) preemptive veto is granted or conditions are imposed by the EPA, it will chill additional investment in and attendant

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<sup>1646</sup> COMM. OF OVERSIGHT AND GOVERNMENT REFORM, ISSA SUBPOENAS EPA FOR PEBBLE MINE DOCUMENTS, Mar. 21, 2014, <http://oversight.house.gov/release/issa-subpoenas-epa-pebble-mine-documents/>. On March 14 Chairman Issa, Subcommittee Chairman James Lankford, and Subcommittee Chairman Jim Jordan, sent a letter to EPS Inspector General Arthur Elkins, Jr. requesting an investigation into the EPA’s decision to rely on a rarely-used provision of the Clean Water Act to preemptively veto the proposed Pebble Project. *Id.*

<sup>1647</sup> JEFF DESJARDINS, VISUAL CAPITALIST, THE PEBBLE PROJECT ECONOMICS AND EMPLOYMENT (2013), *available at* <http://www.visualcapitalist.com/pebble-project-economics-employment/>.

<sup>1648</sup> Letter from John Shively, CEO, The Pebble Partnership, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, June 29, 2012 (on file with author).

<sup>1649</sup> Diane Meyers, *Pebble Mine Jumps the Gun on Challenge to EPA’s 404(c) Authority*, SCIENCE, LAW & THE ENVIRONMENT, Sept. 29, 2014, <http://www.sciencelawenvironment.com/2014/09/pebble-mine-jumps-the-gun-on-challenge-to-epas-404c-authority/>.

<sup>1650</sup> Letter from Arvin Ganesan, Associate Administrator, EPA, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, June 22, 2012 (on file with author).

<sup>1651</sup> Letter from John Shively, CEO, The Pebble Partnership, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, June 29, 2012 (on file with author).

<sup>1652</sup> *Id.*

jobs from mining projects nationwide.<sup>1653</sup> The Pebble Project is simply calling for “due process” and to “understand why, in these challenging economic times, a federal agency can operate outside of the standard NEPA process to potentially stop a project before it has been defined or filed for a single permit.”<sup>1654</sup>

Pebble Mine has pursued and continues to pursue litigation questioning the actions of the EPA. The Court initially dismissed Pebble Mine’s claim that preemptive vetoes’ were outside of EPA’s authority for lack of jurisdiction because EPA only commenced an action, but has not concluded any final action.<sup>1655</sup> Once the EPA concludes its open comment period and promulgates an official determination on the use of waters in the Bristol Bay watershed for disposal the Court will obtain jurisdiction.<sup>1656</sup> Pebble Mine is now pursuing a second lawsuit alleging the EPA colluded with opponents of Pebble Mine.

### *UNIONIZATION BY REGULATION*

Throughout the Obama Administration there has been a significant push for regulations that strongly promote and harbor unionization. The regulations force upon private-sector employees unionization that otherwise would be left to their informed discretion. The most recent regulations significantly interfere with an individual’s decision to join or forego union membership as well as attempt to force employers to set up shop in union states, both of which exceed far beyond the bounds of the National Labor Relations Board statutory authority and call into question the purpose behind such regulations. Commentators have stated, “[t]he Obama-era National Labor Relations Board has tilted so heavily toward union interests that companies might be forgiven for thinking the process is rigged against them.”<sup>1657</sup>

In 1935, the National Labor Relations Act established the ability of private-sector workers’ to unionize and collectively bargain with the employer as well as the ability for employers and unions to enter into “union security agreements” or “union shop” agreements. Union security contractual agreements required employers to hire employees that were contributing members to the union or joined the union shortly after gaining employment.<sup>1658</sup> If the employee did not join the union and pay union dues, they would be fired by the employer. Therefore, employees, through the union security agreements, were directly compelled to join and pay for union membership. However, the Taft-Hartley Act, passed in 1947, permitted states to pass legislation that would supersede these union security agreements effectively banning such agreements from occurring.<sup>1659</sup> The individual states that pass such legislation are called “right-to-work” states because they allow employees the

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<sup>1653</sup> *Id.*

<sup>1654</sup> *Id.*

<sup>1655</sup> Diane Meyers, *Pebble Mine Jumps the Gun on Challenge to EPA’s 404(c) AUTHORITY, SCIENCE, LAW & THE ENVIRO.*, Sept. 29, 2014, <http://www.sciencelawenvironment.com/2014/09/pebble-mine-jumps-the-gun-on-challenge-to-epas-404c-authority/>.

<sup>1656</sup> *Id.*

<sup>1657</sup> Editorial, *Another Labor Board Power Play*, Wall Street J., (May 23, 2011), available at <http://online.wsj.com/article/SB10001424052748704816604576335191478940656.html> (last visited June 7, 2011).

<sup>1658</sup> BENJAMIN COLLINS, CONG. RESEARCH SERV., R42575, RIGHT TO WORK LAWS: LEGISLATIVE BACKGROUND AND EMPIRICAL RESEARCH (2014).

<sup>1659</sup> See 29 U.S.C. 164(b). The RTW provisions of the NLRA are also sometimes referred to as 14(b) provisions, after the section of the NLRA that permits RTW laws

right to work regardless of whether or not they join or contribute to unions. There are currently 24 right-to-work states, with the most recent right to work statutes taking place in Indiana and Michigan in 2012.<sup>1660</sup> Right to work states guarantee employee freedom and provide an environment that spurs economic growth, the importance of which cannot be understated. The economic implication of union states versus right-to-work states has been and continues to be an area of study for many scholars and academics across industries. The empirical evidence across the board has shown, “aggregate employment in [right-to-work] states has increased... while employment in union security states has declined.”<sup>1661</sup> While the debate between right-to-work and union states continues it is uncontested that employers, as a matter of business judgment among numerous other factors<sup>1662</sup>, have the freedom to choose where to locate their business.

One of the most glaring unprecedented administrative pushes towards unionization was the 2010 suit brought by Acting General Counsel of the NLRB against Boeing alleging improper transfer of existing work. The suit was the result of Boeing’s decision to invest over \$1 billion in building a manufacturing plant in South Carolina, a right-to-work state, as opposed to opening the plant in Washington, a union state.<sup>1663</sup> The relief the NLRB requested was movement of the South Carolina plant to Washington<sup>1664</sup>, directly taking away a business decision for its own company and effectively compelling unionization by location of the plant. The allegations raised involved Section 8(a)(1) and (3) of the National Labor Relations Act, section 1 makes it unlawful “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [self-organize, collective bargaining, etc.]”<sup>1665</sup> and section 3 makes it an unfair labor practice for any employer to encourage or discourage membership in a labor organization.<sup>1666</sup>

Boeing’s plant in South Carolina, which opened shortly before the complaint against the corporation was filed, brought over \$1 billion in investment into the State as well as more than 9,000 jobs<sup>1667</sup>. The economic stimulus provided by one plant has had drastic effects on the improvement of the local economy in South Carolina. The relief requested, if granted, would result in the loss of thousands of jobs, over a billion dollars of investment, and stalled economic production. Furthermore, if the relief requested was enforced it would explicitly favor the rights to union workers in Washington over the rights of right-to-work employees in South Carolina.<sup>1668</sup>

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<sup>1660</sup> BENJAMIN COLLINS, CONG. RESEARCH SERV., R42575, RIGHT TO WORK LAWS: LEGISLATIVE BACKGROUND AND EMPIRICAL RESEARCH (2014).

<sup>1661</sup> *Id.*

<sup>1662</sup> A contributing factor is whether the state is union or right-to-work since there are different, but important, implications in both state structures.

<sup>1663</sup> The Committee held a hearing on the alleged suit titled *Unionization Through Regulation: The NLRB’s Holding Pattern on Free Enterprise*. The hearing took place in South Carolina on June 17, 2011.

<sup>1664</sup> Complaint; Letter from J. Michael Luttig, Executive Vice President & General Counsel, Boeing, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).

<sup>1665</sup> 29 U.S.C. § 158(a)(1).

<sup>1666</sup> *Id.* § 158 (a)(3).

<sup>1667</sup> Jim McNerney, Boeing Chairman, President & CEO, *Boeing is Pro-Growth, Not Anti-Union*, OPINION, WALL STREET J., May 11, 2011 available at

<http://online.wsj.com/article/SB10001424052748703730804576315141682547796.html> (last visited June 8, 2011).

<sup>1668</sup> Motion to Intervene, *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor

However, the NLRB argued the current employee's in Washington had a right for the plant to be built in their State. This allegation completely disregarded the fact there was no actual transfer of work from Washington, where an existing Boeing plant was already located, to South Carolina, but rather a new line of production was the focus of the plant work in South Carolina.

However, the public criticism and outrage over the unprecedented action seeking to interject the NLRB into the complex internal economic decision of Boeing resulted in the suit being dropped. Notably, the criticism over the complaint against Boeing was bipartisan, garnering statements from high ranking Democrats and Republicans across the aisle. In addition, sixteen state attorneys general, including two non-right-to-work states<sup>1669</sup>, filed an amicus brief supporting Boeing. The public outcry and subsequent dropping of the suit magnify the unprecedented action the NLRB, and the administration as a whole, has attempted to take, directly pushing a pro-union agenda. The South Carolina Boeing case is just one example of regulations being construed and interpreted with an eye towards unionization, a choice voters explicitly confront when voting for right-to-work legislation.

### **NLRB Notice Posting Rule**

On August 30, 2011, the National Labor Relations Board issued a final rule that requires employers subject to the National Labor Relations Act ("NLRA") to post a notice of select employee rights under the NLRA.<sup>1670</sup> In particular, the notice emphasizes employees' right to unionize and collectively bargain, but it does not include workers' rights to object to the use of their union dues and fees for political purposes.

A broad array of industries, spearheaded by the U.S. Chamber of Commerce and the National Association of Manufacturers, disputed the NLRB's authority to issue the rule and filed suit. On March 2, 2012, the U.S. District Court for the District of Columbia found that the NLRB had the authority to issue the rule; however, the court invalidated most of the enforcement mechanisms as improper under the NLRA.<sup>1671</sup> On April 13, 2012, the U.S. District Court for the District of South Carolina reached the opposite conclusion—finding that under the "plain language and structure of the [NLRA]" the NLRB "lack[ed] authority . . . to promulgate the rule."<sup>1672</sup> Subsequent to this ruling, the D.C. District Court directed the NLRB to delay implementation of the rule pending the outcome of the appeals process.<sup>1673</sup>

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Relations Board, Region 19, United States of America, Case No. 19-CA-34231. (The employees point out that the NLRB's proposed remedy "favors the alleged Section 7 rights of the unionized workers to strike in Washington... over the equivalent Section 7 rights of non-union employees in South Carolina, who have chosen to... work in a nonunion setting free from [the] union's economic coercion and malfeasance.").

<sup>1669</sup> The states being Colorado and Michigan.

<sup>1670</sup> Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54006 (Aug. 30, 2011).

<sup>1671</sup> *National Association of Manufacturers v. National Labor Relations Board*, Memorandum Opinion, No. 11-1629 (ABJ) (D.C. Dist. Ct. Mar. 2, 2012).

<sup>1672</sup> *Chamber of Commerce of the United States and South Carolina Chamber of Commerce v. National Labor Relations Board*, Order, No. 2: 11-cv-02516-DCN (SC Dist. Ct. Apr. 13, 2012).

<sup>1673</sup> Office of Public Affairs, National Labor Relations Board, NLRB Chairman Mark Gaston Pearce on recent decisions regarding employee rights posting, Apr. 17, 2012, available at <http://www.nlr.gov/news/nlr-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting>.

Business organizations argue that the rule is a ploy by the NLRB to achieve private-sector unionization by regulation, and they are emphatic in their belief that the NLRB is exceeding its statutory bounds under the NLRA. The Western Growers Association believes the rule “will make it easier for traditional union organizing efforts[,]” and the Agricultural Retailers Association notes that “legislative history makes clear the intent of Congress that the NLRB does not have the authority to issue a notice posting rule since Congress explicitly grants such authority to other agencies in relevant statutes.”<sup>1674</sup>

However, Congress did not grant such authority in the NLRA. Moreover, the National Council of Textile Organizations (“NCTO”) “believes that workers are fully aware of their rights in the workplace and clearly understand that workplace complaints can be filed with the NLRB, the U.S. Department of Labor, and the Equal Employment Opportunity Commission (“EEOC”).” Therefore, the rule not only exceeds statutory authority, but it is also unnecessary.<sup>1675</sup> Indeed, “NCTO members strive to fulfill the letter and spirit of the laws meant to protect the health and safety of the workers who are employed by the industry.”<sup>1676</sup>

Notwithstanding the status of the rule, business organizations are concerned about the cost and practical implications if it is allowed to move forward. According to the NLRB’s own estimates, six million employers could be affected by the rule imposing a compliance burden of \$386.4 million.<sup>1677</sup> The Brick Industry Association believes the rule “could set a disturbing precedent and chill job creation.”<sup>1678</sup> The National Federation of Independent Business argues that “since the NLRB can only investigate matters brought to its attention by employees, the [rule] serves as a mechanism for the Board to increase its caseload and influence over small businesses.”<sup>1679</sup> The Non-Ferrous Founders’ Society notes that the rule is especially problematic because it is “not subject to the same open and candid . . . review as are those [rules] of other agencies . . . .”<sup>1680</sup> At a broader level, some fear “there is a danger that [the] politically-motivated Board will continue to issue decisions and propose rules that run counter to an effective employer-employee relationship.”<sup>1681</sup> The Non-

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<sup>1674</sup> Letter from Daren Coppack, Agricultural Retailers Association, the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 7, 2012 (on file with author).

<sup>1675</sup> Letter from Cass Johnson, President, National Council of Textile Organizations to Darrell Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 1, 2012 (on file with author).

<sup>1676</sup> *Id.*

<sup>1677</sup> National Labor Relations Board, Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54006 (Aug. 30, 2011).

<sup>1678</sup> Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov’t. Reform, May 25, 2012 (on file with author).

<sup>1679</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, May 31, 2012 (on file with author).

<sup>1680</sup> Letter from James L. Mallory, Executive Director, Non-Ferrous Founders’ Society to Chairman Darrell Issa, H. Comm. on Oversight & Gov’t Reform, June 1, 2012 (on file with author).

<sup>1681</sup> Letter from Robert E. McKenna, President and CEO, Motor & Equipment Manufacturers Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov’t. Reform, June 1, 2012 (on file with author).

Ferrous Founders' Society hopes that Congress will step in to return the NLRB to an "unbiased and non-evangelistic judge" of labor-management disputes.<sup>1682</sup>

### **NLRB "Quickie Election" Rule**

On December 22, 2011, the NLRB issued a final rule that alters the procedures for union organizing elections.<sup>1683</sup> The rule, original rule commonly known as the "quickie election" rule, allowed an organizing election to occur in 15 to 20 days versus the current average of 39 days and the NLRB's own target of 42 days. It also postpones certain pre-election challenges until after the union election. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace challenged the rule on multiple procedural and substantive grounds. On May 14, 2012, the U.S. District Court for the District of Columbia invalidated the rule on the basis that the NLRB lacked the quorum required under the National Labor Relations Act when it issued the rule. The court quipped that, "[a]ccording to Woody Allen, eighty percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters . . ." <sup>1684</sup> The court chose not to rule on the additional challenges and indicated that its ruling "need not necessarily spell the end of the final rule for all time."<sup>1685</sup> The NLRB subsequently indicated it will likely continue to pursue the rule,<sup>1686</sup> and it re-issued a proposed rulemaking on February 5, 2014, and issued a revised final rule in late 2014 which will take effect in April 2015.<sup>1687</sup>

The Committee sought feedback from businesses when the rule was initially proposed. Business organizations argued that the rule would greatly limit an employer's ability to lawfully educate employees and "tilt[s] the playing field in favor of organized labor" at the expense of free speech and due process rights.<sup>1688</sup> The American Frozen Food Institute and the Interlocking Concrete Pavement Association stressed that the existing labor environment provided adequate opportunity for unions and employers to discuss their views, for or against, unionization in the workplace. Employers believe the new rule is an attempt by union sympathizers to undermine the will of Congress by allowing unions to be certified before employers have a chance to communicate with employees, "creat[ing] opportunities for mischief and misconduct . . ." <sup>1689</sup> The Brick Industry Association attests that the rule "restrict[s] employees full access to important facts and employers'

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<sup>1682</sup> Letter from James L. Mallory, Executive Director, Non-Ferrous Founders' Society to Chairman Darrell Issa, H. Comm. on Oversight & Gov't Reform, June 1, 2012 (on file with author).

<sup>1683</sup> National Labor Relations Board, Representation—Case Procedures, Final Rule, 76 Fed. Reg. 80138 (Dec. 22, 2011).

<sup>1684</sup> *U.S. Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, Memorandum Opinion, No. 11-2262 (JEB) (D.C. Dist. Ct. May 14, 2012).

<sup>1685</sup> *Id.*

<sup>1686</sup> See Office of Public Affairs, National Labor Relations Board, NLRB suspends implementation of representation case amendments based on court ruling, May 15, 2012, *available at* <http://www.nlr.gov/news/nlr-suspends-implementation-representation-case-amendments-based-court-ruling>.

<sup>1687</sup> Joel Barras, *NLRB Passes Quickie Election Rules*, FORBES, Dec. 15, 2014.

<sup>1688</sup> Letter from Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 1, 2012 (on file with author).

<sup>1689</sup> Letter from Charles A. McGrath, Executive Director, Interlocking Concrete Pavement Institute to Chairman Darrell Issa, H. Comm. on Oversight & Gov't Reform, May 29, 2012 (on file with author); Letter from Kraig R. Naaz, President and CEO, American Frozen Food Institute to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 1, 2012 (on file with author).

free speech and due process rights during union representation elections.”<sup>1690</sup> Indeed, “[b]y rushing the timeframe . . . employees will be forced to make a decision without relevant details, and employers will be unable to offer balanced information on collective bargaining.”<sup>1691</sup>

It is also believed that the NLRB significantly underestimated the cost of the rule and that small businesses, in particular, will be hit hard by costly legal fees. The U.S. Chamber of Commerce emphasizes that the NLRB estimated the costs based on the limited number of employers who have faced election petitions in the past, but “ignored the facts” that the rule could increase the filing of petitions and that a shortened schedule imposes preparation costs on employers who have to anticipate the risk of a petition in advance of actual filing.<sup>1692</sup>

The National Association of Manufacturers emphasized that “smaller-sized manufacturers who lack the legal expertise to navigate complex and detailed labor laws” could see a significant increase in violations for unknowing employers.<sup>1693</sup> The NFIB had similar concerns stating “[t]his shortened timeframe would hit small businesses particularly hard, since small employers usually lack labor-relations expertise and in-house legal departments.”<sup>1694</sup>

Others stress that the rule could have a negative effect on the economy. The American Bakers Association believes that the rule “will continue to deter economic growth,” and it is just another example of the NLRB’s “willingness to . . . to circumvent regular order to advance a specific agenda.”<sup>1695</sup> Indeed, the Brick Industry Association believes that “[s]uch extreme and unnecessary changes to long-standing election procedures disrupt business and jeopardize job creation as the brick industry struggles to rebound.”<sup>1696</sup>

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<sup>1690</sup> Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov’t. Reform, May 25, 2012 (on file with author).

<sup>1691</sup> *Id.*

<sup>1692</sup> Letter from Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, June 1, 2012 (on file with author).

<sup>1693</sup> Letter from Jay Timmons, President & CEO, National Association Manufacturers, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, June 4, 2012 (on file with the author).

<sup>1694</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, May 31, 2012 (on file with author).

<sup>1695</sup> Letter from Robb MacKie, President and CEO, American Bakers Association to Darrell Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, June 1, 2012 (on file with author).

<sup>1696</sup> Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov’t. Reform, May 25, 2012 (on file with author).

## DOL Persuader Activity Rule

On June 21, 2011, the U.S. Department of Labor's ("DOL") Office of Labor-Management Standards proposed a rule to revise its reporting requirements for employer and consultant "persuader activity" under the Labor Management Reporting and Disclosure Act ("LMRDA").<sup>1697</sup> Section 203 of the LMRDA outlines reporting requirements for employers and their consultants who enter into an agreement aimed at affecting employees' decisions to unionize.<sup>1698</sup> Currently, attorneys and other third parties who are not in direct contact with employees are exempt from reporting requirements under the "advice" exemption.<sup>1699</sup> The proposed rule revises DOL's long-standing interpretation of, and significantly narrows, the "advice" exemption, thus expanding reporting requirements beyond active union organizing and collective bargaining activities.<sup>1700</sup>

Business groups assert that the proposed rule is a "drastic expansion" of communications that trigger the reporting requirements, which will infringe upon free speech and attorney-client confidentiality.<sup>1701</sup> In a reverse of long-standing practice, "even the most routine advice from a lawyer to an employer facing an organizing drive would be subject to disclosure. The end result will be a chilling effect on the number of lawyers providing labor relations advice and increased pressure on employers not to exercise their legally protected rights, such as free speech."<sup>1702</sup> Indeed, a shareholder at Littler Mendelson, P.C., the nation's largest law firm providing advice to employers, has expressed concern about the "extensive" substantive problems with the rule because it may require both the attorney and the client to report vast amounts of confidential and financial data discouraging attorneys from assisting employers.<sup>1703</sup>

According to the National Association of Manufacturers, the Brick Industry Association, and the Retail Industry Leaders Association, the practical effect of the rule is an attempt to "ga[g]" small businesses so that they "will not have essential information on what can and cannot be legally said or done during the election process, limiting legitimate education efforts so employees hear both

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<sup>1697</sup> Department of Labor Office of Labor-Management Standards News Release, US Labor Department announces proposed rule concerning reporting on use of labor relations consultants, June 20, 2011.

<sup>1698</sup> Department of Labor Office of Labor-Management Standards, Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, Proposed Rule 76 Fed. Reg. 36178 (June 21, 2011).

<sup>1699</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author).

<sup>1700</sup> Department of Labor Office of Labor-Management Standards News Release, US Labor Department announces proposed rule concerning reporting on use of labor relations consultants, June 20, 2011.

<sup>1701</sup> Letter from Geoffrey Burr, Vice President, Federal Affairs, Associated Builders and Contractors, Inc. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author); Letter from Jay Timmons, President & CEO, National Association Manufacturers to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending, June 4, 2012 (on file with author).

<sup>1702</sup> Letter from Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, June 1, 2012 (on file with author).

<sup>1703</sup> See Letter from Michael J. Lotito, Littler Mendelson, P.C. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov't. Reform, May 31, 2012 (on file with author).

sides before voting on union representation.”<sup>1704</sup> The National Federation of Independent Business argued:

For nearly 50 years the DOL has recognized that legal advice is excluded from reporting under federal labor law. The proposed new rule would force lawyers and law firms that counsel a small business on most labor relations matters, and whether the business has a union or not, to disclose not only their work with that client, but also all fees and arrangements for all clients for all labor-relations services. The net result could well be that many lawyers will no longer take on clients seeking labor-relations counsel.<sup>1705</sup>

The Motor & Equipment Manufacturers Association echoed NFIB’s sentiment, viewing the proposed rule “as potentially devastating to employers, particularly smaller employers, who need the advice of counsel to make appropriate decisions on how to communicate with their employees within the confines of labor law.”<sup>1706</sup>

It is also believed that DOL significantly underestimated the cost of the rule. While DOL estimated that the rule would impose a cost of \$826,000 annually,<sup>1707</sup> business groups estimate the proposed rule is economically significant—meaning it could have an effect of \$100 million or more annually on the economy.<sup>1708</sup> According to the U.S. Chamber of Commerce, who conducted interviews and received input from actual employers who must comply with the current requirements, the amount of time required to determine whether a form must be filed is more than double DOL’s “arbitrary” estimate.<sup>1709</sup> Moreover, it is argued that DOL vastly underestimated the number of employers who would need to make the determination of whether the required form should be filed.<sup>1710</sup> Accounting for these deficiencies, the U.S. Chamber estimates that the compliance costs could be more than \$203 million annually—well within the barometer for an economically significant rule.<sup>1711</sup> Moreover, contrary to Executive Order requirements, DOL does not justify the costs of the rule by providing a monetary estimate of the benefits.<sup>1712</sup>

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<sup>1704</sup> Letter from Jay Timmons, President & CEO, National Association Manufacturers, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, June 4, 2012 (on file with the author); Letter from J. Gregg Borchelt, President and CEO, Brick Industry Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight and Gov’t. Reform, May 25, 2012 (on file with author).

<sup>1705</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t Reform, May 31, 2012 (on file with author).

<sup>1706</sup> Letter from Robert E. McKenna, Motor & Equipment Manufacturers Association to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, June 1, 2012 (on file with author).

<sup>1707</sup> Department of Labor Office of Labor-Management Standards, Labor-Management Reporting and Disclosure Act; Interpretation of the “Advice” Exemption, Proposed Rule 76 Fed. Reg. 36178 (June 21, 2011).

<sup>1708</sup> Letter from Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, June 1, 2012 (on file with author).

<sup>1709</sup> *Id.*

<sup>1710</sup> *Id.*

<sup>1711</sup> *Id.*

<sup>1712</sup> Letter from Michael J. Lotito, Littler Mendelson, P.C. to Chairman Darrell Issa and Subcommittee Chairman Jim Jordan, H. Comm. on Oversight & Gov’t. Reform, May 31, 2012 (on file with author).

## *GROWTH OF REGULATION IN THE FINANCIAL SECTOR*

The response of Congress to the financial crisis included the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created new regulatory bodies and presented a host of opportunities for the Federal Government to oversee the activities of banks and financial institutions. The unprecedented growth of regulation in this area after the passage of Dodd Frank threatens the availability of capital for investment in new businesses, imposes unnecessary and burdensome compliance obligations and creates uncertainty for business owners that results in restricted growth. Below are a few of the issues investigated by the Committee.

### **CFPB Structure, Oversight and Regulatory Authorities**

The Consumer Financial Protection Bureau (“CFPB”) is a newly created independent agency empowered by the Dodd-Frank Act with wide-ranging supervisory, enforcement and rulemaking authority over financial consumer products and services.<sup>1713</sup> In the Committee’s preliminary staff report on the impact of regulations on job creation, at least three organizations expressed concerns about some aspect of the CFPB, which has been called the “most powerful agency in American history.”<sup>1714</sup> Since the report’s release, the CFPB has assumed statutory power, and the number of organizations expressing concern has almost tripled.

The American Financial Services Association (“AFSA”) is concerned that, unlike other independent agencies, the CFPB is “directed by a single regulator,” lacks “congressional oversight through the normal budget process” and has “independent litigating authority.”<sup>1715</sup> There is also discomfort about the CFPB’s plans to coordinate and streamline the authorities it is assuming from six different federal entities. For instance, the Debt Buyers Association International (“DBA”) is worried that the CFPB and the Federal Trade Commission “could pursue inconsistent policies” when enforcing the Federal Debt Collection Protections Act (“FDCPA”),<sup>1716</sup> thereby creating “additional uncertainty” for member companies.<sup>1717</sup> AFSA is also concerned that the CFPB can enforce rulemakings on individuals and institutions without first determining “the adequacy of existing state laws and regulations under which these companies operate.”<sup>1718</sup>

Uncertainty regarding the CFPB’s regulatory agenda also threatens to decrease credit availability and affordability, harm small businesses, stunt job creation, and jeopardize full economic recovery. For debt buyers, “uncertainty over how the CFPB will exercise its unprecedented powers . . . has stalled industry growth and chilled hiring among DBA member companies.”<sup>1719</sup> Since companies

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<sup>1713</sup> P.L. 111–203, Title X, § 1011 (July 21, 2010).

<sup>1714</sup> Mary Kissel, *Cordray’s Charm Offensive*, Wall. St. J., Jan. 13, 2012.

<sup>1715</sup> Letter from Bill Himpler, President, Executive Vice President, American Financial Services Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (June 1, 2012) (on file with the author).

<sup>1716</sup> P.L. 104–208 (Sep. 30, 1996).

<sup>1717</sup> Letter from Jan Stieger, Executive Director, DBA International, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov’t Spending (June 1, 2012) (on file with the author).

<sup>1718</sup> Letter from Bill Himpler, President, Executive Vice President, American Financial Services Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (June 1, 2012) (on file with the author).

<sup>1719</sup> Letter from Jan Stieger, Executive Director, DBA International, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov’t Spending (June 1, 2012) (on file with the author).

typically pass compliance costs on to consumers through increased prices, the CFPB's actions will invariably increase the costs of financial products and services, which could harm small businesses disproportionately. For this reason, the Credit Union National Association (CUNA) and other representatives of small businesses encourage the CFPB to convene panels in accordance with Small Business Regulatory Enforcement Fairness Act ("SBREFA") and to use its authority under Section 1022 of the Dodd-Frank Act "to exempt small financial institutions, such as credit unions, from its rulemaking."<sup>1720</sup>

### **SEC Disclosure Regulations for Resource Extraction Industries**

The Committee also considered the impacts of two rules proposed by the Securities and Exchange Commission ("SEC"). The two rules reviewed by the Committee proposed implementing certain disclosure requirements for public companies as required by the Dodd-Frank Act. The "conflicts minerals" rule requires public companies whose products derive from "conflict minerals" (i.e., gold, tin, tantalum and tungsten) to disclose annually whether these "conflict minerals" originated in Democratic Republic of Congo or an adjoining country.<sup>1721</sup> The "disclosure by resource extraction issuers" rule requires public companies in the U.S. to annually report payments made to U.S. and foreign governments related to the development of oil, natural gas, and mineral extraction.<sup>1722</sup> In the Committee's preliminary staff report, at least five organizations took issue with these rules; since that time, the concerns have tripled.

Several respondents pointed out that compliance with the "conflict minerals" rule will be burdensome and costly. For instance, IPC-Association Connecting Electronics Industries ("IPC") states that the rule "could impose extremely burdensome reporting requirements" on certain electronics manufacturers.<sup>1723</sup> The National Tooling and Machining Association ("NTMA") also notes that compliance costs fall disproportionately on small manufacturers, which often "lack knowledge" about where materials they use originate, and the unintended effects of this rule could "strain customer relationships and lead to lost business for smaller companies." The Small Business Administration ("SBA") has raised similar concerns to the SEC about the cost.<sup>1724</sup>

While the SEC estimates that actual compliance costs for the "conflict minerals" rule will be around \$71 million and that the rule will "impact between 1,199 and 5,551 companies," the Business Roundtable attests that these figures "vastly underestimate" true costs.<sup>1725</sup> Both the U.S. Chamber

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<sup>1720</sup> Letter from Bill Cheney, President & CEO, Credit Union National Association, Executive Director, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending (June 1, 2012) (on file with the author).

<sup>1721</sup> Conflict Minerals, 74 Fed. Reg. 80948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 229, 249).

<sup>1722</sup> Discloser of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80978 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 229, 249).

<sup>1723</sup> Letter from John W. Mitchell, President and CEO, IPC-Association Connecting Electronics Industries, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending (June 1, 2012) (on file with the author).

<sup>1724</sup> See Letter from Thomas Donahue, President and CEO, U.S. Chamber of Commerce, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending, p. 12, (June 1, 2012) (on file with the author).

<sup>1725</sup> Letter from John Engler, President, Business Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov't Spending, p. 12, (June 1, 2012) (on file with the author).

of Commerce and the National Association of Manufacturers (“NAM”) revealed that businesses themselves estimate true compliance costs for the rule to be between \$9-16 billion and state that the rule could affect “hundreds of thousands of companies.”<sup>1726</sup> The Business Roundtable and American Express stated that these costs are so high that, for some companies, “achieving compliance” will be “extremely difficult, if not impossible.”<sup>1727</sup>

Many respondents also urged the SEC to rework the proposed “conflicts minerals” rule before it released a final ruling. CTIA-The Wireless Association called implementation of the rule “confusing,” the Consumer Electronics Association (“CEA”) said the rule’s reporting requirements were too “vaguely worded” and the Business Roundtable implored the SEC to promulgate a rule that is “cost-effective and workable.”<sup>1728</sup> According to NAM, “the necessary infrastructure” is not even currently in place “to trace the origin of the minerals or to determine with certainty that they are not conflict minerals . . . .” As such, the Motor and Equipment Manufacturers Association (“MEMA”) and the NTMA suggest the SEC adopt a “phased-in” approach of rule compliance. Others, like the Manufacturing Jewelers & Suppliers of America (“MJSA”) and the Jewelers of America (“JA”), question why the SEC is attempting to regulate the minerals trade at all, noting that “using the regulatory authority of the SEC to impact the use of raw materials . . . is troubling and perhaps the wrong approach.”<sup>1729</sup>

Respondents also expressed concerns that the SEC’s disclosure regulations would put their member companies at a competitive disadvantage internationally. CTIA-The Wireless Association argues that publicly-traded U.S. companies will be at a disadvantage thanks to the “conflicts minerals” rule because “companies that do not file with the SEC will not be required to comply” with the rule.<sup>1730</sup> American Express, the Business Roundtable and ConocoPhillips all point out that the one-sided disclosure requirements in the “disclosure by resource extraction issuers” rule could “erode the competitiveness of U.S. companies in global markets” by allowing foreign competitors access to sensitive information on U.S. companies.<sup>1731</sup> The American Petroleum Institute provides an example, describing how foreign energy companies, “which control about 78 percent of the world’s

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<sup>1726</sup> Letter from Thomas Donahue, President and CEO, U.S. Chamber of Commerce, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author); Letter from John Engler, President, Business Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author).

<sup>1727</sup> BR Letter; Letter from Arne Christenson, Senior Vice President, Government Affairs, American Express, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (May 23, 2012) (on file with the author).

<sup>1728</sup> Letter from Michael Petricone, Senior Vice President, Consumer Electronics Association to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author).

<sup>1729</sup> Letter from David Cochran, President & CEO, Manufacturing Jewelers & Suppliers of America (MJSA) and Matthew Runci, President & CEO, Jewelers of America, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (May 25, 2012) (on file with the author).

<sup>1730</sup> Letter from Steve Largent, President & CEO, CTIA Wireless Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author).

<sup>1731</sup> Letter from Red Cavaney, Senior Vice President, Government Affairs, ConocoPhillips Company, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (June 7, 2012) (on file with the author).

oil resources,” would have access to proprietary information without having to disclose similar details.<sup>1732</sup>

### **SEC/CFTC Over-the-Counter Derivatives Regulation**

The SEC and the U.S. Commodities Future Trading Commission (“CFTC”) were given significant discretion to regulate over-the-counter (“OTC”) derivatives trade by the Dodd-Frank Act.<sup>1733</sup> The Committee exposed the interests of the regulated community, showing that the proposed OTC derivatives rules had caused a significant amount of alarm within the U.S. business community. Before the Committee’s first report on the issue, *Assessing Regulatory Impediments to Job Creation*,<sup>1734</sup> was released, at least five organizations had claimed to the Committee that OTC derivatives rules were problematic; since the report’s release, at least three more organizations have expressed concerns.

Respondents were generally worried that new OTC derivatives regulations “will create a burdensome structure that will make it more costly” to enter into derivatives transactions, which companies use to “hedge,” or mitigate, business risks.<sup>1735</sup> There was also concern that these rules “will create uncertainty in overseas markets,” which could put U.S. businesses at a competitive disadvantage internationally.<sup>1736</sup> ConocoPhillips was concerned that the CFTC and SEC’s new definitions of “swap dealers” and “major swap participants” would entail large compliance costs and cause companies to “curtail their risk management hedging activities” to avoid classification.<sup>1737</sup> If companies are less willing to transact financial derivatives, market liquidity could be reduced, reducing the financial flexibility needed for economic growth and job creation.<sup>1738</sup>

The main point of contention for respondents, however, was the CFTC’s recently finalized “end user exception to the mandatory clearing of swaps” rule. American Express, AFSA, and the Business Roundtable believed that this rule would divert resources from business investment and job creation because it requires certain non-financial companies that use derivatives to reduce exposure to commercial risk (the so-called “end-users”) to “post margin,” or set aside capital in case they fail. Respondents believed this diversion of resources could “seriously harm” economic recovery, increase risk and volatility, stall economic growth and, as NAM adds, possibly “driv[e] up

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<sup>1732</sup> Letter from Marty Durbin, Executive Vice President, American Petroleum Institute, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (June 6, 2012) (on file with the author).

<sup>1733</sup> P.L. 111–203, Title VII, (July 21, 2010).

<sup>1734</sup> H. Comm. on Oversight & Gov’t Reform Preliminary Staff Report, *Assessing Regulatory Impediments to Job Creation*, 112th Cong. (2011) available at [http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary\\_Staff\\_Report\\_\\_Regulatory\\_Impediments\\_to\\_Job\\_Creation.pdf](http://oversight.house.gov/wp-content/uploads/2012/02/Preliminary_Staff_Report__Regulatory_Impediments_to_Job_Creation.pdf).

<sup>1735</sup> Letter from John Engler, President, Business Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcom. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author).

<sup>1736</sup> *Id.* See also letter from Arne Christenson, Senior Vice President, Government Affairs, American Express, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (May 23, 2012) (on file with the author).

<sup>1737</sup> Letter from Red Cavaney, Senior Vice President, Government Affairs, ConocoPhillips Company, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform (June 7, 2012) (on file with the author).

<sup>1738</sup> *Id.*

the cost of capital.”<sup>1739</sup> A U.S. Chamber of Commerce/Business Roundtable survey revealed that, if “end-users” are required to post margin under the rule, U.S. businesses could be forced “to sideline up to \$6.7 billion in working capital . . . and lead to over 100,000 jobs lost.”<sup>1740</sup>

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<sup>1739</sup> Letter from Jay Timmons, President & CEO, National Association Manufacturers, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 4, 2012) (on file with the author).

<sup>1740</sup> Letter from Thomas Donahue, President and CEO, U.S. Chamber of Commerce, to Darrell Issa, Chairman, Comm. on Oversight & Gov’t Reform and Jim Jordan, Chairman, Subcomm. on Reg. Affairs, Stimulus Oversight & Gov’t Spending, p. 12, (June 1, 2012) (on file with the author).

## REDEFINING THE LAW

The Administration has continually engaged in practices that attempt to expand its authority to make law – whether through the IRS changing the applicability of subsidies under the Affordable Care Act or EPA redefining “waters of the U.S.” As a direct effect of this expansion, burdensome regulations are being imposed in contravention of the will of the people as expressed in statute – and a direct effect threatened by this expansion is to pull previously unregulated activities under the purview of unelected bureaucrats lacking “democratic accountability.”

In less direct ways, agencies have attempted to redefine the law that applies to the promulgation of regulations. The EPA has relied upon questionable economic analyses in promulgating potentially burdensome rules despite the clear guidance provided in statutes, Executive Orders and OIRA’s Circular A-4, discussed above. For example, the SBA, by way of its office of advocacy, has pointed out that on at least four occasions since 2009, the EPA has not complied with the Regulatory Flexibility Act by considering the impacts of proposed regulations on small businesses.<sup>1741</sup> Recently, press has reported that EPA is again circumventing procedural rulemaking requirements, this time by releasing methane regulations prior to conducting studies required by the Clean Air Act.<sup>1742</sup> Defenders of this procedural violation claim that “it could take too long to do the ‘detailed analysis’ that might normally accompany Clean Air Act regulation . . . . ‘It’s easier to control it than to fully characterize it.’”<sup>1743</sup>

### *ACA REDEFINES “FULL-TIME” EMPLOYEE*

The Affordable Care Act subjects businesses with more than 50 full-time workers to the “employer mandate,” which requires employers to offer a health care plan that complies with all federal requirements. The federal requirements for health care plans under the ACA require broader coverage than most current employer sponsored plans provide. One of the most significant changes to the intent of the ACA was the redefinition of “full-time employee” under the employer mandate. The ACA’s employer mandate tax penalty defines a “full-time” employee as someone who works at least 30 hours per week. Although part-time employees count toward the 50-person penalty threshold, businesses do not actually owe the statutory tax penalties on part-time workers.<sup>1744</sup> This regulatory change results in a surprising situation: businesses are incentivized to replace full-time workers with part-time labor in order to avoid the tax penalties.<sup>1745</sup> The 50-person penalty

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<sup>1741</sup> Sean Higgins, *EPA ignores its own economic analyses, small business agency says*, WASH. EXAMINER, Oct. 16, 2014, available at <http://www.washingtonexaminer.com/epa-ignores-its-own-economic-analyses-small-business-agency-says/article/2554859/>.

<sup>1742</sup> Jennifer A. Dlouhy, *Energy Department: U.S. must act now on methane emissions*, FUEL FIX BLOG (Oct. 20, 2014, 1:18 PM), <http://fuelfix.com/blog/2014/10/20/energy-department-u-s-must-act-now-on-methane-emissions/>.

<sup>1743</sup> *Id.* (quoting Mary Nichols, California Air Resources Board Chairman).

<sup>1744</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111–148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111–152.

<sup>1745</sup> Larry Schuler on behalf of the National Restaurant Association, Statement on “True Cost of PPACA: Effects on the Budget and Jobs,” Hearing Testimony for Energy & Commerce Committee Hearing “True Cost of PPACA: Effects on the Budget and Jobs,” March 30, 2011 at 4. (“As a result of this change in the definition of a full-time employee, the industry will very closely manage employees’ hours to 29 hours or less. In practice, it will mean a larger employee base, working less hours—no more than 25 hours to avoid bumping into the cap—and an increase in labor and training costs, already one of the most significant line item costs for our businesses. For the employees, it will mean the need to get a second and third job to make up for lost hours and, thus, income.”); Phil Kennedy on

threshold has caused vast uncertainty regarding how various employees, such as seasonal workers, student work-study employees, adjunct faculty members, and those in volunteer positions, will be treated for purposes of calculating an employer’s tax penalty. Many businesses are therefore faced with the impossible task of deciding whether to retain their current number of employees and pay the tax penalties and increasing cost of healthcare coverage or to let go of a number of employees as a way to mitigate the costs – according to a Chamber of Commerce study, over 74 percent of businesses stated it will be much more difficult to hire new employees under the Affordable Care Act.<sup>1746</sup>

The number of full-time equivalent employees has actually been predicted to decline by 2.0 million in 2017, and 2.5 million by 2024.<sup>1747</sup> Furthermore, the Congressional Budget Office found the total net number of hours worked will reduce by about 1.5 percent to 2 percent between 2017 to 2024, almost exclusively due to employer’s decision to supply less labor.<sup>1748</sup>

### *CHANGING THE APPLICATION OF OBAMACARE SUBSIDIES*

The reforms employers and insurance companies must implement as required the Affordable Care Act are costly; to prevent these costs being passed down to the American people generally – and to encourage states to bear a larger portion of these costs through the creation of state exchanges – the Affordable Care Act provides federal subsidies. The non-partisan Congressional Budget Office (“CBO”) estimates that federal expenditures on the ACA’s premium subsidies and related items will total nearly \$1.839 billion over the next decade.<sup>1749</sup> While subsidies will lower the cost of health insurance for qualified individuals, the costs of providing these health insurance subsidies will fall directly onto the shoulders of individual taxpayers.

The largest federal expenditures under the ACA are the federal “premium assistance” subsidies provided to offset the costs of purchasing affordable insurance, which are currently being distributed to enrollees of both federally and state created exchanges. The subsidies provided through Exchanges are an essential part of the regulatory scheme of the Affordable Care Act. The issue surrounding the subsidies deals directly with the language of Section 1401, which creates section 36B of the Internal Revenue Code, that states premium tax credits are only available to those “enrolled...through an Exchange established by the State under 1311.”<sup>1750</sup> Further, section

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behalf of the US Chamber of Commerce, Statement on “True Cost of PPACA: Effects on the Budget and Jobs,” Hearing Testimony for Energy & Commerce Committee Hearing “True Cost of PPACA: Effects on the Budget and Jobs,” March 30, 2011 at 8. (It seems that there is one way for me to avoid paying these fines – I can either get (and stay) under 50 employees, or I can start forcing employees to part-time status, making them independent contractors, outsourcing certain services, and taking similar efforts to negate the fines. . . .49 [T]he health care law may force my hand, as well as that of many other small business people. I do not want to lose anyone on my payroll, but if comes down to laying off a few employees or being saddled with these fines, I won’t have a choice).

<sup>1746</sup> United States Chamber of Commerce, “United States Chamber of Commerce Q4 Small Business Study,” available at

[http://www.uschambersmallbusinessnation.com/uploads/Chamber%20Q4\\_Summary%20Memo\\_Final%20.pdf](http://www.uschambersmallbusinessnation.com/uploads/Chamber%20Q4_Summary%20Memo_Final%20.pdf).

<sup>1747</sup> CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024 117 (2014), available at [http://www.cbo.gov/sites/default/files/45010-Outlook2014\\_Feb\\_0.pdf](http://www.cbo.gov/sites/default/files/45010-Outlook2014_Feb_0.pdf).

<sup>1748</sup> CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024 117 (2014), available at [http://www.cbo.gov/sites/default/files/45010-Outlook2014\\_Feb\\_0.pdf](http://www.cbo.gov/sites/default/files/45010-Outlook2014_Feb_0.pdf).

<sup>1749</sup> [http://www.cbo.gov/sites/default/files/45231-ACA\\_Estimates.pdf](http://www.cbo.gov/sites/default/files/45231-ACA_Estimates.pdf)

<sup>1750</sup> 26 U.S.C. § 36B.

1311 of the ACA defines a health insurance exchange as a “governmental agency or nonprofit entity that is established by the state.”<sup>1751</sup>

While the statutory text seems to expressly limit the availability of subsidies only to participants purchasing insurance through state created Exchanges, the Administration has taken the position that “an Exchange established by the State” incorporates both state-created and federally-created exchanges. In May 2012, the Treasury Department, through the IRS, promulgated a final regulation stating tax credits (alternatively called “subsidies”) were available to individuals purchasing insurance through both state created and federally created exchanges. The preamble to the IRS’ regulation states, “...the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges.”<sup>1752</sup> The IRS’ interpretation has been heavily contested<sup>1753</sup> and continues to be litigated.<sup>1754</sup> According to the Congressional Research Service:

[A] strict textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS’s authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent...and likely be deemed invalid.<sup>1755</sup>

Furthermore, scholars have undertaken an analysis of the legislative history of the Affordable Care Act. In doing so, Jonathan Adler and Michael Canon found Congress’ express limitation of subsidy eligibility to be an “intentional and purposeful” way to incentivize states to create their own exchanges.<sup>1756</sup> The scholars concluded the IRS rule extending subsidies to individuals purchasing insurance from federally created exchanges violates the clear text of the Affordable Care Act expanding beyond the scope of authority delegated to the agency and is therefore illegal.

Many experts have indicated that the IRS’s rule to allow premium subsidies to participants of federal exchanges, compared to a strict textual reading that would disallow such subsidies, will lead to hundreds of billions of dollars in spending and higher taxes that were not authorized by

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<sup>1751</sup> ACA Sec. 1311(d)(1).

<sup>1752</sup> Department of the Treasury, Internal Revenue Service, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377-8 (May 23, 2012).

<sup>1753</sup> In July 2013, the Subcommittee on Energy Policy, Health Care and Entitlements held a hearing addressing IRS’ legal basis for expanding Obamacare’s taxes and subsidies. Additionally, the Full Committee on Oversight and Government Reform issued a joint staff report along with the House Ways and Means Committee concluding the Administration conducted inadequate review of key issues prior to expanding health law’s taxes and subsidies.

<sup>1754</sup> See Jess Bravin & Louise Radnofsky, *Supreme Court to Hear Case on Health-Care Law Subsidies: Challengers Argue Affordable Care Act Only Permits Tax Credits on State-Run Exchanges*, WALL ST. J., Nov. 8, 2014, available at <http://www.wsj.com/articles/supreme-court-to-hear-case-on-health-law-subsidies-1415383458>.

<sup>1755</sup> Jennifer Staman and Todd Garvey, *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, CONG. RESEARCH SERV. (Jul. 23, 2012).

<sup>1756</sup> Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX: J. OF LAW-MEDICINE 121 (2013) (available at <http://law.case.edu/journals/HealthMatrix/Documents/23HealthMatrix1.5.Article.AdlerFINAL.pdf>).

Congress.<sup>1757</sup> The 36 states would account for “approximately 8.3 million people are to be eventually covered in the 36 exchanges run by the Federal Government... reaching \$100 billion in annual subsidies by 2018.”<sup>1758</sup> Additionally, scholars Jonathan Adler and Michael Cannon predict the rule will account for nearly “\$600 billion of unauthorized spending, \$178 billion of unauthorized tax reduction, more than \$100 billion in unauthorized taxes, and to increase the federal deficits by some \$700 billion” by the year 2023.<sup>1759</sup>

The outcome of the Supreme Court case will shape the landscape of ACA subsidies. The resulting decision will have serious implications on just how large expenditures for insurance subsidies will be, directly implicating the burdens of taxpayers across the United States. Not only will the resulting decision effect implementation and distribution of premium subsidies, but it will have strong implications for the authority to distribute “cost-sharing” subsidies defined within section 1402 of the ACA.

#### *RESOURCE CONSERVATION AND RECOVERY ACT DEFINITION OF “SOLID WASTE”*

On July 22, 2011, EPA proposed to revise the definition of “solid waste” under the hazardous waste provisions of the Resource Conservation and Recovery Act (“RCRA”).<sup>1760</sup> The revisions affect how EPA determines whether secondary materials are being *recycled* or *discarded*, and hence qualify as “waste.” The proposed amendments remove specific recycling exclusions from the current regulations, thereby increasing the burden on manufacturers seeking to recycle or reclaim secondary materials. The Non-Ferrous Founders’ Society called attention to an absurdity of the rule, pointing out that the regulation would even apply to “in-plant recycling of materials intended for internal use.”<sup>1761</sup> The Non-Ferrous Founders’ Society urged EPA to recognize the obvious: “solid waste definitions [should] only be applied to materials that are abandoned or otherwise destined for disposal.”<sup>1762</sup>

The process that led to this proposed redefinition of solid waste is a classic example of EPA’s use of sue-and-settle rulemaking. The most recent definition of solid waste, promulgated in 2008, “was the product of two years of collaboration between the EPA and stakeholders.”<sup>1763</sup> Nonetheless, on January 29, 2009, the Sierra Club petitioned the Obama Administration to reconsider the rule.<sup>1764</sup> In a settlement agreement filed on September 10, 2010, EPA voluntarily committed to address all of

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<sup>1757</sup> Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 Health Matrix 119, 120 (2013); Jennifer Staman and Todd Garvey, CONG. RESEARCH SERV., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, (2012).

<sup>1758</sup> Daniel W. Roslokken, *The Great Circuit Divide Over Individual Subsidies*, NEW JERSEY L. J., Sept. 24, 2014, <http://www.njlawjournal.com/id=1202671242078/The-Great-Circuit-Divide-Over-Individual-Subsidies?slreturn=20140901143206>.

<sup>1759</sup> <http://law.case.edu/journals/HealthMatrix/Documents/23HealthMatrix1.5.Article.AdlerFINAL.pdf> and sources cited therein.

<sup>1760</sup> Definition of Solid Waste, 76 Fed. Reg. 44,094, July 22, 2011.

<sup>1761</sup> Letter from James L. Mallory, Executive Director, Non-Ferrous Founders’ Society, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 1, 2012 (on file with author).

<sup>1762</sup> *Id.*

<sup>1763</sup> *Id.*

<sup>1764</sup> EPA’s and Sierra Club’s Lodging of Settlement and Motion to Sever and Hold Case in Abeyance, *Sierra Club v. Environmental Protection Agency*, No. 09-1041 (D.D.C. Sept. 9, 2010).

the issues raised in the Sierra Club's petition, and to issue a proposed redefinition by June 30, 2011.<sup>1765</sup> EPA could not meet this deadline, demonstrating the impracticality of the settlement's prescribed timeline.

Ironically, the rule will operate to defeat one of the fundamental tenets of environmentalism: recycling. The American Coatings Association noted that as currently written, "the regulations will discourage sustainable materials management and lead to an increase in the incineration, waste treatment, and landfill disposal of secondary materials."<sup>1766</sup> The IPC-Association Connecting Electronic Industries concurs, stating that the new definition will "impose significant regulatory burdens on recycling."<sup>1767</sup>

Ultimately the proposed redefinition will impose extraordinary costs with few discernible benefits: the American Forest and Paper Association wrote that the new rule "will add significant administrative burdens to the industry with *no environmental benefit* and possibly would disrupt the industry's practices which have proven to be effective, efficient, and environmentally protective."<sup>1768</sup> The Business Roundtable estimated that EPA's proposed definition of solid waste "will cost more than \$100 million a year in documentation and analysis costs."<sup>1769</sup> The National Federation of Independent Business highlighted the rule's unique harms to small businesses: "[m]any scrap yards and other small business love to recycle scrap metal because of its high value . . . EPA is seeking to impose a significant new paperwork requirement on these small-business owners."<sup>1770</sup>

#### *CLEAN WATER ACT DEFINITION OF "WATERS OF THE UNITED STATES"*

In one of the most expansive actions undertaken by the current administration the EPA redefined "waters of the United States". On April 27, 2011, the EPA issued draft guidance to provide "clarification" on the question of which bodies of water are subject to federal regulation by EPA and the Army Corps of Engineers ("Corps") under the Clean Water Act ("CWA").<sup>1771</sup> In the draft guidance, EPA expands its reach and seeks to regulate a broad category of wetlands, regardless of its status as navigable water. This guidance document is intended to replace and supersede similar guidance issued in 2008, in response to the U.S. Supreme Court's decision in *Rapanos v. United States*.<sup>1772</sup> In *Rapanos*, the Court rejected the position of the Corps that its authority over water

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<sup>1765</sup> *Id.*

<sup>1766</sup> Letter from J. Andrew Doyle, President, American Coatings Association, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't. Reform, June 1, 2012 (on file with author).

<sup>1767</sup> Letter from Dr. John W. Mitchell, President and CEO, IPC-Association Connecting Electronics Industries, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't. Reform, June 1, 2012 (on file with author).

<sup>1768</sup> Letter from Donna Harman, President and CEO, American Forest & Paper Association, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, June 6, 2012 (on file with author) (emphasis in original).

<sup>1769</sup> Letter from John Engler, President, Business Roundtable, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't. Reform, June 1, 2012 (on file with author).

<sup>1770</sup> Letter from Susan Eckerly, Senior Vice President for Public Policy, National Federation of Independent Businesses, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't. Reform, May 31, 2012 (on file with author).

<sup>1771</sup> Environmental Protection Agency and Army Corps of Engineers, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," April 27, 2011, p. 2, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

<sup>1772</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

was essentially limitless under the CWA.<sup>1773</sup> Rather, the Court found that the term “waters of the United States” “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’”<sup>1774</sup> In addition, the Court held that all waters with a “significant nexus” to “navigable waters” are covered under the CWA.<sup>1775</sup>

The words “significant nexus” remain open to judicial interpretation and considerable controversy. Legislation was introduced in the 110<sup>th</sup> and 111<sup>th</sup> Congress that would have expanded the definition of waters of the U.S. to include intrastate waters and reaffirmed the original Corps interpretation struck down by the Supreme Court.<sup>1776</sup> These measures never gained sufficient support to pass either chamber of Congress.

The definition of what is legally a “water of the U.S.” is extremely important as it triggers multiple responsibilities under the CWA, including a federal prohibition on discharges of pollutants (Section 301), requirements to obtain a permit prior to discharge (Sections 402 and 404), water quality standards and measures to attain them (Section 303), oil spill liability and oil spill prevention and control measures (Section 311), certification that federally permitted activities comply with state water quality standards (Section 401), and enforcement (Section 309).<sup>1777</sup> EPA and the Corps acknowledge that, compared with the existing guidance, the proposed revisions are likely to increase the number of waters identified as protected by the CWA.<sup>1778</sup>

Multiple job creators expressed their concern for EPA’s draft guidance. According to NFIB, the EPA is aiming to expand the definition of U.S. waters that are “navigable” in some cases to even small depressions or farm ponds that do not impair the flow of rivers.<sup>1779</sup> According to the National Association of Manufacturers, “[t]he EPA and the Corps are trying to accomplish through revised guidance what the 110<sup>th</sup> and 111<sup>th</sup> Congress refused to do: an unprecedented expansion of federal jurisdiction under the CWA.”<sup>1780</sup> The National Soy Bean Processors Association argues that the extremely broad view of the scope of federal authority would encompass many natural landscape features not readily recognizable as “water” and thwart any rational limits established by Congress or the U.S. Supreme Court.<sup>1781</sup> They also note that EPA has failed to explain how the new

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<sup>1773</sup> *Id.*

<sup>1774</sup> *Id.*

<sup>1775</sup> *Id.*

<sup>1776</sup> Claudia Copeland, Legislative Approach to Defining Waters of the United States, Dec. 29, 2010, *available at* <http://www.fas.org/sgp/crs/misc/R41225.pdf>.

<sup>1777</sup> *Id.*

<sup>1778</sup> Environmental Protection Agency and Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” April 27, 2011, p. 2, *available at* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

<sup>1779</sup> Letter from Susan Eckerly, Senior Vice President, Public Policy, National Federation of Independent Businesses to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, May 31, 2012 (on file with author).

<sup>1780</sup> Letter from Jay Timmons, President, National Association of Manufacturers to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 4, 2012 (on file with author).

<sup>1781</sup> Letter from Thomas A. Hammer, President, National Oilseed Processors Association to the Honorable Darrell E. Issa, Chairman, H. Comm. Oversight and Gov’t. Reform, June 1, 2012 (on file with author).

expanded definition will apply to the many CWA provisions that would be implicated by the guidance.<sup>1782</sup>

The American Forest and Paper Association points out that it is, “an excellent example of ‘regulation by guidance’ -- the Administration began, but never concluded, a rulemaking process covering very similar issues”<sup>1783</sup> The Agricultural Retailers Association worries that the guidance has serious legal implications and will open farmers up to CWA citizen and third-party lawsuits through other policies like the National Pollutant Discharge Elimination System (NPDES) permits for pesticides and application and spray drift.<sup>1784</sup>

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<sup>1782</sup> *Id.*

<sup>1783</sup> Letter from Donna Harman, President, American Forest & Paper Association to the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, May 31, 2012 (on file with author).

<sup>1784</sup> Letter from Daren Coppack, Agricultural Retailers Association, the Honorable Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov’t. Reform, June 7, 2012 (on file with author).

## GOVERNMENT INTERFERENCE IN THE PRIVATE LIVES OF INDIVIDUALS

Throughout this administration the Federal Government has continually played an increasing role in the daily private lives of individuals, from mandating what type of health coverage they are required to purchase to mandating which vehicles citizens can drive. The increasingly large presence of the Federal Government continues to mandate how individuals live their lives in unprecedented areas. The Federal Government is preventing individuals from making daily decisions about their personal lives all the while placing the burdensome costs of such regulation on the very individuals they are restricting.

### *INDIVIDUAL MANDATE*

One of the most vital regulations to the overall success of the Affordable Care Act is the individual mandate. The individual mandate requires individuals to maintain minimum essential healthcare coverage, qualify for an exemption, or pay a shared responsibility payment.<sup>1785</sup> Individual mandate was created to incentivize healthy individuals to purchase insurance.<sup>1786</sup> For young healthy individuals the costs of insurance far exceed the benefits of coverage. The cost of the penalty tax, known as the shared responsibility payment, is set at the greater of two amounts: a flat amount for each uninsured adult, set to rise from \$95 in 2014 to \$695 in 2016, or a percentage of the household adjusted gross income set to rise from 1% in 2014 to 2.5% in 2016.<sup>1787</sup> The Congressional Budget Office, along with the Joint Committee on Taxation, estimate the total cost of individual payments from 2015-2024 will total \$46 billion.<sup>1788</sup>

The individual mandate is designed to prevent individuals from choosing to forego purchasing health insurance. In addition to the mandate, the legislation requires community rating<sup>1789</sup> essentially shifting the cost of health insurance from those high-risk individuals to be subsidized by low-risk individuals.<sup>1790</sup> In preventing high-risk individuals from being charged higher rates for insurance the insurance pool had to vastly increase. The most adversely affected individuals will be the young adults, primarily males, who would usually forego purchasing insurance due to the cost exceeding the net benefits. A recent study found, “the sought-after 23-year-old demographic rose most dramatically, with men in the age group seeing an average 78.2 percent price increase before factoring in government subsidies, and women having their premiums rise 44.9 percent.”<sup>1791</sup> The

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<sup>1785</sup> 26 U.S.C. § 5000a (2012) (requiring most individuals to maintain certain basic level of health care, thereby expanding the pool of insured individuals and lowering overall costs).

<sup>1786</sup> For an overview of the reasons why such a financial incentive might be necessary, see Linda J. Blumberg & John Holahan, *Do Individual Mandates Matter?*, URBAN INST. (Jan. 2008), [http://www.urban.org/UploadedPDF/411603\\_individual\\_mandates.pdf](http://www.urban.org/UploadedPDF/411603_individual_mandates.pdf).

<sup>1787</sup> <http://www.cbo.gov/sites/default/files/45397-IndividualMandate.pdf>

<sup>1788</sup> <http://www.cbo.gov/sites/default/files/45397-IndividualMandate.pdf>, (additionally an average \$5 billion will be collected from individual tax penalties per year over the 2017-2024 time period).

<sup>1789</sup> “[H]ealth insurers are required to offer coverage to all applicants, cannot exclude pre-existing conditions, and are constrained in their ability to vary premiums.” Amy B. Monahan, *On Subsidies and Mandates: A Regulatory Critique of the ACA*, 36 J. CORP. L. 781, 787 (2011).

<sup>1790</sup> *Id.*

<sup>1791</sup> The study was conducted by HealthPocket, a nonpartisan independently managed subsidiary of Health Insurance Innovations in Sunnyvale, California. The study examined average health insurance premiums before the implementation of Obamacare in 2013 and then afterward in 2014. The research looked at men and women ages 20,

increase was similar for 30-year-old men and women. These increases did not take into account those eligible for federal subsidies.

The large increase in premium price can be accounted for by the expansion of services required, such as the minimum essential benefits package, as well as the increased number of less healthy people who will be heavily reliant on insurance services through the requirement to cover applicants with pre-existing conditions.<sup>1792</sup> Furthermore, uninsured individuals' enrolling into the insurance exchanges is vital to the overall success of the Affordable Care Act. Without a substantial amount of the uninsured purchasing forms of insurance, premium prices will continue to rise to subsidize the cost of carrying high risk individuals, those with pre-existing conditions. According to the Congressional Budget Office enrollment in the insurance exchanges should amount to 13 million individuals after the 2015 enrollment period set to open on November 15<sup>th</sup>, 2014.<sup>1793</sup> However, this would require the CBO estimated 6 million<sup>1794</sup> who sought insurance in 2014 to continue their coverage plans as well as enrolling 7 million newly insured individuals. The result is unlikely since the enthusiasm for the program is not near the same level as the first year of enrollment.

In addition, this year's open enrollment period will last three months closing in February 2015, as opposed to the six month open enrollment period in 2014. Recently Health and Human Services revealed expected enrollment in health care Exchanges to fall between 9 million and 9.5 million by the end of 2015, a number extraordinarily lower than the CBO estimates.<sup>1795</sup> The administration's recent drop in expected enrollment numbers questions the popularity and strength of the marketplace the administration continually touts as a success of the Affordable Care Act. The revelation was released just five days prior to the roll out of the 2015 enrollment period. Since the release of the new expected enrollment numbers there has been speculation as to the drastic difference between CBO's and HHS's estimates. Furthermore, HHS declined to address when within the new predictions the Department estimates reaching 25 million enrollees, the number widely used as a marker of the health care reforms overall success.<sup>1796</sup>

### **Administrative Burden**

The individual mandate is currently covered by final regulations issued by the Treasury Department, the IRS, and the Department of Health and Human Services, not to mention the Treasury Department and the IRS have also issued a number of proposed regulations to provide guidance on additional issues identified within the final regulations.<sup>1797</sup> The average citizen will not only have to find and understand these regulations but will have to sort through the various federal agencies to come across detailed information concerning the individual mandate and its

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23 and 30 using data for nonsmokers, no spouses, and no children. Valerie Richardson, *Obamacare premiums up 78% for some*, WASH. TIMES, Oct. 29, 2014.

<sup>1792</sup> Valerie Richardson, *Obamacare premiums up 78% for some*, WASH. TIMES, Oct. 29, 2014.

<sup>1793</sup> Table 2 - <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2014-04-ACAtables2.pdf>.

<sup>1794</sup> As of mid-October an estimated 7.1 million people had obtained insurance through the marketplace requiring 5.9 million newly insured individuals to enroll before the closing of the 2015 enrollment period.

<sup>1795</sup> Rachana Pradhan, *HHS: No double-digit Obamacare enrollment in 2015*, POLITICO, Nov. 11, 2014, [http://www.politico.com/story/2014/11/hhs-obamacare-enrollment-2015-112746.html?ml=t1\\_1](http://www.politico.com/story/2014/11/hhs-obamacare-enrollment-2015-112746.html?ml=t1_1).

<sup>1796</sup> <http://www.msn.com/en-us/news/us/obamacare-sign-ups-seen-30percent-lower-than-forecast/ar-AA7tmzl>.

<sup>1797</sup> <http://www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision>.

exemptions. The complex law, in addition to the involvement of multiple government agencies, has “some experts worried individuals will be tripped up by lost paperwork, the need to verify with multiple sources and long delays that extend beyond tax season.”<sup>1798</sup>

The individual mandate includes a list of exemptions including: individuals who cannot afford coverage, taxpayers with incomes below the filing threshold, members of Federally recognized Indian tribes, religion, incarcerated individuals, individuals who are not lawfully present, individuals who experience short gaps in coverage (usually three months or less), and individuals who qualify for a hardship exemption.<sup>1799</sup> The “hardship exemption”, which was released late December 2013, created a broad exemption category stating people who have “experienced another hardship in obtaining insurance” will not be penalized. There are two ways individuals are able to file for exemptions either through a marketplace exemption or throughout the process of tax filing.

There are 14 different categories within the hardship exemption<sup>1800</sup>: Most notably is the last category of hardship exemptions leaving entirely open the question of what precisely qualifies as a hardship. Additionally, the hardship is not set for any specific time span and will vary from case to case further raising individual’s uncertainty of their insurance and penalty status under the regulations.<sup>1801</sup> Furthermore, once an individual applies for an exemption they must wait to hear whether they will receive the exemption; if they are approved, they then must fill out new tax paperwork prolonging the process.<sup>1802</sup>

The broad and encompassing list of exemptions brings into question whether the original theory of having everyone purchase insurance in order to subsidize the costs of providing community rate coverage for high risk individuals, not allowing cost-sharing for a range of services, covering all ten categories of essential benefits, and providing broad preventive care is holding true.

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<sup>1798</sup> Rachael Bade, *A maze to opt out of Obamacare individual mandate*, POLITICO, Oct. 9, 2014, available at <http://www.politico.com/story/2014/10/obamacare-opting-out-111730.html>.

<sup>1799</sup> <http://ccf.georgetown.edu/all/individual-mandate-exceptions/>.

<sup>1800</sup> Healthcare.gov. The 14 categories are: You were homeless; you were evicted in the past 6 months or were facing eviction or foreclosure; you received a shut-off notice from a utility company; you recently experienced domestic violence; you recently experienced the death of a close family member; you experienced a fire, flood, or other natural or human-caused disaster that caused substantial damage to your property; you filed for bankruptcy in the last 6 months; you had medical expenses you couldn’t pay in the last 24 months that resulted in substantial debt; you experienced unexpected increases in necessary expenses due to carrying for an ill, disabled, or aging family member; you expect to claim a child as a tax dependent who’s been denied coverage in Medicaid and CHIP, and another person is required by court order to give medical support to the child (in this case you don’t have to pay the penalty for the child); As a result of an eligibility appeals decisions, you’re eligible for enrollment in a qualified health plan through the Marketplace, lower costs on your monthly premiums, or cost-sharing reductions for a time period when you weren’t enrolled in QHP through the Marketplace; you were determined ineligible for Medicaid because your state didn’t expand eligibility for Medicaid under the ACA; your individual insurance plan was cancelled and you believe other Marketplace plans are unaffordable; or you experience another hardship in obtaining health insurance.

<sup>1801</sup> <https://www.healthcare.gov/fees-exemptions/hardship-exemptions/>.

<sup>1802</sup> <http://www.politico.com/story/2014/10/obamacare-opting-out-111730.html>.

## Minimum Essential Benefits Package

The Secretary of the Health and Human Services issued regulations regarding the establishment of a minimum essential benefits package (“EBP”). The EBP is the menu of goods and services that must be covered for all insurance plans purchased in the new exchanges and all non-grandfathered plans. The EBP regulation created ten categories of essential benefits, those being: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services; including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.<sup>1803</sup> According to a 2013 survey examining 11,100 individual health plans across the United States, “[l]ess than 2% of the existing health plans in the individual market today provide all the Essential Health Benefits required under the Affordable Care Act.”<sup>1804</sup>

The 10 categories within the essential benefits package represent the minimum requirements of an insurance plan. Insurance plans are able to offer as many additional benefits as they choose. The 10 categories within the EBP were included to enable access to essential services all the while ensuring coverage was affordable.<sup>1805</sup> “If a plan is deficient in one of the ten specified categories, the state must supplement those benefits”.<sup>1806</sup> The problem with the minimum essential benefits package is that many people will now be paying for coverage that is not needed or in certain circumstances wanted. For example, an elderly woman with no young children who has surpassed her child bearing years will be paying for maternity and new born care as well as pediatric services. These expenses are ones in which the woman could have previously foregone but under the Affordable Care Act she is forced to purchase, assuming her insurance plan complies with the minimum essential benefits package.

### *ETHANOL E-15*

On June 15, 2012, EPA authorized the first set of companies to begin introducing E15 into the marketplace.<sup>1807</sup> This rulemaking signified EPA’s final step in the implementation of two partial waivers that increased the amount of ethanol in gasoline from 10 percent (“E10”) to 15 percent (“E15”) for model year (“MY”) 2001 and newer light-duty motor vehicles.<sup>1808</sup>

At the outset, industry organizations are concerned about the E15 “partial” waivers because “this is the first time that EPA has allowed the use of a fuel that is not fully compatible with the entire existing fleet.”<sup>1809</sup> When granting the waivers, EPA excluded vehicles predating MY 2001, motorcycles, heavy-duty vehicles and non-road engines because E15 will damage those engines.<sup>1810</sup>

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<sup>1803</sup> Healthcare.gov. (section 1302(b) of the ACA).

<sup>1804</sup> <https://www.healthpocket.com/healthcare-research/infostat/few-existing-health-plans-meet-new-aca-essential-health-benefit-standards#.VC10K7fu3cs>.

<sup>1805</sup> <http://www.iom.edu/Reports/2011/Essential-Health-Benefits-Balancing-Coverage-and-Cost.aspx>.

<sup>1806</sup> <http://www.nahu.org/meetings/annual/2012/sessions/Essential%20BenefitsJanetTrautwein.pdf>.

<sup>1807</sup> EPA, *E15 (a blend of gasoline and ethanol)*, available at <http://www.epa.gov/otaq/regs/fuels/additive/e15/> (last visited July 2, 2012).

<sup>1808</sup> 76 Fed. Reg. 4,662 (Jan. 26, 2011).

<sup>1809</sup> Letter from Charles T. Drevna, President, American Fuel & Petrochemical Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 5, 2012) (on file with author).

<sup>1810</sup> *Id.*

This exclusion has raised legal questions over EPA’s compliance with Sec. 211(f)(4) of the Clean Air Act (“CAA”).<sup>1811</sup> Under CAA, EPA must determine if a fuel or fuel additive will cause or contribute to the failure of *any* emission control device or system; however, EPA has conceded that E15 will cause damage to engines in vehicles manufactured before 2001.<sup>1812</sup>

Aside from the legal issues, respondents believe that as a practical matter, EPA failed to conduct proper research of the effects of E15. Initially, EPA and the Department of Energy (“DOE”) worked with the Coordinating Research Council (“CRC”) to conduct a multi-year series of tests.<sup>1813</sup> CRC had received \$40 million in federal funding for the testing, but for reasons unknown, EPA relied on a 2008 DOE study and hastily granted the waivers before the CRC was able to publish their results.<sup>1814</sup> In May 2012, CRC released results from the two-year study that corroborated the industry’s concern that EPA acted prematurely and should have waited for the CRC testing to conclude.<sup>1815</sup> Of utmost concern, the CRC study found that E15 caused engine failure in 25 percent of the vehicles tested – representing about five million vehicles on U.S. roads.<sup>1816</sup> In addition, the CRC study identified other mechanical failures in vehicles EPA approved for E15 usage, including the potential loss of compression and power, diminished vehicle performance, poor fuel economy and misfires.<sup>1817</sup>

EPA’s partial waiver will also cause confusion for consumers at the gas pump. According to the Association of Fuel and Petroleum Manufacturers, “[b]ecause E15 would theoretically be sold under the same canopy as regular gasoline, there is a high likelihood of consumer misfueling,” in other words using the wrong fuel for their vehicle.<sup>1818</sup> To mitigate the potential misfueling of vehicles, engines, and equipment excluded from the E15 waivers, EPA simultaneously issued a final rule in June 2011 that requires a warning label to notify consumers about the vehicles approved for E15.<sup>1819</sup> This “mitigation rule,” however, may not be sufficient. Specifically, the American Fuel and Petrochemical Manufacturers emphasized that, “the mitigation rule, which is nothing more than a cautionary label posted on the gasoline pump, is a woefully ineffective warning device.”<sup>1820</sup>

Some organizations contend that EPA’s push for E15 “places consumers and vehicle manufacturers at significant risk.”<sup>1821</sup> According to the Association of Global Automakers, “[v]ehicle manufacturers have serious concerns about the impact of misfueling on our customers due to potential product damage, emissions increases, and safety problems, as well as the liabilities these consequences may

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<sup>1811</sup> *Id.*

<sup>1812</sup> *Id.*

<sup>1813</sup> Letter from Mitch Bainwol, President & CEO, Alliance of Automobile Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 1, 2012) (on file with author).

<sup>1814</sup> *Id.*

<sup>1815</sup> *Id.*

<sup>1816</sup> *Id.*

<sup>1817</sup> *Id.*

<sup>1818</sup> Letter from Charles T. Drevna, President, American Fuel & Petrochemical Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 5, 2012) (on file with author).

<sup>1819</sup> 76 Fed. Reg. 44,406 (July 25, 2011).

<sup>1820</sup> Letter from Charles T. Drevna, President, American Fuel & Petrochemical Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 3 (June 5, 2012) (on file with author).

<sup>1821</sup> Letter from Michael J. Stanton, President & CEO, Association of Global Automakers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 5, 2012) (on file with author).

create for auto manufacturers.”<sup>1822</sup> In particular, studies have shown that ethanol levels exceeding E10 may cause engine damage in vehicles and non-road engines such as chainsaws, lawnmowers, boats, and snowmobiles.<sup>1823</sup> These repairs are costly, and even the most likely repair of a cylinder head replacement will cost \$2,000 to \$4,000 for a single cylinder head engine and \$4,000 to \$8,000 for a V-type engine.<sup>1824</sup> As a result, automobile manufacturers, such as Toyota, have adopted policies that deny warranty coverage for issues related to the misuse of fuels exceeding ten percent ethanol volume.<sup>1825</sup>

In addition to costly repair bills, the introduction of E15 will increase industry compliance costs that may get shifted to consumers through increased fuel prices. In particular, EPA has estimated the cost of industry compliance with the mitigation rule at \$3.64 million a year.<sup>1826</sup> Moreover, the American Petroleum Institute, an association representing over 500 companies involved in all aspects of the oil and natural gas industry, recently completed a review of studies on service station equipment and reported that half of the existing retail outlets are incompatible with E15.<sup>1827</sup> Aside from increased costs, ethanol blends have proven to burn at higher temperatures and to corrode faster, which may result in serious physical injury to persons using outdoor power equipment.<sup>1828</sup>

### *FUEL ECONOMY STANDARDS*

On May 19, 2009, the White House announced the “Historic Agreement” between the auto manufacturers, labor unions, the State of California, the Department of Transportation (“DOT”), and the EPA to set fuel economy standards for model year (“MY”) 2012–2016 automobiles.<sup>1829</sup> On July 29, 2011, President Obama announced an agreement to set fuel economy standards for MY 2017–2025.<sup>1830</sup> On November 16, 2011, DOT and EPA officially announced the proposed rule for MY 2017–2025 fuel economy standards.<sup>1831</sup>

These higher fuel economy standards could generate significant negative impacts on consumers and job creators. If consumers do not buy the vehicles that manufacturers are forced to produce, sales will fall, production will slow, and manufacturers and dealers will be forced to eliminate jobs. According to Ward’s Automotive survey of 1,100 engineers, in order to meet these standards “most

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<sup>1822</sup> *Id.*

<sup>1823</sup> Letter from Charles T. Drevna, President, American Fuel & Petrochemical Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 5, 2012) (on file with author).

<sup>1824</sup> Letter from Mitch Bainwol, President & CEO, Alliance of Automobile Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 3 (June 1, 2012) (on file with author).

<sup>1825</sup> Letter from Thomas J. Lehner, Vice President, Gov’t & Indus. Affairs, Toyota Motor North America, Inc., to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 3 (Jan. 10, 2010) (on file with author).

<sup>1826</sup> *Regulatory Announcement: EPA Finalizes Regulations to Mitigate the Potential for Misfueling of Vehicles, Engines and Equipment with E15*, U.S. ENVIRONMENTAL PROTECTION AGENCY (June 2011), available at <http://www.epa.gov/otaq/regs/fuels/additive/e15/420f11023.pdf>.

<sup>1827</sup> Letter from Marty Durbin, Executive Vice President, American Petroleum Institute, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 2 (June 6, 2012) (on file with author).

<sup>1828</sup> Letter from Mitch Bainwol, President & CEO, Alliance of Automobile Manufacturers, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, 3 (June 1, 2012) (on file with author).

<sup>1829</sup> Light-Duty Greenhouse Gas Standards and Corporate Average Fuel Economy Standards, Final Rule, 75 Fed. Reg. 25324 (May 7, 2010).

<sup>1830</sup> Press Release, White House, *President Obama Announces Historic 54.5 mpg Fuel Efficiency Standard*, (July 29, 2011).

<sup>1831</sup> 76 Fed. Reg. 74,854 (December 1, 2011).

cars will have to be smaller, more expensive and less varied than they are today.”<sup>1832</sup> Moreover, it is unlikely “the goals can be met without sacrifices in vehicle cost, size, safety and choice.”<sup>1833</sup> Indeed, the Defour Group has found vehicle cost increases associated with the proposal could depress light vehicle sales by 25 percent and result in the loss of as many as 220,000 automotive jobs.<sup>1834</sup> According to the Center for Automotive Research (“CAR”), compliance with these higher standards will cost American car buyers between \$4,190 and \$6,435 per vehicle while delivering a lifetime fuel savings of only \$1,690 to \$2,693.<sup>1835</sup>

Another concern is the model year 2017-2025 standards are being issued three years ahead of schedule and without any compelling reason to act under such an accelerated timeline. Mazda is concerned about the extended period of time covered by the rules. Mazda states, “[t]he extended time frame creates a critical need for the regulations to be thoroughly re-examined, and mid-course corrections made, at regular intervals. The impact . . . on the auto industry, and particularly on smaller automakers such as Mazda, cannot be overstated.”<sup>1836</sup> The Alliance of Automobile Manufacturers also cites the long lead time for this rule as problematic: “[a]ny future regulation that encompasses long lead-times, significant potential regulatory burden/cost, and/or uncertain consumer acceptance of new and more costly technologies should also include a mechanism for midpoint adjustments.”<sup>1837</sup>

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<sup>1832</sup> Peter Valdes-Dapena, *Auto engineers: Mileage rules will hurt safety*, CNNMoney, (August 3, 2011) (Available at [http://money.cnn.com/2011/08/03/autos/wards\\_auto\\_CAFE\\_engineer\\_survey/](http://money.cnn.com/2011/08/03/autos/wards_auto_CAFE_engineer_survey/) -).

<sup>1833</sup> *Id.*

<sup>1834</sup> Defour Group LLC, *STUDY: 56 MPG Standard by MY2025 to Cost 220,000 jobs*, (July 7, 2011) (Available at <http://www.defourgroupp.com>).

<sup>1835</sup> Jay Baron, Sean McAlinden, Greg Schroeder, & Yen Chen, *The U.S. Automotive Market and Industry in 2025*, The Center for Automotive Research, (June 2011) (Available at <http://www.cargroup.org/pdfs/ami.pdf>).

<sup>1836</sup> Letter from Shawn W. Murphy, Vice President and General Counsel, Mazda, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Govt. Reform (June 1, 2012).

<sup>1837</sup> Letter from Mitch Bainwol, President and CEO, Alliance of Automobile Manufacturers, to Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform (June 1, 2012).

# APPENDIX A: COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, 113TH CONGRESS

DARRELL E. ISSA, CALIFORNIA, *Chairman*

JOHN L. MICA, *Florida*  
MICHAEL R. TURNER, *Ohio*  
JOHN J. DUNCAN, JR., *Tennessee*  
PATRICK T. McHENRY, *North Carolina*  
JIM JORDAN, *Ohio*  
JASON CHAFFETZ, *Utah*  
TIM WALBERG, *Michigan*  
JAMES LANKFORD, *Oklahoma*  
JUSTIN AMASH, *Michigan*  
PAUL A. GOSAR, *Arizona*  
PATRICK MEEHAN, *Pennsylvania*  
SCOTT DesJARLAIS, *Tennessee*  
TREY GOWDY, *South Carolina*  
BLAKE FARENTHOLD, *Texas*  
DOC HASTINGS, *Washington*  
CYNTHIA M. LUMMIS, *Wyoming*  
ROB WOODALL, *Georgia*  
THOMAS MASSIE, *Kentucky*  
DOUG COLLINS, *Georgia*  
MARK MEADOWS, *North Carolina*  
KERRY L. BENTIVOLIO, *Michigan*  
RON DeSANTIS, *Florida*

ELIJAH E. CUMMINGS, *Maryland, Ranking Member*  
CAROLYN B. MALONEY, *New York*  
ELEANOR HOLMES NORTON, *District of Columbia*  
JOHN F. TIERNEY, *Massachusetts*  
WM. LACY CLAY, *Missouri*  
STEPHEN F. LYNCH, *Massachusetts*  
JIM COOPER, *Tennessee*  
GERALD E. CONNOLLY, *Virginia*  
JACKIE SPEIER, *California*  
MATT CARTWRIGHT, *Pennsylvania*  
MARK POCAN, *Wisconsin*<sup>1838</sup>  
TAMMY DUCKWORTH, *Illinois*<sup>1839</sup>  
ROBIN L. KELLY, *Illinois*<sup>1840</sup>  
DANNY K. DAVIS, *Illinois*<sup>1841</sup>  
PETER WELCH, *Vermont*<sup>1842</sup>  
TONY CÁRDENAS, *California*<sup>1843</sup>  
STEVEN A. HORSFORD, *Nevada*<sup>1844</sup>  
MICHELLE LUJAN GRISHAM, *New Mexico*

LAWRENCE BRADY, *Staff Director*  
JOHN CUADERES, *Deputy Staff Director*  
LINDA GOOD, *Chief Clerk*  
DAVID RAPALLO, *Minority Staff Director*

Committee Room: 2154 Rayburn House Office Building  
Staff Offices: 2157 Rayburn House Office Building (Majority)  
2471 Rayburn House Office Building (Minority)  
Telephone: (202) 225-5074 (Majority)  
(202) 225-5051 (Minority)

Website Address: <http://oversight.house.gov/>

<sup>1838</sup> Rep. Pocan resigned October 29, 2013.

<sup>1839</sup> Rep. Tammy Duckworth was elected to serve as a Member of the Committee on Jan. 14, 2013, pursuant to H.Res. 22.

<sup>1840</sup> Rep. Robin Kelly was elected to serve as a Member of the Committee on April 16, 2013, pursuant to H.Res. 163.

<sup>1841</sup> Reps. Davis, Cárdenas, and Horsford were elected to serve as Members of the Committee on Jan. 23, 2013, pursuant to H.Res. 42.

<sup>1842</sup> Rep. Peter Welch was elected to serve as a Member of the Committee on February 13, 2013, pursuant to H.Res. 64.

<sup>1843</sup> Reps. Davis, Cárdenas, and Horsford were elected to serve as Members of the Committee on Jan. 23, 2013, pursuant to H.Res. 42.

<sup>1844</sup> Reps. Davis, Cárdenas, and Horsford were elected to serve as Members of the Committee on Jan. 23, 2013, pursuant to H.Res. 42.

## APPENDIX B: SUBCOMMITTEE STRUCTURE, 2009 – 2014

### 113<sup>TH</sup> CONGRESS (2013 – 2014)

Chairman Darrell Issa; Ranking Member Elijah Cummings

1. The Subcommittee on Federal Workforce, U.S. Postal Service and the Census: Chairman Blake Farenthold (R-TX). Legislative jurisdiction over the federal civil service, the U.S. Postal Service, and the Census Bureau.
2. The Subcommittee on Government Operations: Chairman John Mica (R-FL). Legislative jurisdiction over government management and accounting measures, the economy, efficiency, and management of government operations and activities, procurement, federal property, public information, including the Freedom of Information Act and Federal Advisory Committee Act, federal records (including the National Archives and Records Administration and the Presidential Records Act) federal information technology and data standards, grant reform, the relationship between the Federal Government and states and municipalities, including unfunded mandates.
3. The Subcommittee on National Security: Chairman Jason Chaffetz (R-UT). Oversight jurisdiction over national security, homeland security, foreign operations, immigration, emergency management, and criminal justice. Legislative jurisdiction over drug policy.
4. The Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs: Chairman Jim Jordan (R-OH). Oversight jurisdiction over regulatory affairs, impediments to economic growth and job creation, monetary policy, banking, infrastructure, and tax policy. Legislative jurisdiction over federal paperwork reduction, data quality, and the Office of Information and Regulatory Affairs.
5. The Subcommittee on Energy Policy, Health Care, and Entitlements: Chairman James Lankford (R-OK). Oversight jurisdiction over federal health care policy, food and drug safety, energy policy, solvency of federal entitlement programs.<sup>1845</sup>

### 112<sup>TH</sup> CONGRESS (2011 – 2012)

Chairman Darrell Issa; Ranking Member Elijah Cummings

1. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy: Chairman Dennis Ross. Legislative jurisdiction of the federal civil service and the U.S. Postal Service. Oversight jurisdiction over labor policy.
2. Subcommittee on Government Organization, Efficiency and Financial Management: Chairman Todd Platts. Legislative jurisdiction over government management and accounting measures, the economy, efficiency, and management of government operations and activities (other than procurement and data standards), federal property, and reorganizations of the executive branch.

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<sup>1845</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES (113th Cong.) Rule 6.

3. Subcommittee on Health Care, District of Columbia, Census and the National Archives: Chairman Trey Gowdy. Legislative jurisdiction over drug policy, the District of Columbia, the Census Bureau, and federal records (including the National Archives and Records Administration and the Presidential Records Act). Oversight jurisdiction over federal health care policy, food and drug safety, public support for the arts, libraries and museums, criminal justice, and transportation.
4. Subcommittee on National Security, Homeland Defense and Foreign Operations: Chairman Jason Chaffetz. Oversight jurisdiction over national security, homeland security, foreign operations, immigration, and emergency management.
5. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending: Chairman Jim Jordan. Legislative jurisdiction over federal paperwork reduction, data quality, and the Office of Information and Regulatory Affairs. Oversight jurisdiction over regulatory affairs, stimulus policy, federal spending, education, agriculture, and communications policy.
6. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs: Chairman Patrick T. McHenry. Oversight jurisdiction over financial and monetary policy, banking, housing, and insurance regulation, financial crisis and rescues, and tax policy.
7. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform: Chairman James Lankford. Legislative jurisdiction over public information, including the Freedom of Information Act and Federal Advisory Committee Act, federal information technology and data standards, procurement and grant reform, the relationship between the Federal Government and states and municipalities, including unfunded mandates. Oversight jurisdiction over public broadcasting.<sup>1846</sup>

## 111<sup>TH</sup> CONGRESS (2009 – 2010)

Chairman Edolphus Towns; Ranking Member Darrell Issa

1. Subcommittee on Domestic Policy: Chairman Dennis Kucinich, Ranking Member Jim Jordan. Oversight jurisdiction over domestic policies, including matters relating to energy, labor, education, criminal justice, and the economy. The Subcommittee also has legislative jurisdiction over the Office of National Drug Control Policy;
2. Subcommittee on Federal Workforce, Postal Service and the District of Columbia: Chairman Stephen Lynch, Ranking Member Jason Chaffetz. Jurisdiction includes Federal employee issues, municipal affairs (other than appropriations) of the District of Columbia, and the Postal Service. The Subcommittee's jurisdiction includes postal naming, holidays, and celebrations.
3. Subcommittee on Government Management, Organization, and Procurement: Chairwoman Diane Watson, Ranking member Brian P. Bilbray, Vice Ranking Member Aaron Schock. Jurisdiction includes the management of government operations, reorganizations of the executive branch, and federal procurement.

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<sup>1846</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES (112th Cong.) Rule 6.

4. Subcommittee on Information Policy, Census, and National Archives: Chairman William Lacy Clay, Ranking Member Patrick T. McHenry, Vice Ranking Member Lynn K. Westmoreland. Jurisdiction includes public information and records laws such as the Freedom of Information Act, the Presidential Records Act, and the Federal Advisory Committee Act, the Census Bureau, and the National Archives and Records Administration.
5. Subcommittee on National Security and Foreign Affairs: Chairman John Tierney (D-MA), Ranking Member Jeff Flake. Oversight jurisdiction over national security, homeland security, and foreign affairs.<sup>1847</sup>

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<sup>1847</sup> RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES (111th Cong.) Rule 8.

## APPENDIX C: COMMITTEE OVERSIGHT AND INVESTIGATIVE REPORTS

### 2009 MINORITY OVERSIGHT AND INVESTIGATIVE REPORTS

February 10, 2009 Minority staff report, “Doubling the National Park Service’s Annual Appropriation – the Unique Influence of the National Parks Conservation Association.”

March 19, 2009 Minority staff report, “Friends of Angelo: Countrywide’s Systematic and Successful Effort to Buy Influence and Block Reform.”

April 15, 2009 Minority staff report, “De-Targeting the Stimulus: States Diverting Medicaid Funds Away from Helping Poor, Protecting Health Care Jobs.”

April 28, 2009 Minority staff report, “Comprehensive Staff Analysis of the Economic Impact of the Waxman/Markey Cap-and-Trade Legislation.”

May 11, 2009 Minority staff report, “Census History: Counting Every Person Once, Only Once and in the Right Place.”

July 7, 2009 Minority staff report, “The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008.”

July 22, 2009 Minority staff report, “Justice or Avarice: The Misuse of Litigation to Harm Consumers.”

July 23, 2009 Minority staff report, “Is ACORN Intentionally Structured As a Criminal Enterprise?”

August 13, 2009 Minority staff report, “Medicare Experience Suggests Americans Should Expect Massive Fraud with Nationalized Health Care.”

September 28, 2009 Minority staff report, “Oversight Status Report” Creating Accountability and Transparency Under One-Party Rule.”

October 7, 2009 Minority staff report, “Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department.”

October 15, 2009 Minority staff report, “The Politics of EPA’s Endangerment Finding.”

November 20, 2009 Minority joint staff report with Senate Finance Committee Minority, “The Firing of the Inspector General for The Corporation for National and Community Service.”

## 2010 MINORITY OVERSIGHT AND INVESTIGATIVE REPORTS

January 26, 2010 Minority staff report, "Public Disclosure As A Last Resort: How the Federal Reserve Fought to Cover Up the Details of the AIG Counterparties Bailout From the American People."

February 2, 2010 Minority staff report, "The Failure to Address the Costs of Defensive Medicine in Health Care Legislation."

February 18, 2010 Minority staff report, "Follow the Money: ACORN, SEIU and their Political Allies."

February 19, 2010 Minority staff report, "Midway Through the 111th Congress, Creating Accountability and Transparency Under One-Party Rule."

February 25, 2010 Minority staff report, "Treasury Department's Mortgage Modification Programs: A Failure Prolonging the Economic Crisis."

March 2, 2010 Minority joint staff report with Senate Finance Committee Minority, "Update and Supplement to the Initial Report: The Firing of the Inspector General for The Corporation for National and Community Service."

April 1, 2010 Minority staff report, "ACORN Political Machine Tries to Reinvent Itself."

April 29, 2010 Minority staff report, "Who's Right on Stimulus Job Creation? The Obama Administration's Fiction vs. The American People's Reality."

Originally Released July 1, 2009 Updated May 12, 2010, staff report, "The Role of Government Affordable Housing Policy in Creating the Global Financial Crisis of 2008."

May 18, 2010 Minority staff report, "The SEC: Designed for Failure."

July 1, 2010 Minority staff report, "How the White House Public Relations Campaign on the Oil Spill is Harming the Actual Clean-up."

August 16, 2010 Minority staff report, "Analysis of the First Year of the Obama administration: Public Relations and Propaganda Initiatives."

September 13, 2010 Minority staff report, "The Removal of the Inspector General for The National Railroad Passenger Corporation (Amtrak)."

September 22, 2010 Minority staff report, "A Constitutional Obligation: Congressional Oversight of the Executive Branch."

## 2011 OVERSIGHT AND INVESTIGATIVE REPORTS

February 9, 2011 preliminary staff report, "Assessing Regulatory Impediments to Job Creation."

March 30, 2011 staff report, "A New Era of Openness: How and Why Political Staff at DHS Interfered with the FOIA Process."

May 23, 2011 staff report, "Rising Energy Costs: An Intentional Result of Government Action."

June 2, 2011 staff report, "The BP Oil Spill Recovery Effort: The Legacy of Choices Made by the Obama Administration."

June 14, 2011 joint staff report, "The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents."

July 26, 2011 joint staff report, "The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence."

September 8, 2011 staff report, "Doubling Down on Failure: Before Asking for a New Stimulus Package, Will the Obama Administration Admit that the First one Failed?"

September 14, 2011 staff report, "Broken Government: How the Administrative State has Broken President Obama's Promise of Regulatory Reform."

September 22, 2011 staff report, "How Obama's Green Energy Agenda is Killing Jobs."

October 27, 2011 staff report, "Uncovering the True Impact of the ObamaCare Tax Credits: Increases the Deficit, Expands Welfare Through the Tax Code, and Implements a New Marriage Tax Penalty."

October 31, 2011 majority staff report, "Investigative Report on Allegations of Improper Payments and Promises of Employment for Sulaimon Brown."

November 16, 2011 joint majority staff report, "A Decade Later: A Call for TSA Reform."

November 16, 2011 staff report, "Government-Sponsored Moguls: Executive Compensation at Fannie Mae and Freddie Mac."

December 13, 2011 majority staff report, "A Crisis of Leadership: How the Actions of Chairman Gregory Jaczko Are Damaging the Nuclear Regulatory Commission."

## 2012 OVERSIGHT AND INVESTIGATIVE REPORTS

January 25, 2012 staff report, "Government Motors: A Preliminary Report on the Effects of Bailouts and Politics on the Obama Administration's Ability to Protect American Consumers."

February 6, 2012 staff report, "Workplace Freedom and Fairness: Are Workers Forced to Fund Political Causes They Oppose?"

March 15, 2012 staff report, "Report Card on Federal Government's Efforts to Track and Manage FOIA Requests."

March 20, 2012 staff report, "The Department of Energy's Disastrous Management of Loan Guarantee Programs."

March 20, 2012 staff report, "The Department of Energy's Weatherization Program: Taxpayer Money Spent, Taxpayer Money Lost."

March 21, 2012 staff report, "Impact of President Obama's Health Care Law on Jobs."

April 25, 2012 staff report, "Uncovering Waste, Fraud, and Abuse in the Medicaid Program."

May 9, 2012 joint staff report with House Committee on Transportation and Infrastructure, "Airport Insecurity: TSA's Failure to Cost Effectively Procure, Deploy and Warehouse its Screening Technologies."

June 15, 2012 staff report, "FDA's Contribution to the Drug Shortage Crisis."

June 20, 2012 report, "Resolution Recommending that the House of Representatives find Eric H. Holder, JR., Attorney General, U.S. Department of Justice, In Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee."

July 5, 2012 staff report, "How Countrywide Used its VIP Loan Program to Influence Washington Policymakers."

July 19, 2012 staff report, "Continuing Oversight of Regulator Impediments to Job Creation: Job Creators Still Buried by Red Tape."

July 31, 2012 joint staff report with Senate Committee on the Judiciary, "Part I of III – Fast and Furious; The Anatomy of a Failed Operation."

August 10, 2012 staff report, "A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations."

September 20, 2012 staff report, "The Federal Government's Failure to Prevent and End Medicaid Overpayments."

October 29, 2012 joint staff report, "Part II of III – Fast and Furious: The Anatomy of a Failed Operation."

November 1, 2012 staff report, "None of the Below: The Truth about President Obama's Actions Against Domestic Energy Production."

December 13, 2012 staff report, "President Obama's Pro-Union Board: The NLRB's Metamorphosis From Independent Regulator to Dysfunctional Union Advocate."

December 14, 2012 staff report, "The Consumer Financial Protection Bureau's Threat to Credit Access in the United States."

December 27, 2012 staff report, "Government Oversight and Accountability in the 112th Congress."

## 2013 OVERSIGHT AND INVESTIGATIVE REPORTS

March 5, 2013 staff report, "Billions of Federal Tax Dollars Wasted Annually by New York's Medicaid Program."

March 5, 2013 staff report, "Open and Unimplemented IG Recommendations Could Save Taxpayers \$67 Billion."

April 15, 2013 joint staff report with House Judiciary Committee, "DOJ's Quid Pro Quo with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law."

April 23, 2013 staff report, "Interim Progress Report for the Members of the House Republican Conference on the Events Surrounding the September 11, 2012 Terrorist Attacks in Benghazi, Libya."

June 25, 2013 staff report, "Questionable Acquisitions: Problematic IT Contracting at the IRS."

September 16, 2013 staff report, "Benghazi Attacks: Investigative Update Interim Report on the Accountability Review Board."

September 17, 2013 staff report, "Interim Update on IRS Investigation of Staff Exempt Applicants."

September 18, 2013 staff report, "Risks of Fraud and Misinformation with ObamaCare Outreach Campaign: How Navigator and Assister Program Mismanagement Endangers Consumers."

October 30, 2013 staff report, "U.S. Department of Veterans Affairs 2011 Human Resources Conferences: A Culture of Mismanagement and Reckless Spending."

December 16, 2013 staff report No. 2, "Risks of Fraud and Misinformation with ObamaCare Outreach Campaign: How Navigator and Assister Program Mismanagement Endangers Consumers."

## 2014 OVERSIGHT AND INVESTIGATIVE REPORTS

February 5, 2014 staff report, "Examining the Administration's \$2 billion ObamaCare Loan Guarantee Gamble: Two Case Studies of Political Influence Peddling and Millions of Taxpayer Dollars Wasted."

February 11, 2014 staff report, "Slipping Through the Cracks: How the D.C. Navy Yard Shooting Exposes Flaws in the Federal Security Clearance Process."

February 26, 2014 joint staff report, "Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers."

March 11, 2014 staff report, "Lois Lerner's Involvement in the IRS Targeting of Tax-Exempt Organizations."

April 7, 2014 staff report, "Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment."

May 29, 2014 joint staff report, "Pseudo-Classification of Executive Branch Documents: Problems With the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation."

May 29, 2014 staff report, "The Department of Justice's 'Operation Choke Point': Illegally Choking Off Legitimate Businesses."

June 10, 2014 staff report, "Systemic Waste and Abuse at the Social Security Administration: How Rubber-Stamping Disability Judges Cost Hundreds of Billions of Taxpayer Dollars."

June 16, 2014, staff report, "How Politics Led the IRS to Target Conservative Tax-Exempt Applicants for their Political Beliefs."

June 19, 2014 joint staff report, "Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board."

July 28, 2014 staff report, "Obama-Care's Taxpayer Bailout of Health Insurers and the White House's Involvement to Increase Bailout Size."

July 29, 2014 staff report, "Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions.:"

September 18, 2014 staff report, "Behind the Curtain of the HealthCare.gov Rollout."

September 18, 2014 staff report, "U.S. Census Bureau: Addressing Data Collection Vulnerabilities."

December 8, 2014 staff report, "Federal Deposit Insurance Corporation's (FDIC) Involvement in 'Operation Choke Point.'"

December 18, 2014 staff report, "Misplaced Priorities: How the Social Security Administration Sacrificed Quality for Quantity in the Disability Determination Process."

December 23, 2014 staff report, "The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Reports of Findings for the 113th Congress."

## APPENDIX D: COMMITTEE HEARINGS

### 2011 HEARINGS

Jan. 26, 2011, 9:30 a.m. Full Committee Hearing on “Bailouts and the Foreclosure Crisis: Report of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”).” Witnesses: The Honorable Neil Barofsky, Special Inspector General for the Troubled Asset Relief Program; The Honorable Tim Massad, Acting Assistant Secretary for Financial Stability and Chief Counsel, U.S. Department of the Treasury.

Feb. 9, 2011, 9:30 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, “State and Municipal Debt: The Coming Crisis?” Witnesses: Ms. Nicole Gelinas, Manhattan Institute; Mr. David Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School; Ms. Eileen Norcross, Mercatus Center, George Mason University; Ms. Iris J. Lav, Senior Advisor, Center on Budget and Policy Priorities.

Feb. 10, 2011, 9:30 a.m. Full Committee Business Meeting regarding the Oversight Plan, and Full Committee Hearing entitled, “Regulatory Impediments to Job Creation.” Witnesses: Mr. Jay Timmons, CEO, National Association of Manufacturers; Mr. Tom Nassif, President and CEO, Western Growers Association; Mr. Harry Alford, CEO, Black Chamber of Commerce; Mr. Michael J. Fredrich, President, MCM Composites, LLC; Mr. Jack Buschur, Buschur Electric; Mr. James Gattuso, Senior Research Fellow in Regulatory Policy, The Heritage Foundation; Mr. Sidney Shapiro, Center for Progressive Reform; Ms. Karen Kerrigan, President and CEO, Small Business and Entrepreneurship Council; and Mr. Jerry Ellig, Senior Research Fellow, Mercatus Center.

Feb. 15, 2011, 9:30 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, “Unfunded Mandates and Regulatory Overreach.” Witnesses: Mayor Patrice Douglas, City of Edmond, OK; Ms. Susan Dudley, George Washington University Regulatory Studies Center; Ms. Denise M. Fantone, Director, Strategic Issues, U.S. GAO; Mr. Anthony H. Griffin, County Executive, Fairfax County, VA.

Feb. 16, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, “The Stimulus: Two Years Later.” Witnesses: John Taylor, Ph.D., Professor of Economics, Stanford University; Russell Roberts, Ph.D., Professor of Economics, Mercatus Center, George Mason University; Christina Romer, Ph.D., Professor of Economics, University of California at Berkeley; Jared Bernstein, Ph.D., Office of the Vice President, The White House; J.D. Foster, Ph.D., Norman B. Ture Senior Fellow in the Economic of Fiscal Policy, The Heritage Foundation; Mr. Alex Brill, Research Fellow, American Enterprise Institute; Mr. Andrew Busch, Global Currency and Public Policy Strategist, BMO Capital Markets Investment Banking Division; Mr. Chris Edwards, Director of Tax Policy Studies, Cato Institute; Josh Bivens, Ph.D., Economic Policy Institute.

Feb. 16, 2011, 1:30 p.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, “Making Sense of the Numbers: Improving the Federal Financial

Reporting Model.” Witnesses: Mr. Thomas Allen, Chairman, The Federal Accounting Standards Advisory Board; Mr. Jonathan D. Breul, Executive Director, IBM Center for the Business of Government; Mr. Michael J. Hettinger, Executive Director, Grant Thornton LLP.

Feb. 17, 2011, 9:30 a.m. Full Committee Hearing on “Waste and Abuse: The Refuse of the Federal Spending Binge.” Witnesses: Hon. Claire McCaskill, U.S. Senate; Mr. Andrew Moylan, Vice President of Government Affairs, National Taxpayers Union; Mr. Thomas A. Schatz, President, Citizens Against Government Waste; Ms. Debra Cammer, Vice President and Partner, IBM; Hon. Gene L. Kodaro, Comptroller General of the United States, U.S. Government Accounting Office; Veronique de Rugy, Ph.D., Senior Research Fellow, Mercatus Center; Mr. Vincent Frakes, Federal Policy Manager, Center for Health Transformation; Mr. Gary Kalman, Director, Federal Legislative Office, U.S. PIRG.

Feb. 28, 2011, 10:30 a.m. Full Committee Joint Hearing with the Committee on Transportation and Infrastructure entitled “America’s Presidential Libraries: Their Mission and Their Future.” Witnesses: Hon. David S. Ferriero, Archivist of the United States, National Archives and Records Administration; Mr. Thomas Putman, Director, John F. Kennedy Presidential Library and Museum; Mr. R. Duke Blackwood, Director, Ronald Reagan Presidential Library; Thomas Schwartz, Ph.D., Illinois State Historian, Abraham Lincoln Presidential Library and Museum; Ms. Anna Eleanor Roosevelt, Chair, Board of Directors, The Roosevelt Institute; and Martha Kumar, Ph.D., Professor, Towson University.

Mar. 1, 2011, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, “The D.C. Opportunity Scholarship Program: Keeping the Door Open.” Witnesses: Mr. Ronald Holassie, Senior, Bishop Carroll High School; Ms. Lesly Alvarez, 8th Grader, Sacred Heart School; Ms. Sheila Jackson, Mother of DC OSP Student; Ms. Latasha Bennett, Mother of DC OSP Student; Mr. Kevin Chavous, Chairman, Black Alliance for Education Options; Patrick Wolf, Ph.D., University of Arkansas; Ms. Betty North, Principal and CEO, Preparatory School of D.C.; and Ramona Edelin, Executive Director, D.C. Association of Public Charter Schools.

Mar. 2, 2011, 9:30 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, “U.S. Military Leaving Iraq: Is the State Department Ready?” Witnesses: Mr. Grant S. Green, Commissioner, Commission on Wartime Contracting; Mr. Michael Thibault, Co-Chair, Commission on Wartime Contracting; Mr. Stuart Bowen, Jr., Special Inspector General, Office of the Special Inspector General for Iraq Reconstruction; Ambassador Patrick Kennedy, Under Secretary for Management, U.S. Department of State; Ambassador Alexander Vershbow, Assistant Secretary for International Security Affairs, U.S. Department of Defense; Mr. Frank Kendall, Principal Deputy Under Secretary for Acquisition, Technology and Logistics, U.S. Department of Defense.

Mar. 2, 2011, 1:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, “Pushing the Envelope: The Looming Crisis at USPS.” Witnesses: Hon. Patrick Donahoe, Postmaster General, USPS; Ms. Ruth Goldway, Chair, Postal Regulatory Commission; Mr. Phil Herr, Director, Physical Infrastructure Issues, U.S. GAO; Mr. Jim Sampey, Executive Vice President and Chief Operations Officer, Valpak; Mr. Arthur Seckler, Coordinator, Coalition for a 21<sup>st</sup>

Century Postal Service; and Mr. Frederic Rolando, Director of Legislative and Political Affairs National Association of Letter Carriers (AFL-CIO).

Mar. 3, 2011, 9:30 a.m. Full Committee Hearing entitled, "The Refuse of the Federal Spending Binge II: How U.S. Taxpayers are Paying Double for Failing Government Programs." Witnesses: Hon. Thomas M. Davis, III, Director of Federal Government Affairs, Deloitte & Touche LLP; Hon. Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office; and Ms. Ryan Alexander, President, Taxpayers for Common Sense.

Mar. 8, 2011, 9:00 a.m. Full Committee Field Hearing entitled, "The Foreclosure Crisis" at the University of Maryland School of Law located at 500, W. Baltimore Street, Baltimore, MD 21201. Witnesses: Hon. Martin O'Malley, Governor of Maryland; Hon. Stephanie Rawlings-Blake, Mayor of Baltimore; Mr. Mark Kaufman, Commissioner of Financial Regulation, MD Department of Labor, Licensing and Regulation; Mr. Kevin Jerron Matthews, Homeowner; Ms. Jane A. Wilson, Chair, Board of Directors, St. Ambrose Housing Aid Center, Inc.

Mar. 9, 2011, 10:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service, and Labor Policy Hearing entitled "Are Federal Workers Underpaid?" Witnesses: Hon. John Berry, Director Office of Personnel Management; Mr. Andrew Biggs, Ph.D., Resident Fellow, American Enterprise Institute; Mr. James Sherk, Senior Policy Analyst in Labor Economics, The Heritage Foundation; Mr. Max Stier, President, Partnership for Public Service; and Ms. Colleen Kelley, National President, National Treasury Employees Union.

Mar. 9, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "A Look at the FY10 Consolidated Financial Report of the U.S. Government." Witnesses: Hon. Gene L. Dodaro, Comptroller General of the United States, U.S. GAO; Hon. Daniel I. Werfel, Controller, Office of Management and Budget; and Hon. Richard L. Gregg, Fiscal Assistant Secretary, U.S. Department of the Treasury.

Mar. 9, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Assessing the Cumulative Impact of Regulation on U.S. Manufacturers." Witnesses: Mr. Aris Papadopolous, CEO and Chairman, Portland Cement Association; Ms. Donna Harman, CEO, American Forest and Paper Association; Mr. Michael P. Walls, Vice President, Regulatory and Technical Affairs, American Chemistry Council; Mr. Michael Kamnikar, Senior Vice President, Forging Industry Association, Ellwood Group; Mr. Bernard Schimmel, Vice President, Technical Services, Boral Bricks, Inc.; and Mr. David C. Foerter, Executive Director, Institute of Clean Air Companies (ICAC).

Mar. 10, 2011, 1:30 p.m. Joint Hearing of the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs and the Subcommittee on Government Organization, Efficiency and Financial Management entitled, "Financial Management, Work Force, and Operations at the SEC: Who's Watching Wall Street's Watchdog?" Witnesses: Hon. Mary Schapiro, Chairman, U.S. Securities and Exchange Commission; Mr. Jeffrey Risinger, Director, Office of Human Resources, SEC; Mr. Jonathan Katz, Former Secretary, SEC; Mr. Stephen J. Crimmins, K & L Gates, LLP; Ms. Helen Chairman, Attorney at Law, Baker and Poliakoff, LLP.

Mar. 11, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Red to Black: Improving Collection of Delinquent Debt Owed to the Government." Witness: David Lebryk, Commissioner, Financial Management Service, Department of the Treasury.

Mar. 11, 2011, 10:00 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Transparency Through Technology: Evaluating Federal Open-Government Initiatives." Witnesses: Ms. Ellen Miller, Executive Director, Sunlight Foundation; Danny Harris, Ph.D., Chief Information Officer, U.S. Department of Education; Mr. Christopher L. Smith, Chief Information Officer, U.S. Department of Agriculture; Mr. Jerry Brito, Senior Research Fellow, Mercatus Center, George Mason University; and Hon. Danny Werfel, Controller, Office of Federal Financial Management, OMB.

Mar. 15, 2011, 1:30 p.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Obamacare: Why the Need for Waivers?" Witnesses: Mr. Steven B. Larsen, J.D., Deputy Administrator and Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services; Mr. Edmund F. Haislmaier, Senior Research Fellow, Center for Health Policy Studies, The Heritage Foundation; Mr. Scoot Wold, Esq., Shareholder, Hitesman & Wold, P.A.; and Ms. Judy Feder, Ph.D., Professor, Georgetown University.

Mar. 15, 2011, 1:30 p.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "State and Municipal Debt: The Coming Crisis? Part II." Witnesses: Hon. Daniel Liljenquist, Utah State Senator; Ms. Robin Prunty, Managing Director, Standard & Poor's; Dean Baker, Ph.D., Center for Economic Policy and Research; Mr. Robert Kurtter, Moody's Investors' Service; and Andrew Biggs, Ph.D., The American Enterprise Institute.

Mar. 16, 2011, 9:30 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "TSA Oversight Part 1: Whole Body Imaging." Witnesses: Hon. Sharon Cissna, Representative, Alaska State House of Representatives; Mr. Marc Rotenberg, Executive Director, Electronic Privacy Information Center; Mr. Fred H. Cate, Senior Policy Advisor, Centre for Information Policy Leadership, Hunton & Williams; David J. Brenner, Ph.D., Center for Radiological Research, Columbia University; Mr. Stewart A. Baker, Partner, Steptoe and Johnson, LLP; Mr. Lee Kair, Assistant Administrator for Security Operations, TSA; and Mr. Robin E. Kane, Assistant Administrator for Security Technology, TSA.

Mar. 16, 2011, 1:30 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Project Labor Agreements and the Cost of Doing Business in the Construction Industry." Witnesses: Mr. John Ennis, CEO, Ennis Electric, Inc.; Ms. Linda Figg, FIGG Engineering Group; Dale Belman, Ph.D., MSU School of Industrial and Labor Relations; Mr. John Biagas, Bay Electric Inc.; Mr. Maurice Baskin, American Builders and Contractors, Inc.; Mr. Daniel Gordon, Administrator, Office of Federal Procurement Policy, Executive Office of the President; Mr. Robert Peck, Commissioner of Public Buildings, GSA; and David Michaels, Ph.D., Assistant Secretary for Occupational Health and Safety, U.S. Department of Labor.

Mar. 17, 2011, 9:30 a.m. Full Committee Hearing entitled, "The Freedom of Information Act: Crowd-Sourcing Government Oversight." Witnesses: Ms. Miriam Nisbet, Director, Office of Government Information, National Archives and Records Administration; Mr. Daniel Metcalfe, Executive Director, Collaboration on Government Secrecy; Mr. Rick Blum, Coordinator, Sunshine in Government; Mr. Tom Fitton, President, Judicial Watch; Ms. Angela Canterbury, Director of Public Policy, Project on Open Government.

Mar. 30, 2011, 9:30 a.m. Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs Hearing entitled, "Has Dodd-Frank Ended Too Big to Fail?" Witnesses: Hon. Neil Barofsky, Special IG for TARP; and Hon. Tim Massad, Acting Assistant Secretary for Financial Stability and Chief Counsel, U.S. Department of the Treasury.

Mar. 31, 2011, 9:30 a.m. Full Committee Hearing entitled, "Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?" Witnesses: Ms. Mary Ellen Callahan, Chief Privacy Officer, The Privacy Office, U.S. Department of Homeland Security; Mr. Charles K. Edwards, Acting Inspector General, Office of the Inspector General, U.S. Department of Homeland Security; Mr. Ivan Fong, General Counsel, Office of the General Counsel, U.S. Department of Homeland Security; Mr. John Verdi, Senior Counsel, Director of Open Government Project, Electronic Privacy Information Center.

Apr. 5, 2011, 9:45 a.m. Full Committee Hearing entitled, "Are Postal Workforce Costs Sustainable?" Witnesses: Hon. Louis J. Giuliano, Chairman, U.S. Postal Service Board of Governors; Hon. James C. Miller, III, Governor, U.S. Postal Service Board of Governors; Hon. Patrick R. Donahoe, Postmaster General and CEO, United States Postal Service; and Mr. Cliff Guffey, President, American Postal Workers Union, AFL-CIO.

Apr. 5, 2011, 1:30 p.m. Subcommittee on Health Care, District of Columbia., Census and the National Archives Hearing entitled, "Waste, Abuse and Mismanagement in Government Health Care." Witnesses: Ms. Deborah Taylor, CFO, Centers for Medicare & Medicaid Services; Peter Budetti, M.D., Deputy Administrator for Program Integrity, Centers for Medicare & Medicaid Services; Mr. Gerald T. Roy, Deputy Inspector General for Investigations, Office of Inspector General, U.S. Department of Health and Human Services; Hon. Loretta Lynch, U.S. Attorney for the Eastern District of New York; Mr. David Botsko, Inspector General, Arizona Health Care Cost Containment System; Ms. Jean MacQuarrie, Vice President for Client Services, Thomson Reuters; Mr. Michael Cannon, Director of Health Policy Studies, Cato Institute; and Ms. Rachel Klein, Deputy Director for Health Policy, Families USA.

Apr. 6, 2011, 1:30 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Hearing entitled, "Assessing the Impact of Greenhouse Gas Regulations on Small Business." Witnesses: Mr. Joe Rajkovic, Director of Regulatory Affairs, Owner-Operator Independent Drivers Association; David Kreutzer, Ph.D., Research Fellow in Energy Economics and Climate Change, The Heritage Foundation; Mr. David D. Doniger, Policy Director, Climate Center, Natural Resources Defense Council; Mr. Keith Holman, Deputy Executive Director, National Lime Association; Ms. Gina McCarthy, Assistant Administrator for the Office of Air and Radiation, U.S. EPA; and Ms. Claudia Rodgers, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration.

Apr. 7, 2011, 1:30 p.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Regulatory Barriers to American Indian Job Creation." Witnesses: Ms. Mary L. Kendall, Acting Inspector General, Department of the Interior; Ms. Anu K. Mittal, Director, Natural Resources and Environment Team, U.S. GAO; Ms. Patricia Douville, Council Member, Rosebud Sioux Tribe; and Hon. Ron Allen, Chairman, Jamestown S'Klallam Tribe.

Apr. 13, 2011, 1:30 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Federal Employees' Compensation Act: A Fair Approach?" Witnesses: Mr. Gary Steinberg, Acting Director, Office of Workers' Compensation Programs, U.S. Department of Labor; Mr. Douglas Fitzgerald, Director, Division of Federal Employees' Compensation, U.S. Department of Labor; Mr. Bill Siemer, Assistant IG for Investigations, USPS; Ms. Lisa McManus, President and CEO, Contract Claim Services, Inc., Ms. Milagros Rodriguez, Occupational Health and Safety Specialist, AMGE.

Apr. 14, 2011, 9:30 a.m. Full Committee Hearing entitled, "State and Municipal Debt: Tough Choices Ahead." Witnesses: Hon. Scott Walker, Governor of Wisconsin; Hon. Peter Shumlin, Governor of Vermont; Andrew Biggs, Ph.D., Resident Scholar, American Enterprise Institute; Mr. Mark Mix, President, National Right to Work Committee; Robert Novy-Marx, Ph.D., Professor of Finance, University of Rochester Simon Graduate School of Business; and Desmond Lachman, Ph.D., Resident Scholar, American Enterprise Institute.

Apr. 14, 2011, 1:30 p.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Tsunami Warning, Preparedness, and Interagency Cooperation: Lessons Learned." Witnesses: William Leith, Ph.D., Acting Associate Director for National Hazards, U.S. Geological Survey, U.S. Department of the Interior; Mr. Kenneth D. Murphy, Regional Administrator – Region X, FEMA; Ms. Mary Glackin, Dep. Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce; Mr. John W. Madden, Director Division of Homeland Security and Emergency Management, State of Alaska; and Ms. Nancy Ward, Regional Administrator, FEMA.

Apr. 15, 2011, 9:30 a.m. Joint Hearing with the Subcommittee on National Security, Homeland Defense and Foreign Operations and Natural Resources Committee's Subcommittee on National Parks, Forests and Public Lands entitled, "The Border: Are Environmental Laws and Regulations Impeding Security and Harming the Environment?" Witnesses: Hon. Silvestre Reyes, Member of Congress; Mr. Ronald Vitiello, Deputy Chief, U.S. Customs and Border Patrol, U.S. Department of Homeland Security; Ms. Kim Thorsen, Deputy Assistant Secretary for Law Enforcement, Security and Emergency Management, U.S. Department of the Interior; Mr. Jay Jensen, Deputy Under Secretary for Natural Resources and Environment, U.S. Department of Agriculture; Mr. George Zachary Taylor National Association of Former Border Patrol Officers; Mr. Gene Wood, National Association of Former Border Patrol Officers; Mr. Jim Chilton, Chilton Ranch; and Ms. Anu Mittal, Director, Natural Resources and Environment, U.S. GAO.

Apr. 15, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Improper Payments: Finding Solutions." Witnesses: Hon. Daniel

Werfel, Controller, OMB; and Ms. Kay L. Daly, Director, Financial Management and Assurance, U.S. GAO.

Apr. 18, 2011, 9:00 a.m. Full Committee Hearing entitled, "Policies Affecting High Tech Growth and Federal Adoption of Industry Best Practices" located at the Council Chambers of the San Jose City Hall, 200 E. Santa Clara Street, San Jose, CA. Witnesses: Mr. Milo Medin, Vice President for Access Services, Google; Mr. Stuart McKee, National Technology Officer, U.S. Public Sector, Microsoft; and Mr. Patrick Quinlan, President, Rivet Software.

Apr. 19, 2011, 8:30 a.m. Full Committee Hearing entitled, "Regulatory Impediments to Job Creation: Assessing the Cumulative Impact of EPA Regulation on America's Farmers" located at Salinas City Council Chambers, 200 Lincoln Avenue, Salinas, California. Witnesses: Mr. Tom Nassif, President and CEO, Western Growers Association; Mr. Jim Bogart, President, Gowers/Shippers Association of Central California; Mr. Richard R. Smith, Owner, Paraiso Vineyards; Mr. Norm Groot, Executive Director, Monterey County Farm Bureau; Mr. Mike Jarrard, Mann Packing Co., Inc.; Mr. Mark Murai.

Apr. 20, 2011, 9:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Regulatory Impediments to Job Creation in the Northeast Part I" located at Irondequoit Town Hall, 1280 Titus Avenue, Irondequoit, NY. Witnesses: Mr. Mike Medina, President, Optimax; Ms. Rebecca A. Meinking, Executive Vice President, Radec Corporation; Mr. Bill Pollock, CEO, Optimization; Mrs. Cathy Martin, President, Monroe County Farm Bureau; Mr. Jonathan L. Taylor, Oakridge Dairy; Mr. John Teeple, Teeple Farms, Inc.; Ms. Jolene Bender, Supervisor, Town of Marion; Ms. Maggie Brooks, Monroe County Executive; and Sheriff Barry Virts, Wayne County.

Apr. 20, 2011, 3:00 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Regulatory Impediments to Job Creation in the Northeast Part II" located at South Side Innovation Center, 2610 S. Salina Street, Syracuse, NY. Witnesses: Mr. Jud Gostin, President, Sensis Corporation; Mr. Steve Lefebvre, President, Empire ABC; Mr. Andrew Reeves, Owner, Reeves Farms; Mrs. Nancy Hourigan, Owner, Hourigan's Dairy Farm; Mr. Tom DeMarree, Owner, Demree Orchards; Mr. Orrin MacMurray, Chairman, C & S Companies; Mr. Travis Glazier, Director of Intergovernmental Relations, Onondaga County Executive; and Mr. Thomas Squires, Cayuga County Administrator.

Apr. 21, 2011, 9:00 a.m. Full Committee Hearing entitled, "Federal Policies Affecting Innovation and Job Growth in the Biotech and Pharmaceutical Industries" located at Atkinson Hall, the University of California, San Diego, 9500 Gilman Drive, La Jolla, CA. Witnesses: David Gollaher, M.D., President and CEO, California Healthcare Institute; Mr. Duane J. Roth, CEO, Connect; Mr. Joseph D. Panetta, President and CEO, BIOCOM; Mr. Alexis Lukianov, Chairman of the Board and Chief Executive Officer, NuVasive, Inc.; Ms. Marye Anne Fox, Chancellor, University of California, San Diego.

May 3, 2011, 9:30 a.m. Full Committee Hearing entitled, "Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation." Witnesses: Hon. David S. Ferriero, Archivist of the United States, National Archives and Records Administration; Mr. Brook Colangelo, Chief Information Officer, Office of Administration, Executive Office of the President.

May 4, 2011, 1:30 p.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Is This Any Way to Treat Our Troops? Part III: Transition Delays." Witnesses: Mr. John Medve, Executive Director, VA/DOD Collaboration Service, U.S. Department of Veterans' Affairs; Mr. Dan Bertoni, Director, Education, Workforce, and Income Security, U.S. GAO; Ms. Lynn Simpson, Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness, U.S. Department of Defense; Mr. Mark Bird, IT Team Assistant Director, U.S. GAO; and Mr. Randall B. Williamson, Health Care Team Director, U.S. GAO.

May 6, 2011, 10:00 a.m. Full Committee Field Hearing entitled, "Pathways To Energy Independence: Hydraulic Fracturing and Other New Technologies", held at the Kern County Board of Supervisors Chambers, 1115 Truxtun Avenue, Bakersfield, California. Witnesses: Assemblywoman Shannon Grove, 32<sup>nd</sup> District of California; Mr. Rock Zierman, CEO, California Independent Petroleum Association; William F. Whitsitt, Ph.D., Executive Vice President, Devon Energy; Mr. Steve Layton, President, E&B Natural Resources Management Corporation; and Mr. Tupper Hull, Vice President Western States Petroleum Association.

May 10, 2011, 12:30 p.m. Full Committee Hearing entitled, "The Future of Capital Formation." Witnesses: Hon. Mary Schapiro, Chairman, U.S. Securities and Exchange Commission; Ms. Meredith Cross, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission; Mr. Barry E Silbert, Founder and Chief Executive Officer, Second Market, Inc.; Mr. Eric Koester, Chief Operation Officer and Founder, Zaarly, Inc.; Richard W. Rahn, Ph.D., Senior Fellow, Cato Institute; Mr. Jon Macey, Sam Harris Professor of Corporate Law, Securities Law and Corporate Finance, Yale Law School; Hon. Roel Campos, Partner, Locke Lord Bissell & Liddell, LLP.

May 11, 2011, 1:30 p.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "USAID: Following the Money." Witnesses: Hon. Rajiv Shah, Administrator, U.S. AID; and Hon. Donald Gambatesa, IG, U.S. AID.

May 11, 2011, 2:00 p.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "Transparency as an Alternative to the Federal Government's Regulation of Risk Retention." Witnesses: Mr. Edward DeMarco, Acting Director, Federal Housing Finance Agency; Anthony B. Sanders, Ph.D., Professor, George Mason University; Mr. Joshua Rosner, Managing Director, Graham Fisher & Co., Inc.; and Ms. Janneke Ratcliffe, Executive Director, Center for Community Capital, UNC.

May 12, 2011, 8:45 a.m. Subcommittee on Health Care, District of Columbia, Census, and the National Archives Hearing entitled, "The District of Columbia's Fiscal Year 2012 Budget: Ensuring Fiscal Sustainability." Witnesses: Hon. Vincent Gray, Mayor, District of Columbia; Hon. Kwame Brown, Chairman, D.C. City Council; Natwar Gandhi, Ph.D., Chief Financial Officer, District of Columbia; Mr. Matt Fabian, Managing Director, Municipal Market Advisors; and Alice Rivlin, Ph.D., Brookings Institution.

May 12, 2011, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service, and Labor Policy Hearing entitled, "Where Have All the Letters Gone? – The Mailing Industry and Its Future." Witnesses: Mr. Dave Riebe, President of Logistics and Distribution, Quad/Graphics; Mr. Jerry

Cerasale, Senior Vice President, Government Affairs, Direct Marketing Association; Mr. Rob Melton, Vice President of Specialty Paper, Domtar; and Mr. Todd Haycock, Director, Postal Services, 3i Infotech, North America.

May 12, 2011, 1:30 p.m. Full Committee Hearing entitled, "Politicizing Procurement: Will President Obama's Proposal Curb Free Speech & Hurt Small Business?" Witnesses: The Honorable Daniel Gordon, Administrator for Office of Federal Procurement Policy, OMB; Mr. Alan Chvotkin, Senior Vice President, Professional Services Counsel; Mr. Mark Renaud, Partner, Wiley Rein, LLP; Ms. M.L. Mackey, CEO, Beacon Interactive Systems; Ms. Lawrie Hollingsworth, President, Asset Recovery Technologies, Inc.; Mrs. Marion Blakey, President and CEO, Aerospace Industries Association; Mr. Brad Smith, Professor Capital University Law School.

May 13, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency, and Financial Management Hearing entitled, "Financial Management at the Department of Homeland Security." Witnesses: Ms. Peggy Sherry, Deputy Chief Financial Officer and Acting CFO, DHS.

May 24, 2011, 9:00 a.m. Full Committee Hearing entitled, "Pain at the Pump: Policies that Suppress Domestic Production of Oil and Gas." Witnesses: Hon. Lisa P. Jackson, Administrator, Environmental Protection Agency; and Hon. David J. Hayes, Deputy Secretary, U.S. Department of the Interior.

May 24, 2011, 1:30 p.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau." Witnesses: Hon. Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau; Mr. Todd Zywicki, Foundation Professor of Law, George Mason University; David S. Evans, Ph.D., Chairman, Global Economics Group; Mr. Adam Levitin, Associate Professor of Law, Georgetown University Law Center; and Mr. Andrew Pincus, Partner, Mayer Brown Rowe & Maw, LLP.

May 25, 2011, 9:30 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Unfunded Mandates, Regulatory Burdens and the Role of the Office of Information and Regulatory Affairs." Witness: Hon. Cass Sunstein, Administrator, Office of Information Regulatory Affairs, OMB.

May 25, 2011, 1:30 p.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Cybersecurity: Assessing the Immediate Threat to the United States." Witnesses: Rear Admiral Michael A. Brown, Director, Cybersecurity Coordination, U.S. Department of Homeland Security; Mr. James A. Lewis, Director of Technology and Public Policy Program, CSIS; Mr. Sean McGurk, Director, National Cybersecurity and Communications Integration Center, U.S. Department of Homeland Security; Mr. Dean Turner, Director, Global Intelligence Network Symantec Security Response; Mr. Phillip Bond, President, TechAmerica.

May 25, 2011, 1:30 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "How Federal Reserve Policies Add to Hard Times at the Pump." Witnesses: Mr. Vincent R. Reinhart, Resident Scholar, AEI; Robert Murphy, Ph.D., Economist, Institute for Energy Research; Dean Baker, Ph.D., Co-Director, Center for Economic Policy Research;

Mr. Greg Wannemacher, President, Wannemacher Total Logistics; and Ms. Karen Kerrigan, President and CEO, Small Business and Entrepreneurship Council.

May 26, 2011, 9:30 a.m. Subcommittee on the Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Rightsizing the Federal Workforce." Witnesses: Hon. Cynthia M. Lummis, U.S. House of Representatives; Hon. Thomas Marino, U.S. House of Representatives; Mr. Andrew G. Biggs, Resident Scholar, AEI; and Mr. William R. Dougan, National President, National Federation of Federal Employees.

June 1, 2011, 1:30 p.m. Subcommittee on the Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Official Time: Good Value for the Taxpayers?" Witnesses: Hon. Phil Gingrey, M.D., U.S. House of Representatives; Mr. Timothy Curry, Deputy Associate Director, Partnership and Public Relations, U.S. Office of Personnel Management; Mr. James Sherk, Senior Policy Analyst in Labor Economics, The Heritage Foundation; Mr. F. Vincent Vernuccio, Labor Policy Counsel, CEI; Mr. John Gage, National President, American Federation of Government Employees.

June 1, 2011, 2:00 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Duplication, Overlap, and Inefficiencies in Federal Welfare Programs." Witnesses: Ms. Patricia Dalton, Chief Operating Officer, Government Accountability Office; Mr. Robert Rector, Senior Research Fellow, The Heritage Foundation; Mr. John Mashburn, Executive Director, The Carleson Center for Public Policy; Ms. Lisa Hamler-Fugitt, Executive Director, Ohio Association of Second Harvest Foodbanks.

June 2, 2011, 9:30 a.m. Full Committee Hearing entitled, "Making the Gulf Coast Whole Again: Assessing the Recovery Efforts of BP and the Obama Administration After the Oil Spill." Witnesses: The Honorable Haley Barbour, Governor, State of Mississippi; Mr. Craig Taffaro, President, St. Bernard's Parish, LA; Mr. Bill Williams, Commissioner, Gulf County, FL; Mr. Cory Kief, President, Offshore Towing, Inc.; Mr. Frank Rusco, Director, Energy and Science Issues, Government Accountability Office; Mr. Michael Bromwich, Director, Bureau of Ocean Energy Management, Regulation, and Enforcement, U.S. Department of Interior.

June 2, 2011, 12:30 p.m. Subcommittee on Government Organization, Efficiency, and Financial Management Hearing entitled, "IRS E-file and Identity Theft." Witnesses: Mr. Jim White, Director of Strategic Issues, Government Accountability Office; Ms. Sharon Hawa, Identity Theft Victim; Ms. Lori Petraco, Identity Theft Victim; Ms. LaVonda Thompson, Identity Theft Victim; The Honorable Douglas H. Shulman Commissioner, Internal Revenue Service.

June 2, 2011, 1:30 p.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "FDA Medical Device Approval: Is There a Better Way?" Witnesses: Congressman Erik Paulsen, Member of Congress, R-Minnesota, 3<sup>rd</sup> District; Dr. Jeffrey (Jeff) Shuren, Director, Centers for Devices and Radiological Health, U.S. Food and Drug Administration; Mr. Jack W. Lasersohn, General Partner, The Vertical Group; David L. Gollaher, PhD, President and CEO, California Healthcare Institute (CHI); Dr. Rita Redberg, Professor of Medicine, University of California San Francisco, Editor of the Archives of Internal Medicine.

June 3, 2011, 9:30 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "H.R. 735 and Project Labor Agreements: Restoring Competition and Neutrality to Government Construction Projects." Witnesses: The Honorable John Sullivan, U.S. House of Representatives; Mr. Dan Gordon, Administrator, Federal Procurement Policy, Office of Management and Budget; Ms. Susan Brita, Deputy Administrator, U.S. General Services Administration; Mr. Maurice Baskin, Counsel, Associated Builders and Contractors, Inc.; Mr. David Tuerk, Professor and Chairman, Suffolk University and Beacon Hill Institute; Mr. Kirby Wu, President, Wu & Associates; Mr. Mike Kennedy, Counsel, The Associated General Contractors of America.

June 13, 2011, 1:00 p.m. Full Committee Hearing entitled, "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?" Witnesses: Mr. Morton Rosenberg, Former Specialist in American Public Law, American Law Division, Congressional Research Service, Library of Congress; Mr. Todd Tatelman, Legislative Attorney, Congressional Research Service's American Law Division; Mr. Louis Fisher, Scholar in Residence, The Constitution Project; Professor Charles Tiefer, Commissioner, Commission on Wartime Contracting.

June 14, 2011, 9:30 a.m. Full Committee Hearing entitled, "Achieving Transparency and Accountability in Federal Spending." Witnesses: The Honorable Earl Devaney, Chairman, Recovery Accountability and Transparency Board; Ms. Ellen Miller, Executive Director, Sunlight Foundation; Mr. Patrick Quinlan, Chief Executive Officer, Rivet Software; Ms. Kim Wallin, Controller, State of Nevada; Mr. Craig Jennings, Director of Federal Fiscal Policy, OMB Watch.

June 15, 2011, 9:30 a.m. Full Committee Hearing entitled, "Operation Fast and Furious: Reckless Decisions, Tragic Outcomes." Witnesses: The Honorable Charles E. Grassley, Ranking Member, U.S. Senate Committee on the Judiciary; Ms. Josephine Terry, Mother of Late Border Agent Brian Terry; Ms. Michelle Terry Balogh, Sister of Late Border Agent Brian Terry; Mr. Robert Heyer, Cousin of Late Border Agent Brian Terry; Special Agent John Dodson, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Phoenix Field Division; Special Agent Olindo "Lee" Casa, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Phoenix Field Division; Special Agent Peter Forcelli, Group Supervisor, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Phoenix Field Division; The Honorable Ronald Weich, Assistant Attorney General, U.S. Department of Justice.

June 15, 2011, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Postal Infrastructure: How Much Can We Afford?" Witnesses: Mr. David Williams, Vice President, Network Operations Management, United States Postal Service; Mr. Dean Granholm, Vice President, Delivery and Post Office Operations, United States Postal Service; Mr. Phillip Herr, Director, Physical Infrastructure Issues, U.S. Government Accountability Office; Mr. Michael Winn, President, Greylock Associates, LLC; Mr. Joe Hete, President and CEO, ATSG, Inc.; Mr. Cliff Guffey, President, American Postal Workers Union, AFL-CIO.

June 17, 2011, 12:30 p.m. Full Committee Field Hearing entitled, "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise", held at the Charleston County Council Chambers, The Lonnie Hamilton Building, 4045 Bridge View Drive, North Charleston, South Carolina.

Witnesses: Mr. Philip Miscimarra, Labor Attorney, Morgan, Lewis & Bockius LLP; Mr. Neil Whitman, President, Dunhill Staffing Systems; Professor Julius G. Getman, Earl E. Sheffield Regents Chair, University of Texas at Austin School of Law; Ms. Cynthia Ramaker, Employee, The Boeing Company (Testifying on Her Own Behalf); Mr. Lafe Solomon, Acting General Counsel, National Labor Relations Board; The Honorable Nikki Haley, Governor of the State of South Carolina; The Honorable Alan Wilson, Attorney General of the State of South Carolina.

June 21, 2011, 1:00 p.m. Full Committee Hearing entitled, "The Hatch Act: The Challenges of Separating Politics from Policy." Witnesses: Mr. Richard W. Painter, Professor of Corporate Law, University of Minnesota Law School, Former Associate White House Counsel to President George W. Bush 2005-2007; Mr. Scott A. Coffina, Partner, Montgomery, McCracken, Walker & Rhoads, LLP, Former Associate White House Counsel to President George W. Bush 2007-2009; Ms. Ana Galindo-Marrone, Hatch Act Unit Chief, U.S. Office of Special Counsel.

June 22, 2011, 1:30 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Lasting Implications of the General Motors Bailout." Witnesses: Mr. Ron Bloom, Former Senior Advisor to the Secretary of the Treasury, U.S. Department of the Treasury; Mr. Vince Snowbarger, Deputy Director, Pension Benefits Guaranty Corporation; Mr. Dan Ikenson, Associate Director, Herbert A. Stiefel Center for Trade Policy Studies at the Cato Institute; Mr. Bruce Gump, Vice Chairman, Delphi Salaried Retiree Association; Dr. Thomas Kochan, Professor, Massachusetts Institute of Technology; Ms. Shikha Dalmia, Senior Analyst, Reason Foundation.

June 22, 2011, 1:30 p.m. Subcommittee on TARP, Financial Services, and the Bailout of Public and Private Programs Hearing entitled, "The Changing Role of the FDIC." Witnesses: The Honorable Sheila Bair, Chairman, Federal Deposit Insurance Corporation.

June 23, 2011, 9:30 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Improving Oversight and Accountability in Federal Grant Programs." Witnesses: Ms. Jeanette Franzel, Managing Director, Financial Management Assurance Team, Government Accountability Office; Ms. Natalie Keegan, Analyst in American Federalism & Emergency Management Policy, Congressional Research Service; Ms. Cynthia Schnedar, Acting Inspector General, Department of Justice; The Honorable Danny Werfel, Controller, Office of Federal Financial Management, Office of Management and Budget; The Honorable Tom Coburn, United States Senate.

June 24, 2011, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and National Archives Hearing entitled, "Washington Metropolitan Area Transit Authority: Is There a Security Gap?" Witnesses: Mr. Richard Sarles, General Manager and Chief Executive Officer, Washington Metropolitan Area Transit Authority; Chief Michael Taborn, Metro Transit Police Division; Chief Cathy Lanier, Metropolitan Police Department; Mr. Anthony Griffin, County Executive, Fairfax County Government.

June 24, 2011, 9:30 a.m. Joint Hearing of the Subcommittee on National Security, Homeland Defense and Foreign Operations with the Committee on Foreign Affairs' Subcommittees on the Western Hemisphere and the Middle East and South Asia entitled, "Venezuela's Sanctionable Activity."

Witnesses: The Honorable Daniel Benjamin, Ambassador-at-Large, Coordinator for Counterterrorism, U.S. Department of State; Mr. Kevin Whitaker, Acting Deputy Assistant Secretary for Western Hemisphere Affairs, U.S. Department of State; Mr. Thomas Delare, Director for Terrorism Finance and Economic Sanctions Policy, U.S. Department of State; Mr. Adam J. Szubin, Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

July 7, 2011, 9:30 a.m. Full Committee Hearing entitled, "Cybersecurity: Assessing the Nation's Ability to Address the Growing Cyber Threat." Witnesses: The Honorable Greg Shaffer, Acting Deputy Under Secretary, National Protection and Programs Directorate, U.S. Department of Homeland Security; Mr. James A. Baker, Associate Deputy Attorney General, U.S. Department of Justice; Mr. Robert J. Butler, Deputy Assistant Secretary for Cyber Policy, U.S. Department of Defense; Mr. Ari Schwartz, Senior Internet Policy Advisor, National Institute of Standards and Technology, U.S. Department of Commerce.

July 8, 2011, 10:00 a.m. Joint Hearing of the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending and the Committee on Education and the Workforce's Subcommittee on Higher Education and Workforce Training entitled, "The Gainful Employment Regulation: Limiting Job Growth and Student Choice." Witnesses: Dr. Dario A. Cortes, President, Berkeley College; Ms. Karla Carpenter, Graduate of Herzing University; Dr. Anthony Carnevale, Director, Center on Education and Workforce, Georgetown University; Mr. Harry C. Alford, President and CEO, National Black Chamber of Commerce.

July 12, 2011, 1:00 p.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Fulfilling a Legal Duty: Triggering a Medicare Plan from the Administration." Witnesses: Mr. Jonathan Blum, Deputy Administrator and Director, Centers for Medicare and Medicaid Services; Dr. Charles P. Blahous III, Public Trustee of Social Security and Medicare; Dr. Joseph Antos, Wilson H. Taylor Scholar in Health Care and Retirement Policy, American Enterprise Institute; Mr. James C. Capretta, Fellow, Ethics and Public Policy Center; Dr. Paul N. Van de Water, Senior Fellow, Center on Budget and Policy Priorities.

July 13, 2011, 9:30 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "TSA Oversight Part 2: Airport Perimeter Security." Witnesses: Mr. John Sammon, Assistant Administrator, U.S. Transportation Security Administration; Mr. Rafi Ron, President, New Age Security Solutions, Former Directory of Security Tel Aviv-Ben Gurion International Airport; Mr. Stephen M. Lord, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office; Mr. William Parker, Inspector, K-9 Unit, Amtrak Police Department; Mr. TJ "Jerry" Orr, Airport Director and Operator, Charlotte International Airport.

July 14, 2011, 9:30 a.m. Full Committee Hearing entitled, "Consumer Financial Protection Efforts: Answers Needed." Witness: The Honorable Elizabeth Warren, Assistant to the President and Special Adviser to the Secretary of the Treasury for the Consumer Financial Protection Bureau.

July 14, 2011, 1:30 p.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "EPA's Appalachian Energy Permittorium: Job Killer or Job Creator?" Witnesses: The Honorable Shelley Moore Capito (R, WV- 2), U.S. House of Representatives; Mr. Tom

Mackall, President, Sterling Mining; Mr. Chris Hamilton, Senior Vice President, West Virginia Coal Association; Mr. Joe Lovett, Executive Director, Appalachian Center for Economy and the Environment; Mr. Roger Horton, Chairman, Safety Committee Local 5958, Co-Chair, Mountain Top Mining Coalition; Mr. John Stilley, President, Amerikohl Mining Inc.; Ms. Nancy Stoner, Acting Assistant Administrator for Water, United States Environmental Protection Agency; Ms. Margaret E. Gaffney-Smith, Chief, Regulatory Community of Practice, Army Corps of Engineers.

July 14, 2011. 1:30 p.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Transparency and Federal Management IT Systems." Witnesses: Mr. Vivek Kundra, Federal Chief Information Officer, The Office of Management and Budget; The Honorable Roger Baker, Assistant Secretary for Information and Technology, U.S. Department of Veterans Affairs; Mr. Lawrence Gross, Deputy Chief Information Officer, U.S. Department of the Interior; Mr. Owen Barwell, Acting Chief Financial Officer, U.S. Department of Energy; Mr. Joel Willemsen, Managing Director of Information Technology Issues, Government Accountability Office.

July 26, 2011, 10:00 a.m. Full Committee Hearing entitled, "Operation Fast and Furious: The Other Side of the Border." Witnesses: Mr. Darren Gil, Former ATF Attaché to Mexico; Mr. Lorren Leadmon, ATF Intelligence Operations Specialist; Special Agent Jose Wall, ATF Senior Special Agent, Tijuana, Mexico; Special Agent William Newell, Former ATF Special Agent in Charge, Phoenix Field Division; Special Agent Carlos Canino, ATF Acting Attaché to Mexico; Special Agent William McMahon, ATF Deputy Assistant Director for Field Operations (West, including Phoenix and Mexico).

July 26, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Lights Out: How EPA Regulations Threaten Affordable Power and Job Creation." Witnesses: The Honorable Robert Perciasepe, Deputy Administrator, Environmental Protection Agency; Ms. Janet Henry, Deputy General Counsel, American Electric Power; Mr. Mike Carey, President, Ohio Coal Association; Dr. Joel Schwartz, Professor of Environmental Epidemiology, Harvard School of Public Health.

July 27, 2011, 9:30 a.m. Full Committee Hearing entitled, "Disposal of Federal Real Property: Legislative Proposals." Witnesses: The Honorable Jason Chaffetz, Member of Congress; The Honorable Mike Quigley, Member of Congress; The Honorable Jeff Denham, Member of Congress; The Honorable Daniel Werfel, Controller, Office of Management and Budget; Mr. David Foley, Deputy Commissioner, Public Buildings Service, U.S. General Services Administration; Ms. Theresa Gullo, Deputy Assistant Director, Budget Analysis Division, Congressional Budget Office; Mr. Joseph Moravec, Former Commissioner, Public Buildings Administration, U.S. General Services Administration; Ms. Maria Foscarinis, Executive Director, National Center on Homelessness & Poverty.

July 27, 2011, 1:30 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "The Thrift Savings Plan: Helping Federal Employees Achieve Retirement Security." Witnesses: Mr. Gregory Long, Executive Director, Federal Retirement Thrift Investment Board; Mr. Clifford Dailing, Chairman, Employee Thrift Advisory Council, Secretary-Treasurer,

National Rural Letter Carriers' Association; Mr. Joseph Beaudoin, President, National Active and Retired Federal Employees Association.

July 28, 2011, 9:30 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Improper Medicare Payments: \$48 Billion in Waste?" Witnesses: The Honorable Daniel R. Levinson, Inspector General, Office of the Inspector General, Health & Human Services; Ms. Michelle Snyder, Deputy Chief Operating Officer, Centers for Medicare & Medicaid Services; Ms. Kay Daly, Director of Financial Management and Assurance, Government Accountability Office; Ms. Kathleen King, Director of Health Care, Government Accountability Office.

July 28, 2011, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census, and the National Archives Hearing entitled, "Impact of Obamacare on Job Creators and Their Decision to Offer Health Insurance." Witnesses: Mr. Andrew Puzder, CEO, CKE Restaurants; Mr. Grady Payne, Connor Industries, Inc.; Mr. Will Morey, President and CEO, Morey's Pier; Ms. Victoria J. Braden, President and CEO, Braden Benefit Strategies, Inc.; Mr. Michael J. Brewer, President, Lockton Benefit Group; Mr. Terry Gardiner, Vice President, Small Business Majority.

Sept. 13, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Take Two: The President's Proposal to Stimulate the Economy and Create Jobs." Witnesses: Professor John Taylor, Mary and Robert Raymond Professor of Economics at Stanford University and the George P. Shultz Senior Fellow in Economics at the Hoover Institution; Ms. Diana Furchtgott-Roth, Senior Fellow, Manhattan Institute; Dr. Heather Boushey, Senior Economist, Center for American Progress; Mr. Peter Schiff, CEO, Euro Pacific Capital Inc.; Mr. Brink Lindsey, Senior Scholar, Kauffman Foundation.

Sept. 14, 2011, 9:30 a.m. Full Committee Hearing entitled, "How A Broken Process Leads to Flawed Regulations." Witnesses: John Graham, Ph. D., Dean, Indiana University School of Public and Environmental Affairs, former OIRA Administrator; Mrs. Robbie LeValley, Co-owner, Homestead Meats, Member of the Board of Directors, National Cattlemen's Beef Association; Mr. David Arkush, Director, Public Citizen's Congress Watch; Mr. David Barker, Owner, Vida Preciosa International, Inc.; Mr. Mathew Palmer, Flight Attendant, Delta Air Lines (testifying on his own behalf); The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

Sept. 15, 2011, 9:30 a.m. Subcommittee on TARP, Financial Services, and the Bailout of Public and Private Programs Hearing entitled, "Crowdfunding: Connecting Investors and Job Creators." Witnesses: Ms. Meredith Cross, Director, Division of Corporation Finance, Security Exchange Commission; Ms. Dana Mauriello, Founder and President, Profounder; Mr. Jeff Lynn, Chief Executive Officer, Seedrs Limited; Mr. Sherwood Neiss, Cofounder, FLAVORx; Mr. Micheal Migliozi, Managing Partner, Forza Migliozi, LLC; Mr. Mercer Bullard, Associate Professor of Law, The University of Mississippi.

Sept. 15, 2011, 10:30 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Defense Department Contracting in Afghanistan: Are We Doing Enough to Combat Corruption?" Witnesses: Mr. Gary J. Motsek, Deputy Assistant Secretary of

Defense for Program Support, Office of the Assistant Secretary of Defense (Logistics & Material Readiness), Office of the Under Secretary of Defense (Acquisition, Technology & Logistics), U.S. Department of Defense; Mr. Kim Denver, Deputy Assistant Secretary of the Army for Procurement, U.S. Department of Defense; Brigadier General Stephen Townsend, USA, Director, Joint Staff Pakistan Afghanistan Coordination Cell, U.S. Department of Defense.

Sept. 21, 2011, 10:00 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Examining Abuses of Medicaid Eligibility Rules." Witnesses: Mr. Stephen Moses, President, Center for Long-Term Care Reform; Mr. David Dorfman, Attorney, Law Offices of David A. Dorfman; Ms. Janice Eulau, Assistant Administrator, Medicaid Services Division, Suffolk County Department of Social Services; The Honorable Julie Hamon, Director, Illinois Department of Healthcare and Family Services.

Sept. 22, 2011, 9:30 a.m. Full Committee Hearing entitled, "How Obama's Green Energy Agenda is Killing Jobs." Witnesses: The Honorable Hilda Solis, Secretary of Labor, United States Department of Energy; Mr. Daniel Poneman, Deputy Secretary, United States Department of Energy; The Honorable Keith Hall, Commissioner, Bureau of Labor Statistics, United States Department of Labor.

Sept. 22, 2011, 2:00 p.m. Joint Hearing of the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs and the Committee on Financial Services Subcommittee on Oversight and Investigations entitled, "Potential Conflicts of Interest at the SEC: The Becker Case." Witnesses: The Honorable Mary Shapiro, Chairman, U.S. Securities and Exchange Commission; Mr. H. David Kotz, Inspector General, U.S. Securities and Exchange Commission; Mr. David M. Becker, Former General Counsel, U.S. Securities and Exchange Commission.

Sept. 23, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "The Department of Defense: Challenges in Financial Management." Witnesses: Mr. Mark Easton, Deputy Chief Financial Officer, U.S. Department of Defense; Mr. Daniel Blair, Deputy Inspector General for Auditing, Office of Inspector General, U.S. Department of Defense; Mr. Asif Khan, Director of Financial Management and Assurance, Government Accountability Office.

Oct. 4, 2011, 10:00 a.m. Full Committee Hearing entitled, "Where is the Peace Dividend? Examining the Final Report to Congress of the Commission on Wartime Contracting." Witnesses: Commissioner Clark Kent Ervin, Commission on Wartime Contracting; Commissioner Katherine Schinasi, Commission on Wartime Contracting; Commissioner Michael J. Thibault, Co-Chair, Commission on Wartime Contracting; Commissioner Robert J. Henke, Commission on Wartime Contracting; Commissioner Christopher Shays, Co-Chair, Commission on Wartime Contracting; Commissioner Charles Tiefer, Commission on Wartime Contracting; Commissioner Dov S. Zakheim, Commission on Wartime Contracting; Commissioner Grant S. Green (Invited), Commission on Wartime Contracting.

Oct. 6, 2011, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Obamacare's Employer Penalty and its Impact on Temporary Workers." Witnesses: Mr. Ed Lenz, Senior Vice President, American Staffing Association; Mr. John Uprichard,

President/CEO, Find Great People International; Mr. Tav Gauss, President/CEO, The Action Group – Human Resources Solution; Mr. Topher Spiro, Managing Director, Health Policy, The Center for American Progress.

Oct. 6, 2011, 9:30 a.m. Subcommittee on Technology, Information Policy, and Intergovernmental Relations and Procurement Reform Hearing entitled, “Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?” Witnesses: Mr. William T. Woods, Director, Acquisition and Sourcing Management, Government Accountability Office; Mr. Steven Shaw, Deputy General Counsel for Contractor Responsibility, Officer of the Air Force General Counsel; Mr. Richard A. Pelletier, Suspension and Debarment Official, Environmental Protection Agency; Nick Nayak, Ph.D., Chief Procurement Officer, Department of Homeland Security; Ms. Nancy Gunderson, Deputy Assistant Secretary, Office of Grants and Acquisition Policy and Accountability, U.S. Department of Health and Human Services.

Oct. 12, 2011, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, “Status Report on the Transition to a Civilian-Led Mission in Iraq.” Witnesses: The Honorable Patrick F. Kennedy, Under Secretary for Management, United States Department of State; The Honorable Alexander Vershbow, Assistant Secretary for International Security Affairs, United States Department of Defense; The Honorable Alan F. Estevez, Assistant Secretary for Logistics and Materiel Readiness United States Department of Defense.

Oct. 12, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, “Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Business and Consumers.” Witnesses: Mr. Jeremy Anwyl, CEO, Edmunds.com; Marlo Lewis, Ph.D., Senior Fellow, Competitive Enterprise Institute; Mr. Roland Hwang, Transportation Program Director, Natural Resources Defense Council; Mr. Scott Grenerth, Independent Trucker, Owner-Operator Independent Driver’s Association; The Honorable David Strickland, Administrator, National Highway Traffic Safety Administration; The Honorable Gina McCarthy, Assistant Administrator for the Office of Air and Radiation, Environmental Protection Agency; Ms. Margo Oge, Director of the Office of Transportation and Air Quality, Environmental Protection Agency.

Oct. 27, 2011, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, “Examining Obamacare’s Hidden Marriage Penalty and Its Impact on the Deficit.” Witnesses: Douglas Holtz-Eakin, Ph.D., President, American Action Forum, Former CBO Director; Ms. Diana Furchtgott-Roth, Senior Fellow, Manhattan Institute for Policy Research; Richard Burkhauser, Ph.D., Professor of Economics, Cornell University; Sara R. Collins, Ph.D., Vice President, Affordable Health Insurance, The Commonwealth Fund.

Oct. 27, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, “Internal Control Weaknesses at the Department of Homeland Security.” Witnesses: Ms. Peggy Sherry, Deputy Chief Financial Officer, Department of Homeland Security; Mr. Robert West, Chief Information Security Officer, Department of Homeland Security; Mr. John McCoy, Deputy Assistant Inspector General for Audits, Office of the Inspector General, Department of Homeland Security.

Nov. 1, 2011, 1:00 p.m. Full Committee Hearing entitled, "Lights Out II: Should EPA Take A Step Back to Fully Consider Utility MACT's Impact on Job Creation?" Witnesses: The Honorable Kenneth Cuccinelli, II, Attorney General, Commonwealth of Virginia; The Honorable Robert Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency; Josh Bivens, Ph.D., Economist, Economic Policy Institute.

Nov. 2, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "The Green Energy Debacle: Where Has All the Taxpayer Money Gone?" Witnesses: The Honorable Gregory H. Friedman, Inspector General, U.S. Department of Energy; Mr. Elliot Lewis, Assistant Inspector General, U.S. Department of Energy; W. David Montgomery, Ph.D., Senior Vice President, National Economic Research Associates, Inc.; Mr. Greg Kats, President, Capital-E; Mr. Brett McMahon, Vice President of Business Development, Miller & Long Concrete Construction.

Nov. 2, 2011, 10:00 a.m. Subcommittee on Technology, Information Policy, and Intergovernmental Relations and Procurement Reform Hearing entitled, "Are Government Contractors Exploiting Worker's Overseas? Examining Enforcement of the Trafficking Victims Protection Act." Witnesses: Ms. Liana Wyler, Senior Analyst, Congressional Research Service; Mr. David Isenberg, Independent Analyst and Writer; Mr. Nick Schwellenbach, Director of Investigations, Project on Government Oversight; Mr. Sam W. McCahon, Founder, McCahon Law; Ms. Evelyn R. Klemstine, Assistant Inspector General for Audits, U.S. Department of State; The Honorable Kenneth P. MooreField, Deputy Inspector General for Special Plans & Operations, U.S. Department of Defense; Ms. Linda Dixon, Combating Trafficking in Persons Program Manager, U.S. Department of Defense; Mr. Michael P. Howard, Chief Operating Officer, Army and Air Force Exchange Service (AAFES).

Nov. 2, 2011, 10:30 a.m. Subcommittee on TARP, Financial Services, and the Bailout of Public and Private Programs Hearing entitled, "America's Innovation Challenge: What Obstacles do Entrepreneurs Face?" Witnesses: Mr. Eric Koester, Co-founder and CEO, Zaarly, Inc.; Ms. Lonna Williams, CEO, Ridge Diagnostics; Tsvi Goldenberg, Ph. D., CEO, eemRa.

Nov. 4, 2011, 9:30 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Identity Theft and Tax Fraud: Growing Problems for the Internal Revenue Service." Witnesses: The Honorable Richard Nugent (FL-05), U.S. House of Representative; The Honorable J. Russell George, Treasury Inspector General for Tax Administration; Mr. Steven T. Miller, Deputy Commissioner for Services & Enforcement, Internal Revenue Service; Mr. Ronald A. Cimino, Deputy Assistant Attorney General for Criminal Matters, Tax Division, United States Department of Justice.

Nov. 14, 2011, 9:00 a.m. Full Committee Hearing entitled, "Delphi Pension Fallout: The Federal Government Picked Winners and Losers, So Who Won and Who Lost?" Witnesses: Mr. Steve Gebbia; Mr. Chuck Cunningham; Mr. Den Black; Mr. Bruce Gump; Ms. Mary Miller; Mr. Tom Rose; Ms. Barbara Bovbjerg, Managing Director, Education, Workforce and Income Security Issues, Government Accountability Office; Mr. Vincent K. Snowbarger, Deputy Director for Operations, Pension Benefit Guaranty Corporation.

Nov. 15, 2011, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Back to the Basics: Is OPM Meeting its Mission?" Witnesses: The Honorable John Berry, Director, U.S. Office of Personnel Management; Mr. Matthew Perry, Chief Information Officer, U.S. Office of Personnel Management; The Honorable Patrick E. McFarland, Inspector General, U.S. Office of Personnel Management; Mr. Jeffrey E. Cole, Deputy Assistant Inspector General for Audits, U.S. Office of Personnel Management; Mr. Pasquale "Pat" M. Tamburrino, Jr., Deputy Assistant Secretary of Defense for Civilian Personnel Policy, U.S. Department of Defense; Ms. Valerie C. Melvin, Director, Information Management and Human Capital Issues, U.S. Government Accountability Office; Mr. Patrick W. Manzo, Executive Vice President, Global Customer Service and Chief Privacy Officer, Monster Worldwide, Inc.; and Mr. Mark Conway, Senior Vice President and Chief Information Officer, Monster Worldwide, Inc.

Nov. 15, 2011, 9:30 a.m. Subcommittee on TARP, Financial Services, and the Bailout of Public and Private Programs Hearing entitled, "How Roadblocks in Public Markets Prevent Job Creation on Main Street." Witnesses: Mr. Eric Noll, Executive Vice President and Co-Head of U.S. Listings and Cash Execution, NASDAQ OMX Group, Inc.; Mr. Joseph Mecane, Executive Vice President and Chief Administrative Officer for U.S. Markets, NYSE Euronext.

Nov. 15, 2011, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Progress of the Obama Administration's Policy Towards Iran." Witnesses: Mr. Mark Dubowitz, Executive Director, Foundation for Defense of Democracies; Kenneth M. Pollack, Ph.D., Director, Saban Center for Middle East Policy, Brookings Institution; Suzanne Maloney, Ph.D., Senior Fellow, Foreign Policy, Saban Center for Middle East Policy, Brookings Institution; Mr. Adam J. Szubin, Director, Office of Foreign Assets Control, U.S. Department of the Treasury; Mr. Henry T. Wooster, Acting Deputy Assistant Secretary, Bureau of Near Eastern Affairs, U.S. Department of State; Colin H. Kahl, Ph.D., Deputy Assistant Secretary of Defense for the Middle East, U.S. Department of Defense.

Nov. 16, 2011, 10:00 a.m. Full Committee Hearing entitled, "Pay for Performance: Should Fannie and Freddie Executives Be Receiving Millions in Bailouts?" Witnesses: Mr. Michael J. Williams, President and Chief Executive Officer, Fannie Mae; Mr. Charles E. "Ed" Haldeman, Jr., Chief Executive Officer, Freddie Mac; Mr. Edward J. DeMarco, Acting Director, Federal Housing Finance Agency.

Nov. 16, 2011, 1:30 p.m. Subcommittee on Technology, Information Policy, and Intergovernmental Relations and Procurement Reform Hearing entitled, "On the Frontlines of Acquisition Workforce's Battle Against Taxpayer Waste." Witnesses: Mr. Daniel Gordon, Administrator, Office of Federal Procurement Policy, Executive Office of the President; Mr. John Hutton, Director, Acquisition and Sourcing Management, U.S. Government Accountability Office; Mr. Roger Jordan, Vice President, Government Relations, Professional Services Council; Ms. Donna Jenkins, Director, Federal Acquisition Institute, General Services Administration; Ms. Katrina McFarland, Director, Defense Acquisition University.

Nov. 30, 2011, 10:00 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Drug Shortage Crisis: Lives are in the Balance." Witnesses: Michelle Hudspeth, M.D., Division Director of Pediatric Hematology/Oncology, Medical University of

South Carolina; Mr. Walter Kalmans, President, Lontra Ventures; Mr. Ted Okon, Executive Director, Community Oncology Alliance; Scott Gottlieb, M.D., Resident Fellow, American Enterprise Institute; Kasey K. Thompson, Pharm.D. Vice President, Office of Policy, Planning and Communications, American Society of Health-System Pharmacists.

Nov. 30, 2011, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "The Price of Uncertainty: How Much Could DOT's Proposed Billion Dollar Service Rule Cost Customers this Holiday Season?" Witnesses: Mr. Ed Nagle III, President and CEO, Nagle Companies; Mr. Glen Keysaw, Executive Director of Transportation/Logistics, Associated Food Stores, Inc.; Mr. Robb MacKie, President and CEO, American Bakers Association; Mr. Frank Miller, Director of Logistics, Badcock & More; Mr. Henry Jasny, Vice President & General Counsel, Advocates for Highway and Auto Safety; Jesse David, Ph.D., Senior Vice President, Edgeworth Economics; The Honorable Anne S. Ferro, Administrator, Department of Transportation Federal Motor Carrier Safety Administration.

Dec. 1, 2011, 9:30 a.m. Full Committee Hearing entitled, "HHS and the Catholic Church: Examining the Politicization of Grants." Witnesses: Mr. George Sheldon, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services; Mr. Eskinder Negash, Director, Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

Dec. 7, 2011, 10:00 a.m. Joint Hearing of the Subcommittee on Government Organization, Efficiency and Financial Management and Subcommittee on Health Care, District of Columbia, Census and the National Archives entitled, "A Medicaid Fraud Victim Speaks Out: What's Going Wrong and Why?" Witnesses: Mr. Richard West, Victim of Medicaid Fraud; Ms. Robin Page West, Attorney Cohan, West & Karpook, P.C.; Ms. Angela Brice-Smith, Director, Medicaid Integrity Group, Centers for Medicare & Medicaid Services; Mr. Gary Cantrell, Assistant Inspector General for Investigations, Office of the Inspector General, Health & Human Services; Ms. Carolyn Yocom, Director, Health Care, Government Accountability Office; Ms. Valerie Melvin, Director, Information Management and Human Capital Issues, Government Accountability Office.

Dec. 7, 2011, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management and Subcommittee on Health Care, District of Columbia, Census and the National Archives Joint Hearing entitled, "A Medicaid Fraud Victim Speaks Out: What's Going Wrong and Why?" Witnesses: Mr. Richard West, Victim of Medicaid Fraud; Ms. Robin Page West, Attorney, Cohan, West & Karpook, P.C.; Ms. Angela Brice-Smith, Director, Medicaid Integrity Group, Centers for Medicare & Medicaid Services; Mr. Gary Cantrell, Assistant Inspector General for Investigations, Office of the Inspector General, Health & Human Services; Ms. Carolyn Yocom, Director, Health Care, Government Accountability Office; Ms. Valerie Melvin, Director, Information Management and Human Capital Issues, Government Accountability Office.

Dec. 7, 2011, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Oversight in Iraq and Afghanistan: Challenges and Solutions." Witnesses: The Honorable Gordon S. Heddell, Inspector General, U.S. Department of Defense; The Honorable Harold W. Geisel, Deputy Inspector General, U.S. Department of State; Mr. Michael G.

Carroll, Acting Inspector General, U.S. Agency for International Development; Mr. Stuart W. Bowen, Inspector General, Special Inspector General for Iraq Reconstruction; Mr. Steven J. Trent, Acting Inspector General, Special Inspector General for Afghanistan Reconstruction.

Dec. 14, 2011, 10:00 a.m. Full Committee Hearing entitled, "The Leadership of the Nuclear Regulatory Committee." Witnesses (all from Nuclear Regulatory Commission): The Honorable Gregory Jaczko, Chairman; The Honorable George E. Apostolakis, Commissioner; The Honorable William C. Ostendorff, Commissioner; The Honorable Kristine L. Svinicki, Commissioner; The Honorable William D. Magwood, IV, Commissioner; Mr. William Borchardt, Executive Director for Operations; and Mr. Steven Burns, General Counsel.

Dec. 14, 2011, 10:00 a.m. Full Committee Hearing entitled, "HHS and the Catholic Church: Examining the Politicization of Grants (minority day of Hearing)." Witnesses: Ms. Florrie Burke, Consultant, Anti-Human Trafficking/Human Rights/Collaborations and Chair Emeritus, Freedom Network USA; and Ms. Andrea Powell, Executive Director and Co-Founder, FAIR Girls.

Dec. 15, 2011, 10:00 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "What the Euro Crisis Means for Taxpayers and the U.S. Economy, Pt I." Witnesses: Desmond Lachman, Ph.D., Resident Fellow, American Enterprise Institute; Anthony Sanders, Ph.D., Distinguished Professor of Real Estate Finance, George Mason University; Mr. Douglas J. Elliott, Fellow, Economic Studies, Initiative on Business and Public Policy, Brookings Institute; Mr. Joshua Rosner, Managing Director, Graham Fisher & Company, Inc.; and Mr. Bert Ely, Principal, Ely & Company, Inc.

Dec. 16, 2011, 9:30 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "What the Euro Crisis Means for Taxpayers and the U.S. Economy, Pt II." Witnesses: Mr. William C. Dudley, President & CEO, Federal Reserve Bank of New York; Mr. Steven B. Kamin, Director, Division of International Finance, Board of Governors of the Federal Reserve System; and Mr. Mark Sobel, Deputy Assistant Secretary of the Treasury for International Monetary and Financial Policy, U.S. Department of the Treasury.

## 2012 HEARINGS

Jan. 24, 2012, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "McPherson Square: Who Made the Decision to Allow Indefinite Camping in the Park?" Witnesses: Mr. Jonathan Jarvis, Director, National Park Service; Ms. Cathy Lanier, Chief, Metropolitan Police Department; Mr. Paul Quander, Jr., Deputy Mayor for Public Safety and Justice, District of Columbia; Mohammad Akhter, M.D., Director, District of Columbia Department of Health; Mr. Timothy Zick, Cabell Research Professor of Law, William and Mary School of Law.

Jan. 24, 2012, 1:30 p.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "How Will the CFPB Function Under Richard Cordray?" Witness: Mr. Richard Cordray, Director, Consumer Financial Protection Bureau.

Jan. 25, 2012, 9:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Retirement Readiness: Strengthening the Federal Pension System." Witnesses: Mr. Charles "Chuck" Grimes, Chief Operating Officer, U.S. Office of Personnel Management; Andrew Biggs, Ph. D., Resident Scholar, American Enterprise Institute; Mr. Pete Sepp, Executive Vice President, National Taxpayers Union; Mr. David B. Snell, Director of Retirement Benefits, National Active and Retired Federal Employees Association (NARFE); The Honorable Howard Coble (NC-06); The Honorable Mike Coffman (CO-06); The Honorable Robert J. Dold (IL-10); The Honorable Tim Griffin (AR-02); and The Honorable Richard B. Nugent (FL-05).

Jan. 25, 2012, 8:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Vole Vehicle Fire: What did NHTSA Know and When Did They Know It?" Witnesses: The Honorable David L. Strickland, Administrator, National Highway Traffic Safety Administration, U.S. Department of Transportation; Mr. Daniel F. Akerson, Chairman and CEO, General Motors; and Mr. John German, Senior Fellow, The International Council on Clean Transportation.

Feb. 1, 2012, 9:30 a.m. Full Committee Hearing entitled, "Uncharted Territory: What are the Consequences of President Obama's Unprecedented "Recess" Appointments." Witnesses: The Honorable Mike Lee, United States Senator (R-UT); The Honorable C. Boyden Gray, Founding Partner, Boyden Gray & Associates; Mr. Andrew J. Pincus, Partner, Mayer Brown; Mr. Michael J. Gerhardt, Samuel Ashe Distinguished Professor in Constitutional Law University of North Carolina (UNC) School of Law; Mr. David B. Rivkin, Partner, Baker Hostetler, LLP; Mr. Mark A. Carter, Partner, Dinsmore & Shohl, LLP.

Feb. 2, 2012, 9:00 a.m. Full Committee Hearing entitled, "Fast and Furious: Management Failures at the Department of Justice." Witness: The Honorable Eric H. Holder, Jr., Attorney General of the United States.

Feb. 7, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Solutions Needed: Improper Payments Total \$115 Billion in Federal Misspending." Witnesses: The Honorable Thomas R. Carper, Chairman, Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, Committee on Homeland Security and Governmental Affairs, United States Senate; The Honorable

Daniel I. Werfel, Controller, Office of Management and Budget; Mr. Mike Wood, Executive Director, Recovery Accountability and Transparency Board; and Ms. Beryl Davis, Director of Financial Management and Assurance, Government Accountability Office.

Feb. 7, 2012, 10:00 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Jobs for Wounded Warriors: Increasing Access to Contracts for Service Disabled Veterans" Witnesses: The Honorable Bill Johnson, United States House of Representatives (OH-6); The Honorable Max Cleland, Former United States Senator from Georgia, Advocate for the Interests of Disabled Veterans; Ms. Belinda Finn, Assistant Inspector General, Veterans Administration Office of the Inspectors General; Mr. James J. O'Neill, Assistant Inspector General for Investigations, Veterans Administration Office of Inspectors General; Mr. Rick Hillman, Managing Director, Forensic Audits and Investigative Service, General Accountability Office; Mr. Rick Weidman, Executive Director, Vietnam Veterans Association; Mr. Andre Gudger, Director, Office of Small Business Programs, Office of the Undersecretary of Defense, Acquisition, Technology & Logistics Department of Defense; Mr. Thomas Leney, Executive Director, Small and Veteran Owned Business Programs; Department of Veterans Affairs; and Mr. William Puopolo, President, Verissimo Global Inc.

Feb. 8, 2012, 10:00 a.m. Full Committee Hearing entitled, "The Right to Choose: Protecting Workers from Forced Political Contributions." Witnesses: Ms. Claire Waites, 8th Grade Science Teacher, Bay Minette, Alabama; Ms. Sally Coomer, Home Healthcare Agency Owner, Home Healthcare Provider, Carnation, Washington; Mr. Terry Bowman, Line Worker, Ford Motor Company; and Kenneth G. Dau-Schmidt, Ph.D., Willard and Margaret Carr Professor of Labor and Employment Law, Maurer School of Law, Indiana University of Bloomington.

Feb. 13, 2012, 9:00 a.m. Full Committee Hearing entitled, "Exploring all the Energy Options and Solutions: South Texas as a Leader in Creating Jobs and Strengthening the Economy" held at Texas A&M University in Corpus Christi, TX." Witnesses: Ms. Elizabeth Ames Jones, Chairman, Railroad Commission of Texas; Mr. Charif Souki, Chief Executive Officer, Cheniere Energy, Inc.; Mr. Jeff Weis, Executive Vice President, Orion Drilling Company LLC; Mr. Scott Stanford, Operations Manager, Royal Offshore, Royal Production Company, Inc.; Mr. Mark Leyland, Senior Vice President, Offshore Wind Projects, Baryonyx Corporation; Mr. Roland C. Mower, President and Chief Executive Officer, Corpus Christi Regional Economic Development Corporation; and Mr. Robert E. Parker, President, Repcon, Inc.

Feb. 15, 2012, 9:30 a.m. Full Committee Hearing entitled, "Why Reshuffling Government Agencies Won't Solve the Federal Government's Obesity Problem." Witnesses: The Honorable Mark R. Warner, United States Senator from Virginia; The Honorable Ron Johnson, United States Senator from Wisconsin; Paul C. Light, Ph.D., Paulette Goddard Professor of Public Service, Robert Wagner School of Public Service; The Honorable Dan Blair, President and CEO, National Academy of Public Administration; Mr. Robert Shea, Principal, Grant Thornton, LLP; and Mr. Max Stier, President and CEO, Partnership for Public Service.

Feb. 16, 2012, 9:30 a.m. Full Committee Hearing entitled, "Separation of Church and State: Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?" Witnesses:

The Most Reverend William E. Lori, Roman Catholic Bishop of Bridgeport, CT, Chairman Ad Hoc Committee for Religious Liberty, United States Conference of Catholic Bishops; The Reverend Dr. Matthew C. Harrison, President, The Lutheran Church—Missouri Synod; C. Ben Mitchell, Ph.D, Graves Professor of Moral Philosophy, Union University; Rabbi Meir Soloveichik, Director, Straus Center for Torah and Western Thought, Yeshiva University and Associate Rabbi, Congregation Kehilath Jeshurun; Craig Mitchell, Ph.D, Associate Professor of Ethics, and Chair, Ethics Department, Associate Director of the Richard Land Center for Cultural Engagement, Southwestern Baptist Theological Seminary; Mr. John H. Garvey, President, The Catholic University of America; Dr. William K. Thierfelder, President, Belmont Abbey College; Dr. Samuel W. “Dub” Oliver, President, East Texas Baptist University; Dr. Allison Dabbs Garrett, Senior Vice President for Academic Affairs, Oklahoma Christian University; Laura Champion, M.D., Medical Director, Calvin College Health Services; and Barry W. Lynn, Esq., Executive Director of Americans United for Separation of Church and State.

Feb. 17, 2012, 9:30 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, “How Much is Too Much? Examining Duplicative IT Investments at DOD and DOE.” Witnesses: Mr. David A. Powner, Director, Government Accountability Office; Ms. Teresa (Teri) Takai, Chief Information Officer, Department of Defense; Mr. Michael W. Locatis, III, Chief Information Officer, Department of Energy; and Mr. Richard Spires, Chief Information Officer, Department of Homeland Security.

Feb. 28, 2012, 9:30 a.m. Full Committee Hearing entitled, “Government 2.0: GAO Unveils New Duplicative Program Report. Witnesses: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office; and The Honorable Tom Coburn, United States Senate.

Feb. 29, 2012, 10:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, “Honoring George Washington’s Legacy: Does America Need a Reminder?” Witnesses: The Honorable Frank Wolf, Member of Congress; Mr. Richard Brookhiser, Author of *George Washington on Leadership*; Ms. Anne D. Neal, President, American Council of Trustees and Alumni; Ms. Lucia Henderson, Vice Regent, District of Columbia Mount Vernon Ladies’ Association.

Feb. 29, 2012, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, “Preventing Stolen Valor: Challenges and Solutions.” Witnesses: Mr. Lernes Hebert, Director of Officer and Enlisted Personnel Management, Office of the Under Secretary of Defense for Personnel and Readiness, U.S. Department of Defense; Colonel Jason Evans, Adjutant General, U.S. Army; Colonel Kari Mostert, Director of Awards and Decorations, U.S. Air Force; Mr. James Nierle, President, Department of the Navy’s Board of Decorations & Medals, U.S. Navy; Mr. Scott Levins, Director, National Personnel Records Center; Mr. Joseph Davis, Director of Public Affairs, Veterans of Foreign Wars; and Mr. C. Douglas Sterner, Curator, Military Times Hall of Valor.

Mar. 1, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, “The Status of Government Financial Management: A Look at the

FY2011 Consolidated Financial Statements.” Witnesses: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office; The Honorable Daniel I. Werfel, Controller, Office of Federal Financial Management, Office of Management and Budget; and The Honorable Richard L. Gregg, Fiscal Assistant Secretary, U.S. Department of the Treasury.

Mar. 6, 2012, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, “The Pros and Cons of Making the Census Bureau’s American Community Survey Voluntary.” Witnesses: The Honorable Ted Poe, Member of Congress; The Honorable Robert Groves, Ph.D., Director, U.S. Census Bureau; Andrew Biggs, Ph.D., Resident Scholar, American Enterprise Institute; Lawrence Yun, Ph.D., Chief Economist, National Association of Realtors; and Mr. Patrick Jankowski, Vice President, Research, Greater Houston Partnership.

Mar. 8, 2012, 9:30 a.m. Full Committee Hearing entitled, “Food Stamp Fraud as a Business Model: USDA’s Struggle to Police Store Owners.” Witnesses: The Honorable Kevin Concannon, Under Secretary for Food, Nutrition and Consumer Services, U.S. Department of Agriculture; The Honorable Phyllis K. Fong, Inspector General, U.S. Department of Agriculture; Ms. Jennifer Hatcher, Senior Vice President, Government and Public Affairs, Food Marketing Institute; and The Honorable Kenya Mann Faulkner, Inspector General, Pennsylvania Office of Inspector General.

Mar. 19, 2012, 9:30 a.m. Full Committee Field Hearing entitled, “Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices, and Foreclosures” to be held at the Brooklyn Borough Hall, located at 209 Joralemon Street, Brooklyn, NY. Witnesses: Mr. Morris Morgan, Deputy Comptroller for Large Bank Supervision, Office of the Comptroller of the Currency; Ms. Suzanne G. Killian, Senior Associate Director for the Division of Consumer and Community Affairs, Federal Reserve System; Mr. Alfred M. Pollard, General Counsel, Federal Housing Finance Agency; Ms. Sheila Sellers, National Mortgage Outreach Executive Bank of America; Mr. Eric J. Schuppenhauer, Senior Vice President, Mortgage Banking - Core Servicing and Borrower Assistance Executive, JPMorgan Chase Bank, NA; Mr. Joe Ohayon, Senior Vice President, Community Relations, Wells Fargo Home Mortgage; Mr. Jeff Jaffee, Chief Regulatory Affairs Officer, CitiMortgage; The Honorable Arthur M. Schack, Supreme Court Justice, State of New York; Ms. Meghan Faux, Deputy Director, South Brooklyn Legal Services; and Mr. Edward Pinto, Resident Fellow, American Enterprise Institute.

Mar. 20, 2012, 10:00 a.m. Full Committee Hearing entitled, “Oversight of the Department of Energy’s Stimulus Spending.” Witness: The Honorable Steven Chu, Secretary of Energy.

Mar. 21, 2012, 9:30 a.m. Full Committee Hearing entitled, “Europe’s Sovereign Debt Crisis: Causes, Consequences for the United States and Lessons Learned.” Witnesses: The Honorable Timothy F. Geithner, Secretary of the Treasury; and The Honorable Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System.

Mar. 21, 2012, 2:00 p.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, “FOIA in the 21st Century: Using Technology to Improve Transparency in Government.” Witnesses: Ms. Melanie Ann Pustay, Director, Office of Information Policy, United States Department of Justice; Ms. Miriam Nisbet, Director, Office of

Government Information Services, National Archives & Records Administration; Mr. Andrew Battin, Director, Office of Information Collection, Environmental Protection Agency; and Mr. Sean Moulton, Director of Federal Information Policy, OMB Watch.

Mar. 22, 2012, 10:00 a.m. Joint Hearing of the Subcommittee on Government Operations, Efficiency and Financial Management and the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security entitled, "New Audit Finds Problems in Army Military Pay." Witnesses: LTC Kirk Zecchini, U.S. Army Reserve; Mr. Asif Khan, Director, Financial Management and Assurance, U.S. Government Accountability Office; Mr. James Watkins, Director, Accountability and Audit Readiness, Department of the Army; Ms. Jeanne M. Brooks, Director, Technology & Business Architecture Integration, Office of the Deputy Chief of Staff, G-1, Department of the Army; and Mr. Aaron Gillison, Deputy Director, Defense Finance and Accounting Service – Indianapolis, Department of Defense.

Mar. 26, 2012, 1:30 p.m. Full Committee Joint Hearing with the Committee on Transportation and Infrastructure entitled, "TSA Oversight Part III: Effective Security or Security Theater?" Witnesses: Mr. Christopher L. McLaughlin, Assistant Administrator for Security Operations, Transportation Security Administration; Mr. Stephen Sadler, Assistant Administrator for Intelligence and Analysis, Transportation Security Administration; Mr. Stephen M. Lord, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office; and Rear Admiral Paul F. Zukunft, Assistant Commandant for Marine Safety, Security and Stewardship, United States Coast Guard.

Mar. 27, 2012, 10:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Can a USPS-Run Health Plan Help Solve its Financial Crisis?" Witnesses: Mr. Patrick Donahoe, Postmaster General and CEO, United States Postal Service; Mr. Walton Francis, Author and Federal Health Care Expert.

Mar. 27, 2012, 10:00 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Labor Abuses, Human Trafficking, and Government Contracts: Is the Government Doing Enough to Protect Vulnerable Workers?" Witnesses: The Honorable Richard Blumenthal, United States Senator from Connecticut; The Honorable Rob Portman, United States Senator from Ohio; The Honorable Luis CdeBaca, Ambassador at Large, U.S. Department of State; Ms. Cathy J. Read, Director, Office of Acquisitions Management, U.S. Department of State; Ms. Evelyn R. Klemstine, Assistant Inspector General for Audits, U.S. Department of State; Mr. Richard T. Ginman, Director, Defense Procurement and Acquisition Policy, U.S. Department of Defense; Ms. Sharon Cooper, Director, Defense Human Resources Activity, U.S. Department of Defense; and The Honorable Kenneth P. MooreField, Deputy Inspector General for Special Plans & Operations, U. S. Department of Defense.

Mar. 29, 2012, 8:30 a.m. Subcommittee on National Security, Homeland Defense, and Foreign Operations Hearing entitled, "Are Changes in Security Policy Jeopardizing USAID Reconstruction Projects and Personnel in Afghanistan?" Witnesses: Mr. Steven J. Trent, Acting Inspector General, Special Inspector General for Afghanistan Reconstruction; and Mr. J. Alexander Their, Assistant to

the Administrator and Director of the Office of Afghanistan and Pakistan Affairs; U.S. Agency for International Development.

Mar. 30, 2011, 1:30 p.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Hearing entitled, "Unfunded Mandates and Regulatory Overreach Part II." Witnesses: Hon. Joni Cutler, South Dakota State Senator; Mr. Raymond J. Keating, Chief Economist, Small Business & Entrepreneurship Council; and Mr. John C. Arensmeyer, Founder and CEO, Small Business Majority.

Apr. 16, 2012, 1:30 p.m. Full Committee Hearing entitled, "Addressing GSA's Culture of Wasteful Spending." Witnesses: The Honorable Brian D. Miller, Inspector General, U.S. General Services Administration; The Honorable Martha N. Johnson, Former Administrator, U.S. General Services Administration; Mr. Jeff Neely, Regional Commissioner, Public Buildings Service, Pacific Rim Region (9), U.S. General Services Administration; The Honorable Michael J. Robertson, Chief of Staff, U.S. General Services Administration, Mr. David E. Foley, Deputy Commissioner, Public Buildings Service, U.S. General Services Administration; and The Honorable Daniel M. Tangherlini, Acting Administrator, U.S. General Services Administration.

Apr. 17, 2012, 10:00 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "The SEC's Aversion to Cost-Benefit Analysis." Witnesses: The Honorable Mary Schapiro, Chairman, U.S. Securities and Exchange Commission; Henry Manne, Ph.D., Dean Emeritus, George Mason University School of Law; Ms. Jacqueline McCabe, Executive Director for Research, Committee on Capital Markets Regulation; Mr. Mercer E. Bullard, Jessie D. Puckett, Jr., Lecturer and Associate Professor of Law, The University of Mississippi School of Law; Mr. J.W. Verret, Assistant Professor Law, George Mason University School of Law; and Mr. H. David Kotz, Managing Director, Gryphon Strategies, (Former Inspector General, U.S. Securities and Exchange Commission).

Apr. 19, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Problems at the Internal Revenue Service: Closing the Tax Gap and Preventing Identity Theft." Witnesses: Mr. Steven T. Miller, Deputy Commissioner of Service and Enforcement, Internal Revenue Service; Ms. Nina E. Olson, National Taxpayer Advocate, Internal Revenue Service; The Honorable J. Russell George, Inspector General, Treasury Inspector General for Tax Administration; Mr. James R. White, Director, Strategic Issues, U.S. Government Accountability Office.

Apr. 25, 2012, 9:30 a.m. Joint Hearing of the Subcommittee on Health Care, District of Columbia, Census and National Archives and the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "Is Government Adequately Protecting Taxpayers from Medicaid Fraud?" Witnesses: The Honorable Charles E. Grassley, United States Senator from Iowa; The Honorable Michele Bachmann, United States Representative from Minnesota; Gabriel E. Feldman, M.D.; Local Medical Director for the Personal Care Services Program, New York City; Christine Ellis, D.D.S., M.S.D., Orthodontist, University of Texas Southwestern Medical Center; David Feinwachs, M.H.A., M.A., J.D., Ph.D., Former General Counsel, Minnesota Hospital Association; Claire Sylvia, J.D., Partner, Phillips & Cohen, LLP; Lucinda Jesson, J.D., Commissioner, Minnesota

Department of Human Services; Cindy Mann, J.D., Director, Center for Medicaid and State Operations, Centers for Medicare and Medicaid Services; and Ms. Carolyn L. Yocom, Director, Health Care, United States Government Accountability Office.

Apr. 25, 2012, 9:30 a.m. Joint Hearing of the Subcommittee on Health Care, District of Columbia, Census and National Archives and the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending entitled, "Is Government Adequately Protecting Taxpayers from Medicaid Fraud?" Witnesses: The Honorable Charles E. Grassley, United States Senator from Iowa; The Honorable Michele Bachmann, United States Representative from Minnesota; Gabriel E. Feldman, M.D.; Local Medical Director for the Personal Care Services Program, New York City; Christine Ellis, D.D.S., M.S.D., Orthodontist, University of Texas Southwestern Medical Center; David Feinwachs, M.H.A., M.A., J.D, Ph.D., Former General Counsel, Minnesota Hospital Association; Claire Sylvia, J.D., Partner, Phillips & Cohen, LLP; Lucinda Jesson, J.D., Commissioner, Minnesota Department of Human Services; Cindy Mann, J.D., Director, Center for Medicaid and State Operations, Centers for Medicare and Medicaid Services; and Ms. Carolyn L. Yocom, Director, Health Care, United States Government Accountability Office.

May 9, 2012, 1:00 p.m. Full Committee Joint Hearing with the Committee on Transportation and Infrastructure entitled, "TSA Oversight Part IV: Is TSA Effectively Procuring, Deploying, and Storing Aviation Security Equipment and Technology?" Witnesses: Mr. David R. Nicholson, Assistant Administrator for Finance and Administration and Chief Financial Officer, Transportation Security Administration; Mr. Charles K. Edwards, Acting Inspector General, Department of Homeland Security; and Mr. Stephen M. Lord, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office.

May 10, 2012, 9:30 a.m. Full Committee Hearing entitled, "Where Are All the Watchdogs? Addressing Inspector General Vacancies." Witnesses: The Honorable Phyllis K. Fong, Inspector General, United States Department of Agriculture, and Chair, Council of the Inspectors General on Integrity and Efficiency; The Honorable Brian D. Miller, Inspector General, United States General Services Administration; Mr. Jake Wiens, Investigator, Project on Government Oversight (POGO); and The Honorable Daniel I. Werfel, Controller, Office of Federal Financial Management, Office of Management and Budget.

May 16, 2012, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy Hearing entitled, "Hatch Act: Options of Reform." Witnesses: The Honorable Carolyn N. Lerner, Special Counsel, U.S. Office of Special Counsel; Special Counsel Lerner will be accompanied by: Ms. Ana Galindo-Marrone, Chief, Hatch Act Unit, U.S. Office of Special Counsel; The Honorable Irvin B. Nathan, Attorney General, District of Columbia; The Honorable Jon J. Greiner, Former Utah State Senator; Mr. Scott A. Coffina, Partner, Drinker Biddle & Reath LLP; and Mr. Jon Adler, National President, Federal Law Enforcement Officers Association.

May 16, 2012, 9:30 a.m. Subcommittee on Regulatory Affairs, Stimulus and Government Spending Hearing entitled, "The Obama Administration's Green Energy Gamble: What Have All the Taxpayer Subsidies Achieved?" Witnesses: Mr. Jim Nelson, President and CEO, Solar3D, Inc.; Mr. Greg Kats, President, Capital-E; Mr. Craig Witsoe, CEO, Abound Solar, Inc.; Mr. Brian D. Fairbanks, President

and CEO, Director, Nevada Geothermal Power, Inc.; Mr. Michael J. Ahearn, Chairman of the Board of Directors, First Solar, Inc.; and Mr. John M. Woolard, President and CEO, BrightSource Energy, Inc.

May 31, 2012, 9:30 a.m. Full Committee Hearing entitled, "Rhetoric vs. Reality: Does President Obama Really Support an 'All-of-the-Above' Energy Strategy?" Witnesses: Mr. Michael Krancer, Secretary, Pennsylvania Department of Environmental Protection; Ms. Kathleen Sgamma, Vice-President of Government and Public Affairs, Western Energy Alliance; Mr. Mark J. Perry, Scholar, American Enterprise Institute; Mr. Daniel J. Weiss, Senior Fellow and Director of Climate Strategy, Center for American Progress Action Fund; Mr. Charles T. Drevna, President, American Fuel & Petrochemical Manufacturers; and Mr. Peter S. Glaser, Partner, Troutman Sanders LLP.

May 31, 2012, 1:30 p.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Rhetoric vs. Reality, Part II: Assessing the Impact of New Federal Red Tape on Hydraulic Fracturing and American Energy Independence." Witnesses: Ms. Lori Wrotenbery, Director, Oil and Gas Conservation Division, Oklahoma Corporation Commission; Mr. Michael McKee, County Commissioner, Uintah County, Utah; Robert Howarth, Ph.D., Director, Agriculture, Energy and Environment Program, Cornell University; Mr. Michael Krancer, Secretary, Department of Environmental Protection; Ms. Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency; and Mr. Mike Pool, Deputy Director, U.S. Bureau of Land Management.

June 4, 2012, 9:00 a.m. Full Committee Field Hearing entitled, "EPA Overreach and the Impact on New Hampshire Communities", held at Exeter, New Hampshire. Witnesses: The Honorable T.J. Jean, Mayor of Rochester, New Hampshire; Mr. Dean Peschel, Peschel Consulting LLC; Mr. John C. Hall, Hall & Associates; Mr. Peter Rice, Public Works Director, City of Portsmouth, New Hampshire; and Mr. H. Curtis "Curt" Spalding, Regional Administrator, EPA New England Headquarters, Region 1.

June 6, 2012, 9:30 a.m. Full Committee Hearing entitled "Addressing Concerns About the Integrity of the U.S. Department of Labor's Jobs Reporting." Witnesses: Mr. Daniel Moss, Executive Editor, Economy, Bloomberg News; Mr. Robert Doherty, General Manager, United States at Reuters News; Ms. Lucy Dalglish, Executive Director, Reporters Committee for Freedom of the Press, Dr. Keith Hall, Senior Research Fellow, Mercatus Center, George Mason University; Ms. Diana Furchtgott-Roth, Senior Fellow, The Manhattan Institute; Mr. Carl Fillichio, Senior Advisor for Communications and Public Affairs, U.S. Department of Labor; Mr. John M. Galvin, Acting Commissioner, U.S. Bureau of Labor Statistics; The Honorable Jane Oates, Assistant Secretary, Employment and Training Administration, U.S. Department of Labor.

June 7, 2012, 9:30 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Assessing Medicare and Medicaid Program Integrity." Witnesses: Peter Budetti, M.D., Director of Center for Program Integrity, Centers for Medicare and Medicaid; Ms. Ann Maxwell, Regional Inspector General for Evaluation and Inspections, Office of the Inspector General for Health & Human Services; Ms. Carolyn Yocom Director of Health Care, Medicaid, U.S. Government Accountability Office; Ms. Kathleen King, Director of Health Care, Medicare, U.S. Government Accountability Office.

June 18, 2012, 9:00 a.m. Full Committee Field Hearing, "Tennessee Job Creation: Do Federal Government Regulations Help or Hinder Tennessee's Economic Development?", held at the Campus of Middle Tennessee State University, Murfreesboro, Tennessee. Witnesses: The Honorable Bill Haslam, Governor, State of Tennessee; The Honorable Lamar Alexander, United States Senate; The Honorable Bob Corker, United States Senate; Mr. William "Bill" F. Hagerty, IV, Commissioner, Tennessee Department of Economic and Community Development; Mr. Mark Faulkner, Owner, Vireo Systems, Inc., (on behalf of the National Federation of Independent Business); Mr. H. Grady Payne, Chief Executive Officer, Conner Industries, Inc., Mr. Scott Cocanougher, Chief Executive Officer, First Community Bank of Bedford County; and Mr. Bob Bedell, Sales Unit Manager, Coca-Cola Bottling Company Consolidated (on behalf of the Beverage Association of Tennessee).

June 19, 2012, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus and Government Spending Hearing entitled, "The Obama Administration's Green Energy Gamble Part II: Were All the Taxpayer Subsidies Necessary?" Witnesses: Mr. David Crane, President and CEO, NRG Energy, Inc.; Mr. Walter C. Rakowich, Co-Chief Executive Officer, Prologis, Inc.; Mr. Robert S. Mancini, Chief Executive Officer, Cogentrix Energy, LLC; Ms. Dita Bronicki, Chief Executive Officer, Ormat Technologies, Inc.; and Ms. Veronique de Rugy, Senior Research Fellow, Mercatus Center at George Mason University.

June 26, 2012, 2:00 p.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "The JOBS Act in Action: Overseeing Effective Implementation That Can Grow American Jobs." Witnesses: Brian Cartwright, Ph. D., Scholar-in-Residence, Marshall School of Business, University of Southern California, Senior Advisor, Patomak Global Partners, LLC, Former General Counsel, U.S. Securities & Exchange Commission; Mr. Alon Hillel-TuchCo-Founder and Chief Financial Officer of RocketHub Inc.; C. Steven Bradford, J.D., Professor of Law, University of Nebraska College of Law; and Mr. John Coffee, Jr., Professor of Law, Columbia University Law School.

June 28, 2012, 9:00 a.m. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform Hearing entitled, "Mandate Madness: When Sue and Settle Just Isn't Enough." Witnesses: The Honorable E. Scott Pruitt, Attorney General for the State of Oklahoma; Mr. Roger Martella, Partner, Sidley Austin LLP, Mr. William Kovacs, Senior Vice President, U.S. Chamber of Commerce; Mr. William Yeatman, Assistant Director, Center for Energy and Environment, Competitive Enterprise Institute; and Mr. Robert Percival, Robert F. Stanton Professor of Law, Director, Environmental Law Program, University of Maryland Francis King Carey School of Law.

June 28, 2012, 9:15 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Assessment of the Transition from a Military to a Civilian-Led Mission in Iraq." Witnesses: The Honorable Patrick F. Kennedy, Under Secretary for Management, U.S. Department of State; Mr. Peter F. Verga, Chief of Staff for the Under Secretary for Policy, U.S. Department of Defense; The Honorable Mara Rudman, Assistant Administrator, Bureau for the Middle East; U.S. Agency for International Development; Mr. Michael J. Courts, Acting Director, International Affairs and Trade, U.S. Government Accountability Office; The Honorable Harold W. Geisel, Deputy Inspector General, U.S. Department of State; Mr. Joseph T. McDermott, Special Deputy Inspector General for Southwest Asia, U.S. Department of Defense; Mr. Michael G. Carroll,

Deputy Inspector General, U.S. Agency for International Development; and Mr. Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction.

June 28, 2012, 9:30 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "The JOBS Act in Action Part II: Overseeing Effective Implementation of the JOBS Act at the SEC." Witness: The Honorable Mary Schapiro, Chairman, U.S. Securities and Exchange Commission.

July 10, 2012, 10:00 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Examining the Impact of ObamaCare on Doctors and Patients." Witnesses: Dick Armstrong, M.D., Chief Operating Officer, Docs4PatientCare; The Honorable Jeff Colyer, M.D., Lt. Governor, State of Kansas; Mr. Kelvyn Cullimore, Jr., Chairman, President and CEO, Dynatronics; Eric Novack, M.D., Phoenix Orthopedic Consultants; Ms. Sally Pipes, President and CEO, Pacific Research Institute; and Mr. Ron Pollack, Founding Executive Director, Families USA.

July 10, 2012, 10:00 a.m. Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs Hearing entitled, "The Administration's Auto Bailouts and the Delphi Pension Decisions: Who Picked the Winners and Losers?" Witnesses: The Honorable Christy Romero, Special Inspector General for the Troubled Assets Relief Program, United States Treasury Department; Mr. Ron Bloom, Former Member of the Automotive Task Force, United States Treasury Department; Mr. Matthew Feldman, Former Member of the Automotive Task Force, United States Treasury Department; Mr. Harry Wilson, Former Member of the Automotive Task Force, United States Treasury Department; Ms. Nikki Clowers, Director, Financial Markets and Community Investment, Government Accountability Office; and Mr. Todd Zywicki, Professor of Law, George Mason University.

July 10, 2012, 1:30 p.m. Full Committee Hearing entitled, "Examining the Impact of ObamaCare on Job Creators and the Economy." Witnesses: Mr. Jamie Richardson, Vice President, White Castle System, Inc.; Mr. Michael Frederich, President and Owner, MCM Composites; Ms. Mary Miller, CEO, JANCOA Janitorial Services, Inc.; the Honorable Daniel Wolf, Massachusetts State Senator, Founder and CEO National Center for Policy Analysis.

July 13, 2012, 9:00 a.m. Full Committee Field Hearing entitled, "America's Energy Future, Part 1: A Review of Unnecessary and Burdensome Regulations" held at the University of Central Oklahoma, Edmond, Oklahoma. Witnesses: Mr. C. Michael Ming, Secretary of Energy, State of Oklahoma; Ms. Patrice Douglas, Commissioner, Oklahoma Corporation Commission; Mr. Mike McDonald, President and Co-Owner Triad Energy, Inc.; President Domestic Energy Producers Alliance; Ms. Patricia D. Horn, Vice President for Governance and Environmental Health & Safety, Oklahoma Gas and Electric Company; Mr. Brian Woodward, Vice President of Regulatory Affairs, Oklahoma Independent Petroleum Association; and Mr. Joe Leonard, Environmental Health and Safety Engineer, Devon Energy Corporation.

July 14, 2012, 9:00 a.m. Full Committee Field Hearing entitled, "America's Energy Future, Part II: A Blueprint for Domestic Energy Production" held at the North Dakota State University, Fargo, North Dakota. Witnesses: Mr. Al. R. Anderson, Commissioner, North Dakota Department of Commerce; Mr.

Lynn D. Helms, Director, North Dakota Industrial Commission, Department of Mineral Resources; Mr. Michael Ziesch, Manager, Labor Market Information Center, Job Service North Dakota. Mr. Jack R. Ekstrom, Vice president Corporate and Government Relations, Whiting Petroleum Corporation; Mr. Jack H. Stark, Senior Vice President of Exploration, Continental Resources, Inc.; Mr. Kevin Hatfield, Senior Director of Gathering Systems, Enbridge, Inc.; and Mr. Henry (Tad) A. True, Vice President, Bridger Pipeline LLC and Belle Fourche Pipeline, Tru Companies.

July 18, 2012, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Taking Care of Our Veterans: What is the Department of Veterans Affairs Doing to Eliminate the Claims Backlog?" Witnesses: The Honorable Allison Hickey, Under Secretary for Benefits, U.S. Department of Veterans Affairs; Mr. Gerald Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States; and Mr. Joseph A. Violante, National Legislative Director, Disabled American Veterans.

July 18, 2012, 10:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing entitled, "The Administration's Bet on Abound Solar: Assessing the Costs to the American Taxpayers." Witnesses: Mr. Craig Witsoe, Former Chief Executive Officer, Abound Solar, Inc.; Mr. Tom Tiller, Former Chairman of the Board, Abound Solar, Inc.; Mr. David Frantz, Acting Executive Director, Loan Programs Office, U. S. Department of Energy; Mr. Jonathan Silver, Former Executive Director, Loan Program Office, U.S. Department of Energy; Ms. Veronique De Rugy, Senior Research Fellow, Mercatus Center at George Mason University; and Mr. Gregory Kats, President, Capital E.

July 19, 2012, 9:30 a.m. Full Committee Hearing entitled, "Continuing Oversight of Regulatory Impediments to Job Creation: Job Creators Still Buried in Red Tape." Witnesses: Mr. Paul A. Yarossi, President, HNTB Holdings, Ltd., on behalf of the American Road & Transportation Builders Association; Mr. Jim Hamby, Chief Executive Officer, Vision Bank; Mr. J. Billy Pirkle, Senior Director EHS, Crop Production Services, Inc., on behalf of the Agricultural Retailers Association, Mr. Howard Williams, Vice President & General Manager, Construction Specialties, Inc.; Mr. Steve Russell, Vice President, Plastics Division, American Chemistry Council; and Mr. Barry Rutenberg; Barry Rutenberg & Associates, Inc., on behalf of the National Association of Home Builders.

July 19, 2012, 1:30 p.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Changes to the Heights Act: Shaping Washington, D.C., for the Future." Witnesses: Ms. Harriet Tregoning, Director, Office of Planning, District of Columbia; Dr. Natwar Gandhi, Chief Financial Officer, District of Columbia; Mr. Marcel Acosta, Executive Director, National Capital Planning Commission; Mr. Roger Lewis, Professor Emeritus, University of Maryland School of Architecture; Mr. Christopher Collins, Counsel, District of Columbia Building Industry Association; and Ms. Laura Richards, Member of the Board of Trustees and past Chairman, Committee of 100 on the Federal City.

July 24, 2012, 9:30 a.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Meth Revisited: Review of State and Federal Efforts to Solve the Domestic Methamphetamine Production Resurgence." Witnesses: The Honorable R. Gil Kerlikowske, Director, Office of National Drug Control Policy, Executive Office of the President; Mr.

Ronald Brooks, Director, Northern California High Intensity Drug Trafficking Area (HIDTA), President, National Narcotic Officers' Associations' Coalition (NNOAC); Mr. Jason Grellner, Detective Sergeant, Franklin County Narcotics Enforcement Unit, State of Missouri, President, Missouri Narcotic Officers Association (MNOA); Mr. Donald (Max) Dorsey, II, Lieutenant/Supervisory Special Agent, South Carolina Law Enforcement Division (SLED), State of South Carolina; Mr. Rob Bovett, District Attorney, Lincoln County, State of Oregon; Mr. Marshall Fisher, Director, Mississippi Bureau of Narcotics (MBN), State of Mississippi.

July 24, 2012, 10:00 a.m. Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Hearing entitled, "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?" Witnesses: Mr. Richard Cordray, Director, Consumer Financial Protection Bureau; Mr. Douglas Fecher, President and CEO, Wright-Patt Credit Union, Inc.; Mr. Steven I. Zeisel Executive Vice President & General Counsel, Consumer Bankers Association; Mr. Michael D. Calhoun; President, Center for Responsible Lending; Dr. Mark A. Calabria, Director of Financial Regulation Studies, Cato Institute.

July 25, 2012, 9:30 a.m. Full Committee Hearing entitled, "GAO Report: The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project." Witnesses: Mr. James C. Cosgrove, Director, Health Care, U.S. Government Accountability Office; Ms. Edda Emmanuelli-Perez, Managing Associate General Counsel, U.S. Government Accountability Office; and Mr. Jonathan Blum, Deputy Administrator and Director, Center for Medicare, Centers for Medicare and Medicaid Services.

July 31, 2012, 8:00 a.m. Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Field Hearing entitled, "The Green Agenda and the War on Coal: Perspectives from the Ohio Valley" held at the Ohio University Eastern Campus, St. Clairsville, Ohio. Witnesses: Mr. Bob Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency; The Honorable Andy Thompson, Representative, Ohio House of Representatives; Mr. Anthony Ahern, President/CEO, Ohio Rural Electric Cooperatives, Inc. and Buckeye Power Inc.; Mr. Tom Mackall, President, East FairField Coal Company; Mr. Shawn Garvin, Administrator, Region 3, U.S. Environmental Protection Agency; and Mr. Bharat Mathur, Deputy Regional Administrator, Region 5, U.S. Environmental Protection Agency.

Aug. 1, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Unresolved Internal Investigations at DHS: Oversight of Investigation Management in the Office of the DHS IG." Witnesses: Mr. Charles K. Edwards, Acting Inspector General, Department of Homeland Security; Mr. David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Department of Homeland Security; and Mr. Daniel H. Ragsdale, Acting Deputy Director, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

Aug. 2, 2012, 9:00 a.m. Full Committee Hearing entitled, "IRS: Enforcing ObamaCare's New Rules and Taxes." Witnesses: Mr. Mark Everson, Vice Chairman, Alliantgroup; Ms. Nina Olson, National Taxpayer Advocate, Internal Revenue Service; Professor Timothy Jost, Washington and Lee University; Mr. Michael Cannon, Director of Health Policy Studies, Cato Institute; Mr. Douglas Shulman, Commissioner, Internal Revenue Service.

Sept. 12, 2012, 9:45 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "Dawood National Military Hospital, Afghanistan: What Happened and What Went Wrong? Part II." Witnesses: Lieutenant General William B. Caldwell, IV, United States Army; Major General Gary S. Patton, United States Army; and The Honorable Kenneth P. MooreField, Deputy Inspector General for Special Plans and Operations, U.S. Department of Defense.

Sept. 13, 2012, 10:00 a.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "SIGAR Report: Document Destruction and Millions of Dollars Unaccounted for at the Department of Defense." Witnesses: Mr. John F. Sopko, Special Inspector General for Afghanistan Reconstruction.

Sept. 13, 2012, 10:00 a.m. Joint Hearing of the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs and the Committee on Financial Services' Subcommittee on Capital Markets and Government Sponsored Enterprises entitled, "The JOBS Act: Importance of Prompt Implementation for Entrepreneurs, Capital Formation, and Job Creation." Witnesses: Mr. Rory Eakin, Co-Founder and Chief Operating Officer, CircleUp; Ms. Alison Bailey Vercruysse, Founder and Chief Executive Officer, 18 Rabbits; Mr. Jeffrey Van Winkle, Treasurer, National Small Business Administration; Mr. Naval Ravikant, Co-Founder, AngelList; and Mr. Robert B. Thompson, Peter P. Weidenbruch Jr. Professor of Business Law, Georgetown University Law Center.

Sept. 20, 2012, 9:30 a.m. Full Committee Hearing entitled, "IG Report: The Department of Justice's Office of the Inspector General Examines the Failures of Operation Fast and Furious." Witness: The Honorable Michael E. Horowitz; Inspector General, U.S. Department of Justice.

Sept. 20, 2012, 2:00 p.m. Subcommittee on Health Care, District of Columbia, Census and the National Archives Hearing entitled, "Examining the Administration's Failure to Prevent and End Medicaid Overpayments." Witnesses: Mr. John Hagg, Director of Medicaid Audits, Office of Inspector General, Department of Health and Human Services; and Ms. Penny Thompson, Deputy Director, Center for Medicaid and CHIP Services, Centers for Medicare and Medicaid Services.

Sept. 20, 2012, 2:00 p.m. Subcommittee on National Security, Homeland Defense and Foreign Operations Hearing entitled, "SIGAR Report: Document Destruction and Millions of Dollars Unaccounted for at the Department of Defense. Part II." Witnesses: Mr. John F. Sopko, Special Inspector General for Afghanistan Reconstruction; The Honorable Allen F. Estevez, Assistant Secretary for Logistics and Materiel Readiness, U.S. Department of Defense; Lieutenant General Brooks L. Bash, USAF, Director for Logistics, Joint Staff, U.S. Department of Defense; Mr. Donald L. "Larry" Sampler, Jr., Deputy Assistant to the Administrator, Office of Afghanistan & Pakistan Affairs, U.S. Agency for International Development.

Oct. 10, 2012, 12:00 p.m. Full Committee Hearing entitled, "The Security Failures of Benghazi." Witnesses: Lt. Col. Andrew Wood, Utah National Guard, U.S. Army; Mr. Eric Nordstrom, Regional Security Officer, U.S. Department of State; Ms. Charlene R. Lamb, Deputy Assistant Secretary for International Programs, Bureau of Diplomatic Security, U.S. Department of State; and the Honorable Patrick F. Kennedy, Under Secretary for Management, U.S. Department of State.

Nov. 14, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Trade Adjustment Assistance for U.S. Firms: Evaluating Program Effectiveness and Recommendations." Witnesses: Mr. Bryan Borlik, Director, Trade Adjustment Assistance for Firms, Economic Development Corporation U.S. Department of Commerce; Mr. William Bujalos, Director Mid-Atlantic Trade Adjustment Assistance Center; Mr. J Alfredo Gomez, Acting Director, International Affairs and Trade U.S. Government Accountability Office; Mrs. Patricia Britton, Vice President of Business Development, Topflight Corporation; Mr. Drew Greenblatt, President, Marlin Steel Wire Products; and Mr. Marc L. Rothstein, President, Prime Synthesis, Inc.

Nov. 29, 2012, 10:00 a.m. Subcommittee on Government Organization, Efficiency and Financial Management Hearing entitled, "Identity Theft and Tax Fraud: Growing Problems for the Internal Revenue Service, Part 4." Witnesses: Ms. Beth Tucker, Deputy Commissioner for Operations Support, Internal Revenue Service; The Honorable J. Russell George, Inspector General, Treasury Inspector General for Tax Administration; Ms. Nina E. Olson, National Taxpayer Advocate, Internal Revenue Service; and Mr. James R. White, Director, Strategic Issues, U.S. Government Accountability Office.

Nov. 29, 2012, 2:00 p.m. Full Committee Hearing entitled, "1 in 88 Children: A Look Into the Federal Response to Rising Rates of Autism." Witnesses: Alan Guttmacher, M.D., Director, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health; Coleen Boyle, Ph.D., Director of the National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention; Mr. Bob Wright, Co-Founder, Autism Speaks; Mr. Scott Badesch, President, Autism Society; Mr. Mark Blaxill, Board Member, SafeMinds; Mr. Bradley McGarry, Coordinator of the Asperger Initiative at Mercyhurst, Mercyhurst University; Mr. Michael John Carley, Executive Director, Global & Regional Asperger Syndrome Partnership; and Mr. Ari Ne'eman, President, Autistic Self Advocacy Network.

Dec. 12, 2012, 10:00 a.m. Full Committee Hearing entitled, "HGH Testing in the NFL: Is the Science eReady?" Witnesses: Lawrence A. Tabak, DDS, Ph.D., Principal Deputy Director, National Institutes of Health, U.S. Department of Health and Human Services; Larry Bowers, Ph.D., Chief Science Officer, U.S. Anti-Doping Agency; Mr. Richard M. Butkus, NFL Hall of Fame Member, I Play Clean ([iplayclean.org](http://iplayclean.org)); Linn Goldberg, M.D., F.A.C.S.M., Head, Division of Health Promotion & Sports Medicine, Oregon Health and Science University; Mr. Mike Gimbel, Director, Powered by Me!, University of Maryland St. Joseph Medical Center.

## 2013 HEARINGS

Jan. 22, 2013, 1:00 p.m. Full Committee Hearing entitled, “Wasting Information Technology Dollars: How Can the Federal Government Reform its IT Investment Strategy?” Witnesses: The Honorable Tom Davis, Former Member of Congress, and Chairman of the Government Reform Committee; Mr. Steven VanRoekel, Federal CIO, Office of Management and Budget; Mr. David Powner, Director, Information Technology Management Issues, U.S. Government Accountability Office; Douglas Bourgeois, Vice President, Chief Executive, VMware, Inc.; Michael Klayko, Advisor and CEO, Brocade Communications Systems, Inc.; Chris Niehaus, Director, Office of Civic Innovation, Microsoft Corporation.

Feb. 5, 2013, 1:00 p.m. Full Committee Hearing entitled, “Government Spending: How Can We Best Address the Billions of Dollars Wasted Every Year?”. Witnesses: Mr. Thomas A. Schatz, President, Citizens Against Government Waste; Mr. Ryan Alexander, President, Taxpayers for Common Sense; The Honorable Dan G. Blair, President, National Academy of Public Administration; Mr. John M. Kamensky, Senior Fellow, IBM Center for the Business of Government.

Feb. 13, 2013, 10:00 a.m. Subcommittee on National Security Hearing entitled, “U.S. Direct Assistance in Afghanistan: Ensuring Transparency and Accountability.” Witnesses: Mr. John F. Sopko, Special Inspector General for Afghanistan Reconstruction.

Feb. 14, 2013, 10:30 a.m. Full Committee Hearing entitled, “Exploring GAO’s High Risk List and Opportunities for Reform.” Witnesses: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office.

Feb. 14, 2013, 1:00 p.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, “The Effects of Rising Energy Costs on American Families and Employers.” Witnesses: Mr. George Hand, General Manager, Canadian Valley Electric Cooperative; Ms. Paula Carmody, President, National Association of State Utility Consumer Advocates; Mr. Eugene M. Trisko, Attorney at Law and Energy Economist; Mr. Daniel Weiss, Senior Fellow, Center for American Progress Action Fund; Mr. Daniel R. Simmons, Director of Regulatory and State Affairs, Institute for Energy Research.

Feb. 14, 2013, 2:00 p.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Hearing entitled, “Unintended Consequences: Is Government Effectively Addressing the Unemployment Crisis?” Witnesses: Casey B. Mulligan, Ph.D., Professor in Economics, The University of Chicago; Eugene Steuerle, Ph.D., Institute Fellow and Richard B. Fisher Chair, The Urban Institute; Ms. Annie Carter, Owner and President, Carter Machine Company; Chad Stone, Ph.D., Chief Economist, Center on Budget and Policy Priorities; The Honorable Stacey Reece, Former Member of the Georgia State House, Franchise Owner, Spherion.

Feb. 26, 2013, 10:00 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Hearing entitled, “Bailout Rewards: The Treasury Department’s Continued Approval of Excessive Pay for Executives at Taxpayer-Funded Companies.” Witnesses: The Honorable Christy Romero, Special Inspector General for the Troubled Asset Relief Program, U.S. Department of the Treasury;

Ms. Patricia Geoghegan, Acting Special Master for TARP Executive Compensation, U. S. Department of the Treasury.

Feb. 27, 2013, 9:30 a.m. Full Committee Hearing entitled, "Time to Reform Information Technology Acquisition: The Federal IT Acquisition Reform Act." Witnesses: Mr. Richard Spires, Chief Information Officer, Department of Homeland Security; Ms. Cristina Chaplain, Director, Acquisition and Sourcing Management, Government Accountability Office; The Honorable Daniel Gordon, Associate Dean for Government Procurement Law Studies, George Washington University Law School, Former Administrator, Office of Federal Procurement Policy, OMB; Mr. Stan Soloway, President and CEO, Professional Services Council; Mr. Paul Misener, Vice President, Global Public Policy, Amazon.com.

Feb. 27, 2013, 1:30 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "The Road Less Traveled: Reducing Federal Travel & Conference Spending." Witnesses: The Honorable Rush Holt, Representative for the 12th Congressional District of New Jersey; The Honorable Danny Werfel, Controller, U.S. Office of Management and Budget; Ms. Cynthia Metzler, Chief Administrative Services Officer, U.S. General Services Administration.

Feb. 27, 2013, 2:00 p.m. Subcommittee on Government Operations Hearing entitled, "Failures in Managing Federal Real Property: Billions in Losses." Witnesses: Dorothy Robyn, Ph.D., Commissioner, Public Buildings Service, U.S. General Services Administration; Mr. David Wise, Director, Physical Infrastructure Team, U.S. Government Accountability Office; Mr. Leonard Gilroy, Director of Government Reform, Reason Foundation.

Mar. 5, 2013, 10:00 a.m. Full Committee Hearing entitled, "Reducing Waste and Mismanagement: Implementing Agency Watchdogs' Recommendations Could Save Taxpayers Billions" Witnesses: The Honorable Anthony W. Miller, Deputy Secretary, U.S. Department of Education; The Honorable Kathleen S. Tighe, Inspector General, U.S. Department of Education; The Honorable John D. Porcari, Deputy Secretary, U.S. Department of Transportation; and The Honorable Calvin L. Scovel III, Inspector General, U.S. Department of Transportation.

Mar. 13, 2013, 10:00 a.m. Full Committee Hearing entitled, "Addressing Transparency in the Federal Bureaucracy: Moving Toward A More Open Government." Witnesses: Ms. Angela Canterbury, Director of Public Policy, Project on Government Oversight; Mr. Jim Harper, Director of Information Policy Studies, Cato Institute; Mr. Daniel Schuman, Policy Counsel, Director of the Advisory Committee on Transparency, The Sunlight Foundation; Ms. Celia Viggo Wexler, Senior Washington Representative, Center for Science and Democracy, Union of Concerned Scientists.

Mar. 19, 2013, 10:00 a.m. Full Committee Hearing entitled, "DOD and DHS: Implementing Agency Watchdogs' Recommendations Could Save Taxpayers Billions." Witnesses: The Honorable Robert Hale, Under Secretary of Defense (Comptroller), U.S. Department of Defense; Ms. Lynne Halbrooks, Principal Deputy Inspector General, U.S. Department of Defense; The Honorable Rafael Borrás, Under Secretary for Management, U.S. Department of Homeland Security; Mr. Charles Edwards, Deputy Inspector General, U.S. Department of Homeland Security.

Mar. 19, 2013, 1:30 p.m. A Joint Hearing of the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs and the Subcommittee on Federal Workforce, U.S. Postal Service and the Census entitled, "Sequestration Oversight: Understanding the Administration's Decision on Spending Cuts and Furloughs." Witnesses: Mr. David Robbins, Managing Director, Federal Communications Commission; Mr. Michael Young, USDA Budget Director, U.S. Department of Agriculture; Mr. Hari Sastry, Deputy Assistant Secretary for Resource Management, U.S. Department of Commerce.

Mar. 19, 2013, 3:00 p.m. Subcommittee on Energy Policy, Health Care and Entitlements entitled, "The Department of Energy's Strategy for Exporting Liquefied Natural Gas." Witnesses: Mr. Chris Smith, Acting Assistant Secretary for Fossil Energy, U.S. Department of Energy; Mr. Tom Choi, National Practice Leader – Gas, Deloitte MarketPoint LLC; Mr. Paul N. Cicio, President, Industrial Energy Consumers of America; Charles K. Ebinger, Ph.D, Director, Foreign Policy, Energy Security Initiative, Brookings Institute.

Apr. 9, 2013, 2:00 p.m. Full Committee Hearing entitled, "Reducing Waste in Government: Addressing GAO's 2013 Report on Duplicative Federal Programs." Witnesses: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office.

Apr. 10, 2013, 9:30 a.m. Full Committee Hearing entitled, "U.S. Foreign Assistance: What Oversight Mechanisms are in Place to Ensure Accountability?" Witnesses: The Honorable John F. Sopko, Special Inspector General for Afghanistan Reconstruction; The Honorable Harold W. Geisel, Deputy Inspector General, U.S. Department of State; Mr. Michael G. Carroll, Deputy Inspector General, U.S. Agency for International Development; The Honorable Kenneth P. MooreField, Deputy Inspector General for Special Plans and Operations, U.S. Department of Defense; Mr. Paul H. Cooksey, Deputy Special Inspector General for Iraq Reconstruction.

Apr. 10, 2013, 1:30 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "Ahead of Postal Reform: Hearing from USPS Business Partners." Witnesses: Mr. Steven Brandt, President and Publisher, Greenville News; Ms. Joy Franckowiak, Director, Postal Affairs and Distribution, Valpak; Ms. Meta Brophy, Director, Procurement Operations, Consumer Reports; Mr. Carl Janssens, VP Pharmacy Operations, CVS Caremark; Mr. Ken Garner, President & CEO, Association of Marketing Service Providers; Mr. Jerry Cerasale, Senior Vice President of Government Affairs, Direct Marketing Association.

Apr. 11, 2013, 10:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "The Federal Employees Health Benefit Program: Is it a Good Value for Federal Employees?" Witnesses: Mr. Jonathan Foley, Director, Planning and Policy Analysis, U.S. Office of Personnel Management; Mr. William A. Breskin, Vice President of Government Programs, Blue Cross and Blue Shield Association; Mr. Thomas C. Choate, Chief Growth Officer, UnitedHealthcare; Mr. Mark Merritt, President and CEO, Pharmaceutical Care Management Association; Ms. Jacqueline Simon, Public Policy Director, American Federation of Government Employees.

Apr. 16, 2013, 9:30 a.m. Full Committee Hearing entitled, "Open to Visitors? Assessing the Federal Effort to Minimize the Sequester's Impact on Access to Our Nation's Capital and National

Treasures.” Witnesses: The Honorable David Ferriero, Archivist of the United States, National Archives and Records Administration; The Honorable Jonathan Jarvis, Director, National Park Service; G. Wayne Clough, Ph.D., Secretary, Smithsonian Institution.

Apr. 17, 2013, 9:30 a.m. Full Committee Hearing entitled, “Options to Bring the Postal Service Back from Insolvency.” Witnesses: The Honorable Gene Dodaro, Comptroller General, U.S. Government Accountability Office; The Honorable Mickey Barnett, Chairman, Board of Governors, United States Postal Service; The Honorable Patrick Donahoe, Postmaster General and Chief Executive Officer, United States Postal Service; Mr. Frederic Rolando, President, National Association of Letter Carriers, AFL-CIO.

Apr. 17, 2013, 2:00 p.m. Subcommittee on National Security Hearing entitled, “Contracting to Feed U.S. Troops in Afghanistan: How did the Defense Department end up in a Multi-Billion Dollar Billing Dispute?” Witnesses: Mr. Michael Schuster, Managing Director Logistics Division, Supreme Group B.V.; Mr. Daniel Blair, Deputy Inspector General for Auditing, U.S. Department of Defense; Mr. Matthew Beebe, Deputy Senior Acquisition Executive, Defense Logistics Agency; Mr. William Kenny, Acquisition Executive, Troop Support, Defense Logistics Agency; Mr. Gary Shifton, Chief, OCONUS Division, Defense Logistics Agency.

Apr. 18, 2013, 9:30 a.m. Subcommittee on National Security Hearing entitled, “Sequestration Oversight: Prioritizing Security over Administrative Costs at TSA.” Witnesses: Mr. John W. Halinski, Deputy Administrator, Transportation Security Administration.

Apr. 24, 2013, 9:30 a.m. Full Committee Hearing entitled, “Broken Promises: the Small Business Lending Fund’s Backdoor Bank Bailout.” Witnesses: The Honorable Christy L. Romero, Special Inspector General, Office of the Special Inspector General for the Trouble Asset Relief Program.

Apr. 24, 2013, 2:00 p.m. Subcommittee on Economic Growth entitled, “Green Energy Oversight: Examining the Department of Energy’s Bad Bet on Fisker Automotive.” Witnesses: Mr. Nicholas Whitcombe, Supervisory Senior Investment Officer, LPO, Department of Energy; Mr. Henrik Fisker, Former Executive Chairman, Fisker Automotive; Mr. Bernhard Koehler, Chief Operating Officer, Fisker Automotive; Mr. Nicolas Loris, Herbert and Joyce Morgan Fellow, The Heritage Foundation; Ms. Zoe Lipman, Independent Consultant.

Apr. 25, 2013, 9:30 a.m. Subcommittee on Government Operations Hearing entitled, “Government Operations Oversight: Addressing Unused and Vacant Federal Property.” Off-site Hearing located at: 49 L Street S.E. in Washington, D.C. Witnesses: Mr. Michael Gelber, Deputy Commissioner, Public Buildings Service, General Services Administration; Mr. David Wise, Director, Physical Infrastructure Team, U.S. Government Accountability Office; The Honorable Tommy Wells, D.C. Councilmember, Ward 6; Mr. Ed Kaminski, Commissioner, Washington DC Advisory Neighborhood Commissions.

Apr. 25, 2013, 10:00 a.m. Subcommittee on National Security and Subcommittee on Economic Growth Joint Hearing entitled, “Oversight of the Federal Government’s Procurement of Ammunition.” Witnesses: Nick Nayak, Ph.D., Chief Procurement Officer, U.S. Department of Homeland Security; Mr. Humberto Medina, Assistant Director, National Firearms and Tactical

Training Unit, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, (Also Chair of the DHS Weapons and Ammunition Commodity Council); The Honorable Patrick P. O'Carroll, Jr., Inspector General, Office of the Inspector General, Social Security Administration; Mr. Jon Adler, National President, National Law Enforcement Officers Association.

Apr. 25, 2013, 10:30 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Examining the Lack of Transparency and Consumer Driven Market Forces in U.S. Health Care." Witnesses: Marty Makary M.D., M.P.H., F.A.C.S., Surgeon, Johns Hopkins Hospital, Health Policy Professor, Johns Hopkins Bloomberg School of Public Health; John Goodman, Ph.D., President and Chief Executive Officer, National Center for Policy Analysis; Ms. Lynn Quincy, Senior Health Policy Analyst, Consumers Union.

May 7, 2013, 10:00 a.m. Joint Hearing of the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs and the Judiciary Committee's Subcommittee on Constitution and Civil Justice entitled, "DOJ's Quid Pro Quo with St. Paul: A Whistleblower's Perspective." Witnesses: The Honorable Charles E. Grassley, United States Senator from Iowa; The Honorable Johnny Isakson, United States Senator from Georgia; Mr. Fredrick Newell, Community Activist, St. Paul, Minnesota; Mr. Thomas F. DeVincke, Attorney representing Mr. Newell in *Newell v. City of St. Paul*; Ms. Shelley R. Slade, Partner, Vogel, Slade & Goldstein, LLP.

May 8, 2013, 11:30 a.m. Full Committee Hearing entitled, "Benghazi: Exposing Failure and Recognizing Courage." Witnesses: Mr. Mark Thompson, Deputy Coordinator for Operations, Bureau of Counterterrorism and Leader, Foreign Emergency Support Team, U.S. Department of State; Mr. Gregory Hicks, Foreign Service Officer and former Deputy Chief of Mission/Chargé d'Affairs in Libya, U.S. Department of State; Mr. Eric Nordstrom, Diplomatic Security Officer and former Regional Security Officer in Libya, U.S. Department of State.

May 9, 2013, 9:00 a.m. Subcommittee on Government Operations Hearing entitled, "Federal Government Approaches to Issuing Biometric IDs." Witnesses: Mr. Stephen Sadler, Assistant Administrator, Office of Intelligence and Analysis, Transportation Security Administration; Mr. Stephen A. Lord, Director, Forensic Audits and Investigations, U.S. Government Accountability Office.

May 9, 2013, 9:30 a.m. Subcommittee on Federal Workforce, Postal Service and the Census Hearing entitled, "Is OPM Processing Federal Worker Pension Claims on Time?" Witnesses: Mr. Patrick McFarland, Inspector General, U.S. Office of Personnel Management; Mr. Kenneth Zawodny, Associate Director, Retirement Services, U.S. Office of Personnel Management; Ms. Valerie C. Melvin, Director, Information Management & Technology Resource Issues, U.S. Government Accountability Office; Dr. George Kettner, President, Economic Systems, Inc.; Mr. Joseph A. Beaudoin, President, National Active and Retired Federal Employees Assoc. (NARFE).

May 14, 2013, 2:30 p.m. Subcommittee on Government Operations Field Hearing entitled, "Data Centers and the Cloud: Is the Government Optimizing New Information Technologies Opportunities to Save Taxpayers Money?" Held in the Meese Conference Room in Mason Hall at George Mason University, Fairfax, VA. Witnesses: Mr. David A. Powner, Director, Information Technology

Management Issues, U.S. Government Accountability Office; Mr. Bernard Mazer, Chief Information Officer, Department of the Interior; Mr. Steve O’Keeffe, Founder, MeriTalk; Ms. Teresa H. Carlson, Vice President, World Wide Public Sector, Amazon Web Services; Mr. Kenyon Wells, Vice President of U.S. Federal, CGI Federal.

May 15, 2013, 10:00 a.m. Full Committee Briefing by the Federal Reserve Chairman, Ben Bernanke, on Fed Activities. Closed Briefing only open to Committee Members.

May 16, 2013, 10:30 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, “Opportunities Lost: Constraints on Oil and Gas Production on Federal Lands and Waters.” Witnesses: Mr. Tommy P. Beaudreau, Acting Assistant Secretary for Land and Minerals Management, U.S. Department of the Interior; Mr. Frank Rusco, Director, Natural Resources and Environment, U.S. Government Accountability Office.

May 21, 2013, 10:00 a.m. Joint Hearing of the Subcommittee on Energy Policy, Health Care and Entitlements and the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs entitled, “Examining the Concerns About ObamaCare Outreach Campaign.” Witnesses: Mr. Gary Cohen, Deputy Administrator and Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicaid Services.

May 22, 2013, 9:30 a.m. Full Committee Hearing entitled, “The IRS: Targeting Americans for Their Political Beliefs.” Witnesses: The Honorable J. Russell George Inspector General, Treasury Inspector General for Tax Administration, The Honorable Douglas Shulman, Former Commissioner, Internal Revenue Service; Ms. Lois G. Lerner, Director, Exempt Organizations, Tax Exempt and Government Entities Division, Internal Revenue Service; The Honorable Neal S. Wolin, Deputy Secretary, U.S. Department of the Treasury.

June 5, 2013, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, “OPM’s Revolving Fund: A Cycle of Government Waste?” Witnesses: The Honorable Patrick E. McFarland, Inspector General, U.S. Office of Personnel Management; Charles D. Grimes, III, Chief Operating Officer, U.S. Office of Personnel Management; Linda E. Brooks Rix, Co-Chief Executive Officer, Avue Technologies Corporation.

June 5, 2013, 10:00 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, “Up Against the Blend Wall: Examining EPA’s Role in the Renewable Fuel Standard.” Witnesses: Mr. Christopher Grundler, Director, Office of Transportation & Air Quality, U.S. Environmental Protection Agency; Mr. Jack Gerard, President and CEO, American Petroleum Institute; Mr. Lucian Pugliaresi, President, Energy Policy Research Foundation Inc.; Mr. Joel Brandenberger, President, National Turkey Federation; Jeremy I. Martin, Ph.D., Senior Scientist, Clean Vehicles Program, Union of Concerned Scientists.

June 6, 2013, 9:30 a.m. Full Committee Hearing entitled, “Collected and Wasted: The IRS Spending Culture and Conference Abuses.” Witnesses: The Honorable J. Russell George, Inspector General, Treasury Inspector General for Tax Administration; Mr. Gregory Kutz, Assistant Inspector General for Audit, Treasury Inspector General for Tax Administration; Mr. Faris Fink, Commissioner, Small

Business and Self-Employed Division, Internal Revenue Service; Mr. Danny Werfel, Acting Commissioner, Internal Revenue Service.

June 10, 2013, 10:00 a.m. Subcommittee on Government Operations Field Hearing entitled, "The Delphi Pension Bailout: Unequal Treatment of Retirees." Held at the Sinclair Community College in Dayton, Ohio. Witnesses: Mr. Bruce Gump, Delphi Salaried Retirees Association; Ms. Mary Miller, Delphi Salaried Retirees Association; Mr. Tom Rose, Delphi Salaried Retirees Association; Mr. Paul Dobosz, Delphi Salaried Retirees Association; Mr. James Sherk, Senior Policy Analyst in Labor Economics, The Heritage Foundation.

June 12, 2013, 9:30 a.m. Full Committee Hearing entitled, "Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?" Witnesses: Mr. John Neumann, Acting Director, Acquisition and Sourcing Management, U.S. Government Accountability Office; The Honorable Angela B. Styles, Partner, Crowell & Moring, Washington, D.C., (Former Administrator, Office of Federal Procurement Policy, OMB); Mr. Scott H. Amey, General Counsel, Project on Government Oversight.

June 13, 2013, 10:00 a.m. Subcommittee on National Security Hearing entitled, "Examining the Government's Record on Implementing the International Religious Freedom Act." Witnesses: The Honorable Suzan Johnson Cook, Ambassador-at-Large for International Religious Freedom, U.S. Department of State; Katrina Lantos Swett, Ph.D., Chair, U.S. Commission on International Religious Freedom; Thomas F. Farr, Ph.D., Director of the Religious Freedom Project, Berkley Center for Religion, Peace and World Affairs, Georgetown University; Ms. Tina Ramirez, President, Hardwired, Inc.; Mr. Amjad Mahmood Khan, National Director of Public Affairs, Ahmadiyya Muslim Community USA; Chris Seiple, Ph.D., President, Institute for Global Engagement.

June 18, 2013, 9:00 a.m. Full Committee Hearing entitled, "Reinventing Government." Witnesses: The Honorable David M. Walker, Government Transformation Initiative; The Honorable Stephen Goldsmith, Daniel Paul Professor of the Practice of Government, Director, Innovations in Government Program, John F. Kennedy School of Government; Ms. Elaine C. Kamarck, Ph.D., Director, Management and Leadership Institute, Senior Fellow, Governance Studies, The Brookings Institution; Mr. Daniel J. Chenok, Executive Director, IBM Center for the Business of Government; Mr. J. David Cox, National President, American Federation of Government Employees.

June 19, 2013, 9:30 a.m. Subcommittee on Government Operations Hearing entitled, "Federal Government Approaches to Issuing Biometric IDs: Part II." Witnesses: Mr. Charles H. Romine, Director of the Information Technology Laboratory, National Institute of Standards and Technology, U.S. Department of Commerce; Mr. Steven Martinez, Executive Assistant Director of the Science and Technology Branch, Federal Bureau of Investigation, U.S. Department of Justice; Mr. John Allen, Director of the Flight Standards Service, Federal Aviation Administration; Ms. Colleen Manaher, Executive Director of Planning, Program Analysis, and Evaluation, Office of Field Operations, Customs and Border Protection, U.S. Department of Homeland Security; Ms. Brenda Sprague, Deputy Assistant Secretary for Passport Services, U.S. Department of State.

June 21, 2013, 9:30 a.m. Subcommittee on Government Operations Field Hearing entitled, "Building a Better Partnership: Exploring the Mine Safety and Health Administration's Regulation of Southern Appalachian Mining." Held at the Mitchell County Historic Courthouse in Bakersville, North Carolina. Witnesses: Mr. Marvin Lichtenfels, Deputy Administrator for Metal/Non-Metal, Mine Safety and Health Administration; Mr. Sam Bratton, President, North Carolina Aggregates Association; Mr. Jeff Stoll, Safety and Health Manager, The Quartz Corporation; Mr. Mack McNeely, Vice President, LBM Industries and Nantahala Talc Limestone.

June 26, 2013, 9:00 a.m. Full Committee Hearing entitled, "The IRS Contracts with Strong Castle, Inc." Witnesses: Ms. Beth Tucker, Deputy Commissioner for Operations Support, Internal Revenue Service; Mr. Michael Chodos, Associate Administrator, Office of Entrepreneurial Development, U.S. Small Business Administration; Mr. Brad Flohr, Senior Advisor for Compensation Service, Veterans Benefit Administration, U.S. Veterans Administration; Mr. Gregory Roseman, Deputy Director, Enterprise Networks and Tier Systems Support, Internal Revenue Service; Mr. William Sisk, Deputy Commissioner, Federal Acquisition Service, General Services Administration; Mr. Braulio Castillo, President and Chief Executive Officer, Strong Castle, Inc.

June 27, 2013, 9:00 a.m. Subcommittee on National Security Hearing entitled, "Border Security Oversight: Identifying and Responding to Current Threats." Witnesses: Mr. Michael Fisher, Chief, U.S. Border Patrol, Customs and Border Protection; Mr. David J. Murphy, Assisting Acting Commissioner, Customs and Border Protection; Mr. Thomas Homan, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Custom Enforcement; Ms. Rebecca Gambler, Director, Homeland Security and Justice, U.S. Government Accountability Office.

June 27, 2013, 9:30 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges." Witnesses: The Honorable Tom Coburn, M.D. (R-Oklahoma), Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, United States Senate; Glenn E. Sklar, Deputy Commissioner, Disability Adjudication and Review, Social Security Administration; The Honorable Larry J. Butler, Administrative Law Judge, Miami Office of Disability Adjudication Review, Social Security Administration; The Honorable Thomas W. Snook, Administrative Law Judge, Miami Office of Disability Adjudication Review, Social Security Administration; The Honorable J.E. Sullivan, Administrative Law Judge, Pittsburgh Office of Administrative Law Judges, U.S. Department of Labor; The Honorable Drew A. Swank, Administrative Law Judge, Pittsburgh Office of Administrative Law Judges, U.S. Department of Labor; Thomas D. Sutton, Board of Directors, National Organization of Social Security Claimants' Representatives.

July 10, 2013, 9:30 a.m. Full Committee Hearing entitled, "Unaccountable Government: GAO Reports Show Feds Struggling to Track Money and Performance." Witnesses: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office.

July 10, 2013, 1:00 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "The Combined Federal Campaign: Making Every Dollar Count." Witnesses: The Honorable David G. Reichert (WA-08), U.S. House of Representatives; Mr. Mark Lambert, Associate Director for Merit System Accountability and Compliance, U.S. Office of Personnel Management, Ms.

Ju'Coby Pittman, President and CEO, Clara White Mission; Mr. Kalman Stein, President and CEO, EarthShare; Ms. Debby Hampton, President and CEO, United Way of Central Oklahoma; Mr. Ken Berger, President and CEO, Charity Navigator.

July 17, 2013, 10:00 a.m. Subcommittee on Energy Policy, Health Care and Entitlements and Committee on Homeland Security Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies Joint Hearing entitled, "Evaluating Privacy, Security, and Fraud Concerns with ObamaCare's Information Sharing Apparatus." Witnesses: Mr. Alan R. Duncan, Assistant Inspector General for Security and Information Technology Services, Treasury Inspector General for Tax Administration; Mr. Terence V. Milholland, Chief Technology Officer, Internal Revenue Service; The Honorable Danny Werfel, Principal Deputy Commissioner, Internal Revenue Service; The Honorable Marilyn B. Tavenner, Administrator, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services; Mr. Henry Chao, Deputy Chief Information Officer, Deputy Director of the Office of Information Services, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services; Mr. John Dicken, Director, Health Care, U.S. Government Accountability Office.

July 17, 2013, 10:15 a.m. Subcommittee on National Security Hearing entitled, "Border Security Oversight, Part II: Examining Asylum Requests." Witnesses: Mr. Joseph E. Langlois, Associate Director, Refugee, Asylum, and International Operations Directorate, U.S. Citizenship and Immigration Services.

July 17, 2013, 1:30 p.m. Full Committee Hearing entitled, "A Path Forward on Postal Reform." Witnesses: The Honorable Adrian Smith, Member of Congress; The Honorable Patrick Donahoe, Postmaster General & CEO, United States Postal Service; Mr. Joel Quadracci, Chairman, President & CEO, Quad Graphics; Mr. Cliff Guffey, President, American Postal Workers Union, AFL-CIO.

July 18, 2013, 11:00 a.m. Full Committee Hearing entitled, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications." Witnesses: Ms. Elizabeth Hofacre, Revenue Agent, Exempt Organizations, Tax Exempt and Government Entities Division, Internal Revenue Service; Mr. Carter Hull (Recently Retired), Tax Law Specialist, Exempt Organizations, Tax Exempt and Government Entities Division, Internal Revenue Service; The Honorable J. Russell George, Inspector General, Treasury Inspector General for Tax Administration; Mr. Michael McCarthy, Chief Counsel, Treasury Inspector General for Tax Administration; Mr. Gregory Kutz, Assistant Inspector General for Management Services and Exempt Organizations, Treasury Inspector General for Tax Administration.

July 18, 2013, 2:30 p.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Hearing entitled, "Regulatory Burdens: The Impact of Dodd-Frank on Community Banking." Witnesses: Mr. Eddie Creamer, President and CEO, Prosperity Bank; Ms. Tanya Marsh, Assistant Professor of Law, Wake Forest University School of Law; The Honorable R. Bradley Miller, Senior Fellow, Center for American Progress (Former Member of Congress); Ms. Hester Peirce, Senior Research Fellow, Mercatus Center, George Mason University.

July 18, 2013, 2:30 p.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Examining the Obama Administration's Social Cost of Carbon Estimates." Witnesses: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

July 25, 2013, 9:30 a.m. Subcommittee on Government Operations Hearing entitled, "Data Centers and the Cloud, Part II: The Federal Government's Take on Optimizing New Information Technologies Opportunities to Save Taxpayers Money." Witnesses: Mr. David Powner, Director, Information Technology Management Issues, U.S. Government Accountability Office; The Honorable Steven VanRoekel, Acting Deputy Director for Management, Federal Chief Information Officer, Administrator for E-Government and Information Technology, Office of Management and Budget; Dr. David L. McClure, Associate Administrator, Office of Citizen Services and Innovative Technologies, U.S. General Services Administration.

July 31, 2013, 10:15 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Oversight of IRS's Legal Basis for Expanding ObamaCare's Taxes and Subsidies." Witnesses: The Honorable Scott Pruitt, Attorney General, State of Oklahoma; Charles Willey, M.D., CEO, Innovare Health Advocates Inc.; Mr. Simon Lazarus, Senior Counsel, Constitutional Accountability Center; Mr. Jonathan Adler, Professor of Law, Case Western Reserve University; Ms. Emily McMahon, Deputy Assistant Secretary for Tax Policy, U.S. Department of the Treasury.

Aug. 1, 2013, 10:00 a.m. Full Committee Hearing entitled, "Department of Energy's Bonneville Power Administration: Discriminating Against Veterans and Retaliating Against Whistleblowers." Witnesses: The Honorable Gregory H. Friedman, Inspector General, U.S. Department of Energy; The Honorable Daniel B. Poneman, Deputy Secretary, U.S. Department of Energy; Ms. Anita J. Decker, Bonneville Power Administration.

Aug. 2, 2013, 9:00 a.m. Subcommittee on National Security and Committee on Natural Resources' Public Lands and Environmental Regulation Subcommittee Joint Hearing entitled, "Missing Weapons at the National Park Service: Mismanagement and Lack of Accountability." Witnesses: Mr. Robert A. Knox, Assistant Inspector General for Investigations, Office of Inspector General, U. S. Department of Interior; Ms. Kim A. Thorsen, Deputy Assistant Secretary, Public Safety, Resource Protection and Emergency Services, U. S. Department of Interior; The Honorable Jonathan B. Jarvis, Director, National Park Service, U. S. Department of the Interior; Ms. Teresa Chambers, Chief of the United States Park Police Force, National Park Service, U. S. Department of the Interior.

Aug. 2, 2013, 9:00 a.m. Subcommittee on Government Operations Hearing entitled, "Examining the Skyrocketing Problem of Identity Theft Related Tax Fraud at the IRS." Witnesses: The Honorable Daniel Werfel, Principal Deputy Commissioner, Internal Revenue Service; Ms. Nina E. Olson, National Taxpayer Advocate, Office of the Taxpayer Advocate; Mr. Michael McKenney, Acting Deputy Inspector General for Audit, Treasury Inspector General for Tax Administration; Mr. Douglas J. MacGinnitie, State Revenue Commissioner, Department of Revenue.

Sept. 10, 2013, 9:00 a.m. Full Committee Hearing entitled, "Preventing Violations of Federal Transparency Laws." Witnesses: The Honorable Gary Gensler, Chairman, U.S., Commodity Futures

Trading Commission; The Honorable Lisa P. Jackson, Vice President of Environmental Initiatives, Apple Inc. (Former Administrator, U.S. Environmental Protection Agency); Mr. Jonathan Silver Visiting Distinguished Senior Fellow, Third Way (Former Executive Director Loan Program Office, U.S. Department of Energy); Mr. Andrew, McLaughlin, Senior Vice President, Betaworks (Former Deputy Chief Technology Officer, Executive Office of the President); The Honorable David S. Ferriero, Archivist of the United States.

Sept. 11, 2013, 9:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "Ensuring an Accurate and Affordable 2020 Census." Witnesses: The Honorable John Thompson, Director, U.S. Census Bureau; Mr. Robert Goldenkoff, Director, Strategic Issues, U.S. Government Accountability Office; Ms. Carol Cha, Director, Information Technology, U.S. Government Accountability Office.

Sept. 11, 2013, 1:30 p.m. Subcommittee on Government Operations Hearing entitled, "Oversight of the SIGTARP Report on Treasury's Role in the Delphi Pension Bailout." Witnesses: The Honorable Christy L. Romero, Special Inspector General for the Troubled Asset Relief Program; Mr. Matthew A. Feldman, Partner, Wilkie Farr & Gallagher, LLP; Mr. Steven Rattner, Chairman, Willett Advisors, LLC; Mr. Harry J. Wilson, Chairman, CEO and founder, The MAEVA Group, LLC; Mr. Harvey R. Miller, Partner, Weil, Gotshal & Manges, LLP; Ms. Barbara D. Bovbjerg, Managing Director, Education, Workforce, and Income Security Issues, U.S. Government Accountability Office; Ms. A. Nicole Clowers, Director, Financial Markets and Community Investment, U.S. Government Accountability Office.

Sept. 18, 2013, 10:00 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs and the Subcommittee on Energy Policy, Health Care and Entitlements Joint Hearing entitled, "Federal Implementation of ObamaCare: Concerns of State Governments." Witnesses: The Honorable Jeff Colyer, M.D., Lieutenant Governor, State of Kansas; The Honorable C. Bradley Hutto, State Senator, State of South Carolina; The Honorable Alan Wilson, Attorney General, State of South Carolina; The Honorable Katrina R. Jackson, State Representative, State of Louisiana; Ms. Kathy Kliebert, Secretary, Department of Health and Hospitals, State of Louisiana; The Honorable Eleanor Sobel, State Senator, State of Florida, The Honorable Matthew Hudson, State Representative, State of Florida.

Sept. 19, 2013, 9:30 a.m. Full Committee Hearing entitled, "Reviews of the Benghazi Attack and Unanswered Questions." Witnesses: Ambassador Thomas R. Pickering, Chairman, Benghazi Accountability Review Board; Admiral Michael G. Mullen, USN (Ret.), Vice-Chairman, Benghazi Accountability Review Board; Mr. Mark J. Sullivan, Chairman, Independent Panel on Best Practices, Former Director, United States Secret Service; Mr. Todd Keil, Member, Independent Panel on Best Practices, Former Asst. Secretary for Infrastructure Protection, U.S. Department of Homeland Security; Ms. Patricia Smith, Mother of Sean Smith; and Mr. Charles Woods, Father of Tyrone Woods.

Oct. 1, 2013, 9:30 a.m. Full Committee Hearing entitled, "Secret Agent Man? Oversight of EPA's IG Investigation of John Beale." Witnesses: The Honorable Arthur A. Elkins, Jr., Inspector General, U.S. Environmental Protection Agency; Mr. Patrick Sullivan, Deputy Inspector General for

Investigations, U.S. Environmental Protection Agency; Mr. Robert Brenner, Former Director of Policy Analysis and Review, Office of Air and Radiation, U.S. Environmental Protection Agency; Mr. John C. Beale, Former Senior Policy Advisor, U.S. Environmental Protection Agency; The Honorable Bob Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency.

Oct. 2, 2013, 10:00 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Oversight of the Wind Energy Production Tax Credit." Witnesses: Mr. Curtis G. Wilson, Associate Chief Counsel, Passthroughs and Special Industries, Internal Revenue Service; Mr. Rob Gramlich, Senior Vice-President for Public Policy, American Wind Energy Association; Mr. Dan W. Reicher, Executive Director, Steyer-Taylor Center for Energy Policy & Finance at Stanford University; Robert J. Michaels, Ph.D., Senior Fellow, Institute for Energy Research, Professor of Economics, California State University, Fullerton.

Oct. 9, 2013, 9:30 a.m. Full Committee Hearing entitled, "Examining the IRS's Role in Implementing and Enforcing ObamaCare." Witnesses: Ms. Sarah Hall Ingram, Director, Affordable Care Act Office, Internal Revenue Service.

Oct. 16, 2013, 9:30 a.m. Full Committee and the Committee on Natural Resources Joint Hearing entitled, "As Difficult As Possible: The National Park Service's Implementation of the Government Shutdown." Witnesses: The Honorable Greg Bryan, Mayor, Town of Tusayan; Ms. Anna Eberly, Managing Director, Claude Moore Colonial Farm; The Honorable Jonathan B. Jarvis, Director, National Park Service; Ms. Lisa Simon, President, National Tourism Association; Mr. Myron Ebell, Director, Center for Energy and Environment, Competitive Enterprise Institute; and Mr. Denis P. Galvin, Board Member, National Parks Conservation Association.

Oct. 30, 2013, 9:30 a.m. Full Committee Hearing entitled, "A Culture of Mismanagement and Wasteful Conference Spending at the Department of Veterans Affairs." Witnesses: The Honorable Gina Farrisee, Assistant Secretary for Human Resources and Administration, U.S. Department of Veterans Affairs; Mr. Edward Murray, Deputy Assistant Secretary for Finance, U.S. Department of Veterans Affairs; The Honorable John Sepúlveda, Former Assistant Secretary for Human Resources and Administration, U.S. Department of Veterans Affairs; The Honorable Richard Griffin, Deputy Inspector General, U.S. Department of Veterans Affairs; Mr. Gary Abe, Deputy Assistant Inspector General for Audits and Evaluations, U.S. Department of Veterans Affairs.

Nov. 13, 2013, 9:30 a.m. Full Committee Hearing entitled, "ObamaCare Implementation: The Rollout of Healthcare.gov." Witnesses: Mr. David A. Powner, Director of IT Management Issues, U.S. Government Accountability Office; Mr. Henry Chao, Deputy Chief Information Officer, Deputy Director of the Office of Information Services, Centers for Medicare and Medicaid Services; Mr. Frank Baitman, Deputy Assistant Secretary for Information Technology and Chief Information Officer, U.S. Department of Health and Human Services; Mr. Todd Park, Chief Technology Officer of the United States, Office of Science and Technology Policy; Mr. Steven VanRoekel, Chief Information Officer of the United States, and Administrator, Office of Electronic Government, Office of Management and Budget; Mr. Richard A. Spires, Former Chief Information Officer, U.S. Department of Homeland Security; and Ms. Karen Evans, Partner, KE&T Partners, LLC.

Nov. 14, 2013, 10:00 a.m. Subcommittee on National Security Hearing entitled, "Border Security Oversight, Part III: Border Crossing Cards and B1/B2 Visas." Witnesses: Mr. John Wagner, Acting Deputy Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection; Mr. John P. Woods, Assistant Director, National Security Investigations Division, Homeland Security Investigations, U.S. Immigration and Customs Enforcement, Mr. Edward J. Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State; and Mr. Juan Osuna, Director, Executive Office for Immigration Review, U.S. Department of Justice.

Nov. 14, 2013, 9:30 a.m. Subcommittee on Government Operations Hearing entitled, "Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service." Witnesses: Mr. Tom Hall, Chief of Customer Services, Amtrak, Mr. Ted Alves, Inspector General, Amtrak Office of the Inspector General; Mr. Dwayne Bateman, Amtrak Food and Beverage Service Employee.

Nov. 19, 2013, 10:00 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, "Continuing Oversight of the Social Security Administration's Mismanagement of Federal Disability Programs." Witnesses: The Honorable Patrick O'Carroll, Inspector General, Social Security Administration; Mr. Glenn E. Sklar, Deputy Commissioner, Disability Adjudication and Review, Social Security Administration; and Mr. Jasper J. Bede, Regional Chief Administrative Law Judge, Region 3 Office of Disability Adjudication and Review, Social Security Administration.

Nov. 20, 2013, 10:00 a.m. Subcommittee on National Security Hearing entitled, "Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense." Witnesses: Mr. John Florence, Branch Chief, Use of Force Policy Division, Field Operations Academy, U.S. Customs and Border Protection; The Honorable Carolyn N. Lerner, Special Counsel, U.S. Office of Special Counsel; Ms. Catherine V. Emerson, Chief Human Capital Officer, U.S. Department of Homeland Security; Mr. Ronald Vitiello, Deputy Chief, Office of Border Patrol, U.S. Customs and Border Protection; and Mr. Brandon Judd, President, National Border Patrol Council, American Federation of Government Employees.

Nov. 22, 2013, 10:00 a.m. Full Committee Field Hearing entitled, "ObamaCare Implementation: Sticker Shock of Increased Premiums for Healthcare Coverage." Witnesses: Mr. Dan Waters, President, Dan Waters & Associates; Mrs. Sherry Overbey, Director, Belmont Crisis Pregnancy Center; Mr. Joel Long, President, Gastonia Sheet Metal Services; Mr. Jason Falls, Owner, Falls Insurance; and Mr. Tav Gauss, President, The Action Group Human Resources Solutions.

Nov. 25, 2013, 10:00 a.m. Full Committee Field Hearing entitled, "ObamaCare Implementation: High Costs, Few Choices for Rural America." Witnesses: Mr. Raymer M. Sale, Jr., President, E2E Benefits Services, Inc.; Jeff Charles Reinhardt, Ph.D., President, The Longstreet Clinic, P.C.; Mr. Michael Boyette, Owner, Owl Town Auto; and Mrs. Emma Lucille Collins, Owner, Synergy Wellness.

Dec. 2, 2013, 10:00 a.m. Full Committee Hearing entitled, "Changes to The Heights Act: Shaping Washington, D.C., for the Future, Part II." Witnesses: Ms. Harriet Tregoning, Director, DC Office of Planning; and Mr. Marcel C. Acosta, Executive Director, National Capital Planning Commission.

Dec. 3, 2013, 10:00 a.m. Subcommittee on Government Operations Field Hearing entitled, "Federal Trade Commission and General Services Administration Thwart Cost Saving Consolidation."

Witnesses: Mr. David Robbins, Executive Director, Federal Trade Commission; and Mr. Chris Wisner, Assistant Commissioner, Office of Leasing, Public Buildings Service, General Services Administration.

Dec. 3, 2013, 10:00 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census Hearing entitled, "Assessing Government's Use of Design-Build Contracts." Witnesses: Mr. James Dalton, Chief of the Engineering and Construction Division, Directorate of Civil Works, United States Army Corps of Engineers (USACE); Mr. Charles Dalluge, Executive Vice President, Leo A Daly Company, On behalf of the American Institute of Architects; and Mr. Randall Gibson, President, Whitesell-Green, Inc., on behalf of the Associated General Contractors of America.

Dec. 4, 2013, 9:30 a.m. Full Committee Hearing entitled, "The Roll Out of HealthCare.gov: The Limitations of Big Government." Witnesses: Veronique de Rugy, Ph.D., Senior Research Fellow, Mercatus Center, George Mason University; Clifford Winston, Searle Freedom Trust Senior Fellow, Economic Studies Program, The Brookings Institution; Mark A. Calabria, Ph.D., Director of Financial Regulation Studies, Cato Institute; and Karen Kruse Thomas, Ph.D., Historian and Communications Associate, Johns Hopkins Bloomberg School of Public Health.

Dec. 6, 2013, 10:00 a.m. Full Committee Field Hearing entitled, "ObamaCare Implementation: The Broken Promise: If You Like Your Current Plan You Can Keep It." Witnesses: Mrs. Julie Dalton, Arizona; Ms. Diana Robinson, Arizona; Mr. Steve Montgomery, Arizona/California Border; and Mrs. Christie Hamman, Arizona.

## 2014 HEARINGS

Jan. 9, 2014, 10 a.m. Full Committee hearing entitled, "Waste in Government: What's Being Done?" Witnesses: The Honorable Tom Carper, United States Senator; The Honorable Tom Coburn, United States Senator; Mr. Thomas A. Schatz, President, Citizens Against Government Waste; Mr. Chris Edwards, Director of Tax Policy Studies, Cato Institute; Mr. Brandon Arnold, Vice President of Governmental Affairs, National Taxpayers Union; and Ms. Jaimie Woo, Tax and Budget Associate, U.S. Public Interest Research Group.

Jan. 14, 2014, 10:00 a.m. Subcommittee on Government Operations hearing entitled, "TSA Oversight: Examining the Screening Partnership Program." Witnesses: Mr. Kelly C. Hoggan, Assistant Administrator for Security Operations, Transportation Security Administration; Mr. Mark Bell, Acting Deputy Inspector General for Audits, U.S. Department of Homeland Security, Office of the Inspector General; Ms. Jennifer Grover, Acting Director, Homeland Security and Justice, Government Accountability Office.

Jan. 15, 2014, 10 a.m. Full Committee hearing entitled, "Empowering Agency Oversight: Views from the Inspectors General Community." Witnesses: The Honorable Peggy E. Gustafson, Inspector General Small Business Administration; The Honorable Michael E. Horowitz, Inspector General, U.S. Department of Justice; and Ms. Kathy A. Buller, Inspector General, Peace Corps.

January 16, 2014, 10:00 a.m. Full Committee hearing entitled, "HHS' Own Security Concerns about HealthCare.gov." Witnesses: Kevin Charest, Ph.D., Chief Information Security Officer, Department

of Health and Human Services; and Ms. Teresa Fryer, Chief Information Security Officer, Centers for Medicare and Medicaid Services.

Jan. 28, 2014, 10 a.m. Full Committee hearing entitled, “A Roadmap for Hackers? – Documents Detailing Healthcare.gov Security Vulnerabilities.” Witnesses: Mr. Milton Shomo, Principal Information Systems Engineer, Cyber Operations, The MITRE Corporation; Kevin Charest, Ph.D., Chief Information Security Officer, U.S. Department of Health and Human Services.

Feb. 4, 2014, 1:30 p.m. Government Operations Subcommittee hearing entitled, “Mixed Signals: The Administration’s Policy on Marijuana.” Witnesses: Mr. Michael P. Botticelli, Deputy Director, Office of National Drug Control Policy.

Feb. 5, 2014, 9:30 a.m. Full Committee hearing entitled, “ObamaCare: Why the Need for an Insurance Company Bailout?” Witnesses: The Honorable Marco Rubio, United States Senator, Florida; John C. Goodman, Ph.D., President and CEO, National Center for Policy Analysis, Washington, D.C.; Mr. Doug Badger, Former Senior White House Advisor for Health Policy to President George W. Bush; Professor Timothy S. Jost, Washington and Lee University; and the Honorable Charles E. Grassley, U.S. Senate.

Feb. 5, 2014, 2 p.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs & Subcommittee on Energy Policy, Health Care and Entitlements joint hearing entitled, “Co-ops: Examining ObamaCare’s \$2 Billion Loan Gamble.” Witnesses: Devon Herrick, Ph.D., Senior Fellow, National Center for Policy Analysis; Roger Stark, M.D., Health Care Policy Analyst, Washington Policy Center; Ms. Sarah Horowitz, Executive Director & CEO, Freelancers Union; Mr. Avik Roy, Senior Fellow, Manhattan Institute; Jan VanRiper, Ph.D., Executive Director, National Alliance of State Health Co-Ops.

Feb. 6, 2014, 9:30 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs hearing entitled, “The IRS Targeting Investigation: What is the Administration Doing?” Witnesses: Ms. Barbara Kay Bosserman (invited), Civil Rights Division, United States Department of Justice; Ms. Catherine Engelbrecht, Founder, King Street Patriots; Ms. Cleta Mitchell, Partner, Foley & Lardner LLP; Ms. Becky Gerritson, Founder and President Wetumpka TEA Party, Inc.; Mr. Jay Sekulow, Chief Counsel, American Center for Law and Justice.

Feb. 10, 2014, 9 a.m. Subcommittee on Government Operations field hearing entitled, “Assessing NASA’s Underutilized Real Property Assets at the Kennedy Space Center.” Witnesses: Mr. Robert D. Cabana, Director, John F. Kennedy Space Center, National Aeronautics and Space Administration; Brigadier General Nina M. Armagno, Commander, 24<sup>th</sup> Space Wing, Director, Eastern Range, Patrick Air Force Base, Florida, United States Air Force; John E.B. Smith, Regional Commissioner, Public Building Service, Southeast Sunbelt Region, U.S. General Services Administration; Mr. Jim Kuzma, Chief Operating Officer, Space Florida; Mr. Charles Lee, Director of Advocacy, Central Florida Policy Office, Audubon Society; Mr. John Walsh, Chief Executive Officer, Cape Canaveral Port Authority.

Feb. 11, 2014, 10 a.m. Full Committee hearing entitled, “DC Navy Yard Shooting: Fixing the Security Clearance Process.” Witnesses: Mr. Sterling Phillips, CEO, US Investigations Services, LLC; The Honorable Katherine Archuleta, Director, U.S. Office of Personnel and Management; Mr. Stephen

Lewis, Deputy Director for Personnel, Industrial and Physical Security Policy, Counterintelligence and Security Directorate, Office of Undersecretary of Defense for Intelligence, U.S. Department of Defense; The Honorable Patrick McFarland, Inspector General, U.S. Office of Personnel Management; Ms. Susan A. Ordakowski, Vice President, Contracts and Compliance, KeyPoint Government Solutions; Mr. Michael Rhodes, Executive Vice President, Mission Systems and Services Business Group, CACI International, Inc.

Feb. 26, 2014, 10 a.m. Full Committee hearing entitled, "Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers." Witnesses: The Honorable Charles E. Grassley, United State Senator, Iowa; Jeffrey Shuren, M.D., Director, Center for Devices and Radiological Health, U.S. Food and Drug Administration; Ms. Ruth McKee, Associate Director for Management, Center for Devices and Radiological Health, Food and Drug Administration; Mr. Walter Harris, Chief Operating Officer and Acting Chief Information Officer, U.S. Food and Drug Administration; Ms. Angele Canterbury, Director for Public Policy, Project on Government Oversight.

Feb. 26, 2014, 1:30 p.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs hearing entitled, "Is the Obama Administration Conducting a Serious Investigation of IRS Targeting?" Witnesses: The Honorable George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP; The Honorable Hans A. von Spakovsky, Manager, Election Law Reform Initiative and Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation; Mr. Glen F. Ivey, Partner, Leftwich and Ludaway LLC; Mr. Richard W. Painter, S. Waler Richey Professor of Corporate Law, University of Minnesota Law School; and the Honorable Eileen J. O'Connor, Former Assistant Attorney General (2001-2007), Tax Division, U.S. Department of Justice.

Feb. 27, 2014, 9:30 a.m. Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs hearing entitled, "The Administration's Proposed Restriction on Political Speech: Doubling Down on IRS Targeting." Witnesses: Ms. Jenny Beth Martin, President and Co-Founder, Tea Party Patriots; Mr. Gabriel Rottman, Legislative Counsel/Policy Advisor, American Civil Liberties Union; The Honorable Wayne Allard, Vice President, Government Relations, American Motorcyclist Association (Former United States Senator from Colorado); Ms. Diana Aviv, President and CEO, Independent Sector; Mr. James R. Mason, III, Senior Counsel, Home School Legal Defense Association; Mr. Allen Dickerson, Legal Director, Center for Comparative Politics.

Feb. 27, 2014, 10 a.m. Subcommittee on National Security hearing entitled, "Afghanistan: Honoring the Heroes of Extortion 17." Witnesses: Mr. Gary Reid, Principal Deputy Assistant Secretary of Defense, Special Operations and Low Intensity Conflict, U.S. Department of Defense; Ms. Deborah Skillman, Director, Casualty and Mortuary Affairs, U.S. Department of Defense; Colonel John M. Devillier, Commander, Air Force Mortuary Affairs Operations, Dover Air Force Base, Delaware, United States Air Force, Department of Defense; Colonel Kerk B. Brown, Director, Army Casualty and Mortuary Affairs Operations Center, United States Army, U.S. Department of Defense; Commander Aaron Brodsky, Director, Navy Casualty Services, United States Navy, U.S. Department of Defense.

Feb. 27, 2014, 2 p.m. Subcommittee on Energy Policy, Health Care, and Entitlements hearing entitled, "Examining the Endangered Species Act." Witnesses: Mr. Samuel Rauch, Deputy Assistant

Administrator for Regulatory Programs, National Oceanic and Atmospheric Administration Fisheries Service, U.S. Department of Commerce; Mr. Michael Bean, Counselor, Fish and Wildlife and Parks, U.S. Department of the Interior.

March 4, 2014, 1:30 p.m. Subcommittee on Federal Workforce, US Postal Service and the Census hearing entitled, "Alaska Bypass: A Broken System." Witnesses: The Honorable Mark Begich, United States Senator, Alaska; The Honorable Don Young, United States Representative, Alaska (At-Large); Mr. Ronald S. Haberman, Alaska District Manager, United States Postal Service; Ms. Tammy Whitcomb, Deputy Inspector General, Office of Inspector General, United States Postal Service; Mr. Dennis Devany, Deputy Director, Office of Aviation Analysis, Office of Aviation and International Affairs, United States Department of Transportation; Mr. Steve Deaton, Senior Vice President, Alaska Central Express (ACE) Air Cargo, Inc.; Mr. Jeff Butler, Vice President, Airport Operations and Customer Service, Alaska Airlines.

March 4, 2014, 1:30 p.m. Subcommittee on Government Operations hearing entitled, "Mixed Signals: The Administration's Stance on Marijuana, Part Two." Witness: The Honorable Thomas M. Harrigan, Deputy Administrator, U.S. Drug Enforcement Administration; the Honorable John F. Walsh, Attorney, Colorado, Department of Justice.

March 5, 2014, 9:30 a.m. Continuation of the Full Committee hearing entitled, "The IRS: Targeting Americans for their Political Beliefs." Witness: Ms. Lois G. Lerner, Former Director, Exempt Organizations, Tax Exempt and Government Entities Division, Internal Revenue Service.

March 13, 2014, 1:30 p.m. Subcommittee on the Federal Workforce, US Postal Service and the Census hearing entitled, "At a Crossroads: the Postal Service's \$100 Billion in Unfunded Liabilities". Witnesses: Mr. Frank Todisco, Chief Actuary, U.S. Government Accountability Office; Mr. Jeffrey Williamson, Chief Human Resources Officer and Executive Vice President, U.S. Postal Service; Mr. Robert Moss, Chief, Budget and Resource Management, Defense Health Agency; Mr. Joel Sitrin, Chief Actuary, U.S. Department of Defense.

March 13, 2014, 1:30 p.m. Subcommittee on National Security hearing entitled, "Status of U.S. Foreign Assistance to Afghanistan in Anticipation of the U.S. Troop Withdrawal." Witnesses: Mr. Donald L. Sampler, Jr., Assistant to the Administrator, Office of Afghanistan and Pakistan Affairs, U.S. Agency for International Development; Mr. Charles M. Johnson, Director, International Affairs and Trade, U.S. Government Accountability Office.

March 26, 2014, 9:30 a.m. Full Committee hearing entitled, "Examining the IRS Response to the Targeting Scandal." Witness: The Honorable John Koskinen, Commissioner, Internal Revenue Service.

April 2, 2014, 9:30 a.m. Full Committee hearing entitled, "Undercover Storefront Operations: Continued Oversight of ATF's Reckless Investigative Techniques." Witness: The Honorable B. Todd Jones, Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

April 3, 2014, 10 a.m. Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs and Energy Policy, Health Care and Entitlement joint hearing entitled, "Examining ObamaCare's

Problem-Filled State Exchanges.” Witnesses: Mr. Tom Matsuda, Interim Director, Hawaii Health Insurance Exchange; Mr. Joshua Sharfstein, M.D., Chairman, Maryland Health Benefit Exchange Board, Maryland Health Insurance Exchange; Ms. Jean Young, Executive Director, Massachusetts Health Insurance Exchange; Mr. Scott Leitz, Interim Chief Executive Officer, Minnesota Health Insurance Exchange; Mr. Greg Van Pelt, Advisor to the Governor, Oregon Health Insurance Exchange; Mr. Peter Lee, Executive Director, California Health Insurance Exchange.

April 3, 2014, 10 a.m. Subcommittee on National Security hearing entitled, “Afghanistan: Identifying and Addressing Wasteful U.S. Government Spending.” Witnesses: Mr. Donald Sampler, Assistant to the Administrator, Office of Afghanistan and Pakistan Affairs, U.S. Agency for International Development; Mr. John Sopko, Inspector General, Special Inspector General for Afghanistan Reconstruction.

April 8, 2014, 10 a.m. Full Committee Hearing entitled, “The President’s Fiscal Year 2015 Budget Proposal for the Postal Service.” Witness: The Honorable Brian C. Deese, Deputy Director, Office of Management and Budget.

April 8, 2014, 1:30 p.m. Full Committee hearing entitled, “Reducing Waste in Government: Addressing GAO’s 2014 Report on Duplicative Federal Programs.” Witness: The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office.

April 9, 2014, 1:30 p.m. Subcommittee on Energy Policy, Health Care and Entitlements hearing entitled, “Examining Ways the Social Security Administration Can Improve the Disability Review Process.” Witnesses: Mr. Daniel Bertoni, Director, Education, Workforce and Income Security, U.S. Government and Accountability Office; Ms. Jennifer Nottingham, President, National Association of Disability Examiners; Ms. Mariana LaCanfora, Acting Deputy Commissioner, Retirement and Disability Policy, Social Security Administration; Ms. Jennifer Shaw Lockhart, State Director, Sooner SUCCESS, The University of Oklahoma Health Sciences Center; The Honorable Patrick O’Carroll, Inspector General, Social Security Administration.

April 30, 2014, 10 a.m. Subcommittee on Energy Policy, Health Care and Entitlements Hearing entitled, “Examining the Effect of Liquefied Natural Gas Exports on U.S. Foreign Policy.” Witnesses: Mr. Christopher A. Smith, Principal Deputy Assistant Secretary for Fossil Energy, U.S. Department of Energy; Mr. Amos J. Hochstein, Deputy Assistant Secretary for Energy Diplomacy, Bureau of Energy Resources, U.S. Department of State.

April 3, 2014, 2:30 p.m. Joint hearing of the Subcommittee on National Security and the Committee on the Judiciary Subcommittee on Immigration and border Security hearing entitled, “Overturning 30 Years of Precedent: Is the Administration Ignoring the Dangers of Training Libyan Pilots and Nuclear Scientists?” Witnesses: Mr. Alan Bersin, Assistant Secretary of International Affairs and Chief Diplomatic Officer, U.S. Department of Homeland Security; Ms. Janice Kephart, CEO, Secure Identity Biometrics Association, Former Counsel to the 9/11 Commission; Mr. James M. Chaparro, Executive Vice President for Strategy Strategic Enterprise Solutions (SE Solutions); Mr. Frederic Wehrey, Ph.D., Senior Associate, Middle East Program, Carnegie Endowment for International Peace.

May 1, 2014, 9:30 a.m. Full Committee Hearing entitled, “Benghazi, Instability and a New Government: Successes and Failures of U.S. Intervention in Libya.” Witnesses: Brigadier General Robert Lovell, U.S. Air Force (Retired), Former Deputy Director for Intelligence and Knowledge Development Directorate (J-2); Kori Schake, Ph.D., Research Fellow, Hoover Institution; Frederic Wehrey, Ph.D., Senior Associate, Middle East Program, Carnegie Endowment for International Peace; Daveed Gartenstein-Ross, Ph.D, Senior Fellow, Foundation for Defense of Democracies.

May 6, 2014, 9:00 a.m. Plymouth Township Hall – Subcommittee on Government Operations Hearing titled, “Field Hearing: Impediments to Job Creation in Michigan.” Witnesses: Mr. Chris Fisher, President & CEO, Associated Builders and Contractors; Ms. Janet Kaboth, President & CEO, Whitacrew Greer Company; Mr. Richard Kligman, President, Superb Custom Homes; Mr. Michael Lenahan, President, Resource Recovery Corporation of West Michigan.

May 7, 2014, 9 a.m. Full Committee Hearing entitled, “Is EPA Leadership Obstructing It’s Own Inspector General?” Witnesses: The Honorable Bob Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency; Mr. Patrick Sullivan, Assistant Inspector General, U.S. Environmental Protection Agency; Mr. Alan Williams, Deputy Assistant Inspector General for Investigations, Office of Inspector General, U.S. Environmental Protection Agency; Ms. Elizabeth Heller Drake, Special Agent, Office of Investigations, U.S. Environmental Protection Agency.

May 9, 2014, 9:30 a.m. Subcommittee on Government Operations hearing entitled, “Mixed Signals: The Administration’s Policy on Marijuana, Part Three.” Witnesses: The Honorable Eleanor Holmes Norton, Delegate for the District of Columbia, U.S. House of Representatives; Mr. Peter Newsham, Assistant Chief, Metropolitan Police Department; Mr. Robert D. MacLean, Acting Chief, U.S. Park Police; Mr. David A. O’Neil, Acting Assistant Attorney General, Criminal Division , U.S. Department of Justice; Ms. Seema Sadanandan, Program Director, American Civil Liberties Union of the Nation’s Capital.

May 20, 2014, 9:00 a.m. Subcommittee on Government Operations hearing entitled, “Examining the Federal Response to Autism Spectrum Disorders.” Witnesses: Mr. Thomas R. Insel, M.D., Director, National Institute of Mental Health, Chair, Interagency Autism Coordinating Committee; Mr. Michael K. Yudin, Acting Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education; Marcia Crosse, Ph.D., Director, Health Care, U.S. Government Accountability Office.

May 20, 2014, 9:30 a.m. Subcommittee on Energy Policy, Health Care and Entitlements hearing entitled, “Medicare Mismanagement: Oversight of the Federal Government Effort to Recapture Misspent Funds.” Witnesses: Shantanu Agrawal, M.D., Deputy Administrator and Director, Center for Program Integrity, Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services; Ms. Kathleen King, Director, Health Care, U.S. Government Accountability Office; Mr. Brian P. Ritchie, Assistant Inspector General for Audit Services, Office of Inspector General, U.S. Department of Health and Human Services.

May 22, 2014, 9 a.m. Subcommittee on the Federal Workforce, US Postal Service and the Census hearing entitled, “Examining Innovative Postal Products for the 21<sup>st</sup> Century.” Witnesses: Mr.

James P. Cochrane, Chief Information Officer and Executive Vice President, U.S. Postal Service; Mr. David C. Williams, Inspector General, U.S. Postal Service Office of Inspector General; Mr. Will Davis, Chief Executive Officer, Outbox, Inc.; Mr. Seth Weisberg, Chief Legal Officer, Stamps.com; Mr. Patrick Eidemiller, Director of Engineering and Technology, M-pack Systems; Mr. Todd Everett, Chief Operating Officer, Newgistics, Inc.

May 22, 2014, 9 a.m. Subcommittee on Government Operations hearing entitled, "Evaluating Public Housing in the U.S.: Reining in Waste, Fraud, Abuse and Mismanagement at Public Housing Authorities." Witnesses: Mr. Cecil House, General Manager, New York City Housing Authority; Mr. Kelvin Jeremiah, President & CEO, Philadelphia Housing Authority; the Honorable David Montoya, Inspector General, U.S. Department of Housing and Urban Development.

May 29, 2014, 10 a.m. Subcommittee on Government Operations hearing entitled, "Pseudo Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information Designation." Witnesses: Ms. Annmarie Lontz, Division Director, Office of Security Services and Assessments, Transportation Security Administration; Mr. John Fitzpatrick, Director, Information Security Oversight Office, National Archives and Records Administration; Ms. Patrice McDermott, Executive Director, OpenTheGovernment.org Coalition.

June 10, 2014, 9:30 a.m. Full Committee hearing entitled, "Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process." Witnesses: The Honorable Tom Coburn, M.D., Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate; Mr. Charles Bridges, Administrative Law Judge, Harrisburg, Pennsylvania, Office of Disability Adjudication and Review, U.S. Social Security Administration; Mr. James A. Burke, Administrative Law Judge, Albuquerque, New Mexico, Office of Disability Adjudication and Review, U.S. Social Security Administration; Mr. Gerald I. Krafur, Administrative Law Judge, Kingsport, Tennessee, Office of Disability Adjudication and Review, U.S. Social Security Administration; Mr. Harry C. Taylor II, Administrative Law Judge, Albuquerque, New Mexico, Office of Disability Adjudication and Review, U.S. Social Security Administration; Mr. Gerald I. Krafur, Administrative Law Judge, Charleston, West Virginia, Office of Disability Adjudication and Review, U.S. Social Security Administration.

June 11, 2014, 9:30 a.m. Full Committee hearing entitled, "Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process, Part II." Witness: The Honorable Carolyn W. Colvin, Acting Commissioner, U.S. Social Security Administration.

June 18, 2014, 10 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Subcommittee hearing entitled, "Poised to Profit: How ObamaCare Helps Insurance Companies Even If It Fails Patients." Witnesses: The Honorable Jeff Sessions, U.S. Senator, Alaska; Mandy Cohen, M.D., Acting Deputy Administrator and Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services; Mr. Seth J. Chandler, Foundation Professor of Law, University of Houston Law Center; Mr. John R. Graham, Senior Fellow, National Center for Policy Analysis; Mr. Edmund F. Haislmaier, Senior Research Fellow, Center for Health

Policy Studies, The Heritage Foundation; Ms. Cori E. Uccello, Senior Health Fellow, American Academy of Actuaries.

June 19, 2014, 10 a.m. Full Committee hearing entitled, “Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board.” Witnesses: The Honorable Rafael Moure-Eraso, Ph.D., Chairman, U.S. Chemical Safety and Hazard Investigation Board; The Honorable Beth Rosenberg, Ph.D., Former Board Member, U.S. Chemical Safety and Hazard Investigation Board; The Honorable Carolyn N. Lerner, Special Counsel, U.S. Office of Special Counsel; The Honorable Arthur A. Elkins, Jr., Inspector General, U.S. Environmental Protection Agency; Mr. Patrick Sullivan, Assistant Inspector General for Investigations, U.S. Environmental Protection Agency; Mr. Mark Griffon, Board Member, U.S. Chemical Safety and Hazard Investigation Board.

June 20, 2014, 9 a.m. Subcommittee on Government Operations hearing entitled, “Mixed Signals: the Administration’s Policy on Marijuana, Part Four – the Health Effects and Science.” Witnesses: Doug Throckmorton, M.D., Deputy Director for Regulatory Programs, Center for Drug Evaluation and Research, U.S. Food and Drug Administration; Nora Volkow, M.D., Director, National Institute of Drug Abuse; Carl Hart, Ph.D., Associate Professor of Psychology & Co-Director of the Institute for Research in African American Studies, Columbia University.

June 23, 2014, 7 p.m. Full Committee hearing entitled, “IRS Obstruction: Lois Lerner’s Missing Emails.” Witness: The Honorable John Koskinen, Commissioner, U.S. Internal Revenue Service.

June 24, 2014, 9:30 a.m. Full Committee Hearing entitled, “IRS Obstruction: Lois Lerner’s Missing Emails, Part II.” Witnesses: Ms. Jennifer O’Connor, Office of the White House Counsel, The White House; The Honorable David S. Ferriero, Archivist of the United States, U.S. National Archives and Records Administration.

June 25, 2014, 9:30 a.m. Full Committee hearing entitled, “Management Failures: Oversight of the EPA.” Witnesses: The Honorable David Vitter, United States Senator, Louisiana; the Honorable Sheldon Whitehouse, United States Senator, Rhode Island; the Honorable Gina McCarthy, Administrator, U.S. Environmental Protection Agency.

July 9, 2014, 1:30 p.m. Subcommittee on Government Operations hearing entitled, “Examining Solutions to Close the \$106 Billion Improper Payments Gap.” Witnesses: The Honorable John Koskinen, Commissioner, U.S. Internal Revenue Service; Ms. Beth Cobert, Deputy Director for Management, U.S. Office of Management and Budget; Ms. Beryl H. Davis, Director, Financial Management and Assurance, U.S. Government Accountability Office; Dr. Shantanu Agrawal, M.D., Deputy Administrator and Director, Center for Program Integrity Center for Medicare and Medicaid Service, U.S. Department of Health and Human Services; Mr. Mark Easton, Deputy Chief Financial Officer, U.S. Department of Defense.

July 10, 2014, 10 a.m. Full Committee Hearing entitled, “Examining New Embassy Construction: Are New Administration Policies Putting Americans Overseas in Danger?” Witnesses: Ms. Lydia Muniz, Director, Bureau of Overseas Building Operations, U.S. Department of State; Mr. Casey Jones, Deputy Director, Bureau of Overseas Building Operations, U.S. Department of State; The Honorable Grant S. Green, Jr., Former Undersecretary for Management, U.S. Department of State.

July 10, 2014, 2 p.m. Subcommittee on Energy Policy, Health Care and Entitlements hearing entitled, "Medicare Mismanagement Part II: Exploring Medicare Appeals Reform." Witness: Ms. Nancy J. Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals, U.S. Department of Health and Human Services.

July 11, 2014, 9:30 a.m. Subcommittee on Federal Workforce, US Postal Service and the Census hearing entitled, "Oversight of the Federal Workforce: The Viability of the Senior Executive Service." Witnesses: Mr. Samuel Retherford, Principal Deputy Assistant Secretary, Office of Human Resources and Administration, U.S. Department of Veterans Affairs; Mr. Stephen Shih, Deputy Associate Director, Executive Resources and Employee Development, U.S. Office of Personnel Management; Ms. Carol A. Bonosaro, President, Senior Executives Association.

July 15, 2014, 10 a.m. Subcommittee on Federal Workforce, US Postal Service and the Census hearing entitled, "Is the Federal Government's General Schedule (GS) a Viable System for the Future?" Witnesses: The Honorable Katherine Archuleta, Director, U.S. Office of Personnel Management; The Honorable Donald J. Devine, Senior Scholar, The Fund for American Studies; Mr. Robert Goldenkoff, Director, Strategic Issues, U.S. Government Accountability Office; Ms. Patricia J. Niehaus, National President, Federal Managers Association; Mr. J. David Cox, National President, American Federation of Government Employees.

July 16, 2014, 10 a.m. Full Committee hearing entitled, "White House Office of Political Affairs: Is Supporting Candidates and Campaign Fund-Raising an Appropriate Use of a Government Office?" Witnesses: Mr. Scott Coffina, Partner, Drinker, Biddle & Reath, LLP (did not testify); The Honorable Carolyn Lerner, U.S. Office of Special Counsel (did not testify); Mr. David Simas, Director, Office of Political Strategy and Outreach, The White House (did not appear).

July 17, 2014, 9 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs hearing entitled, "Examining the Justice Department's Solution to the IRS Targeting Scandal." Witnesses: The Honorable James M. Cole, Deputy Attorney General, U.S. Department of Justice.

July 23, 2014, 10 a.m. Subcommittee on Economic Growth, Job Creation and Regulatory Affairs hearing entitled, "An Update on the IRS Response to Its Targeting Scandal." Witnesses: The Honorable John Koskinen, Commissioner, U.S. Internal Revenue Service.

July 24, 2014, 9:30 a.m. Full Committee hearing entitled, "The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury." Witnesses: Mr. Michael Daugherty, Chief Executive Officer, LabMD, Inc.; Mr. David Roesler, Executive Director, Open Door Clinic of Greater Elgin; Mr. Gerard Stegmaier, Partner, Goodwin Procter; Mr. Woodrow Hartzog, Associate Professor, Samford University.

July 25, 2014, 9 a.m. Full Committee hearing entitled, "White House Office of Political Affairs: Is Supporting Candidates and Campaign Fund-Raising an Appropriate Use of a Government Office?"

July 29, 2014, 10 a.m. Subcommittee on Economic Growth, Job Creation and the Regulatory Affairs hearing entitled, "Examining Allegations of Corruption at the Export-Import Bank." Witnesses: The Honorable Fred P. Hochberg, Chairman and President, Export-Import Bank of the United States; Mr.

Johnny Gutierrez, Former Employee, Short Term Trade, Finance Division, Export-Import Bank of the United States; Ms. Diane Katz, Research Fellow in Regulatory Policy, the Heritage Foundation.

July 29, 2014, 10 a.m. Subcommittee on Energy Policy, Health Care and Entitlements hearing entitled, "Examining the Federal Government's Failure to Curb Wasteful State Medicaid Financing Schemes." Witnesses: Ms. Katherine Iritani, Director, Health Care, U.S. Government Accountability Office; Mr. John Haag, Director of Medical Audits, U.S. Department of Health and Human Services; Ms. Cindy Mann, Deputy Administrator and Director, Centers for Medicare and Medicaid Services.

July 29, 2014, 10 a.m. Subcommittee on Government Operations hearing entitled, "Federal Real Property: Eliminating Waste and Mismanagement of Real Property Assets." Witnesses: The Honorable David Mader, Controller, Office of Federal Financial Management, U.S. Office of Management and Budget; Mr. Michael Gelber, Deputy Commissioner, Public Buildings Services, U.S. General Services Administration; Mr. David J. Wise, Director, Physical Infrastructure Team, U.S. Government Accountability Office; Mr. James M. Sullivan, Director, Office of Enterprise Management, U.S. Department of Veterans Affairs.

July 30, 2014, 9:30 a.m. Full Committee hearing entitled, "IRS Abuses: Ensuring that Targeting Never Happens Again." Witnesses: Mr. David Keating, President, Center for Comparative Politics; Ms. Cleta Mitchell, Partner, Foley & Lardner LLP; Mr. James Sherk, Senior Policy Analyst in Labor Economics, The Heritage Foundation; The Honorable Hans A. von Spakovsky, Manager, Election Law Reform Initiative and Senior Legal Fellow, The Heritage Foundation.

July 31, 2014, 9 a.m. Subcommittee on Government Operations hearing entitled, "Planes, Trains and Automobiles: Operating While Stoned." Witnesses: The Honorable Christopher A. Hart, Acting Chairman, National Transportation Safety Board; Mr. Jeffrey P. Michael, Ph.D., Associate Administrator for Research and Program Development, National Highway Traffic Safety Administration, U.S. Department of Transportation; Ms. Patrice M. Kelly, Acting Director, Office of Drug and Alcohol Policy and Compliance, U.S. Department of Transportation; Mr. Ronald Flegel, Director, Division of Workplace Programs, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Administration, U.S. Department of Health and Human Services.

September 9, 2014, 2 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census hearing entitled, "Examining the Administration's Treatment of Whistleblowers." Witnesses: The Honorable Carolyn Lerner, Special Counsel, U.S. Office of Special Counsel; The Honorable Susan Tsui Grundmann, Chair, U.S. Merit Systems Protection Board; Mr. Robert MacLean, Former Federal Air Marshal, Transportation Security Administration, U.S. Department of Homeland Security; Robert Van Boven, M.D., D.D.S., Former Director, Brain Imaging and Recovery Laboratory, Central Texas Veterans Health Care System, U.S. Department of Veterans Affairs; Mr. Tom Devine, Legal Director, Government Accountability Project.

September 10, 2014, 9:30 a.m. Full Committee hearing entitled, "Obstructing Oversight: Concerns from Inspectors General." Witnesses: The Honorable Michael E. Horowitz, Inspector General, U.S. Department of Justice; the Honorable Arthur A. Elkins, Jr., Inspector General, U.S. Environmental Protection Agency; Ms. Kathy A. Buller, Inspector General, Peace Corps.

September 17, 2014 2 p.m. Subcommittee on Economic Growth, Job Creation and the Regulatory Affairs hearing entitled, “The IRS Targeting Scandal: Changing Stories of Missing E-mails.” Witnesses: The Honorable John Koskinen, Commissioner, U.S. Internal Revenue Service.

September 18, 2014, 11 a.m. Full Committee hearing entitled, “Examining ObamaCare’s Failures in Security, Accountability, and Transparency.” Witnesses: The Honorable Marilyn Tavenner, Administrator, Centers for Medicare & Medicaid Services; U.S. Department of Health and Human Services; Mr. Greg Wilshusen, Director, Information Security Issues, U.S. Government Accountability Office; Ms. Ann Barron-DiCamillo, Director, U.S. Computer Emergency Readiness Team, U.S. Department of Health and Human Services.

September 18, 2014, 2 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census hearing entitled, “U.S. Census Bureau: Addressing Data Collection Vulnerabilities.” Witnesses: The Honorable John H. Thompson, Director, U.S. Census Bureau; Director, U.S. Census Bureau; The Honorable Todd Zinser, Inspector General, U.S. Department of Commerce.

September 18, 2014 2 p.m. Subcommittee on National Security hearing entitled, “Protecting International Religious Freedom.” Witnesses: The Honorable Sarah Sewall, Undersecretary for Civilian Security, Democracy, and Human Rights, U.S. Department of State; Katrina Lantos Swett, Ph.D., Chair, U.S. Commission on International Religious Freedom; Thomas Farr, Ph.D., Director, Religious Freedom Project, Berkley Center for Religion, Peace and World Affairs, Georgetown University; Mr. Robert Smith, Managing Director and Regional Advisor for the United States International Center for Law and Religion Studies, J. Reuben Clark Law School, Brigham Young University; Mr. Emmanuel Ogebe, Special Counsel, Justice for Jos Project, Jubilee Campaign; Mr. Tad Stahnke, Vice President, Research and Analysis; Human Rights First.

September 30, 2014, 10 a.m. Full Committee hearing entitled, “White House Perimeter Breach: New Concerns about the Secret Service.” Witnesses: The Honorable Julia Pierson, Director, U.S. Secret Service; the Honorable W. Ralph Basham, Partner, Command Consulting Group, LLC; Mr. Todd M. Keil, Senior Advisor, TorchStone Page, Inc.

October 14, 2014 1 p.m. Subcommittee on Government Operations hearing entitled, “Gym Memberships, Gift Cards, and Hair Salons: Examining the Misuse of Government-Supplied Credit Cards.” Witnesses: Ms. Anne Richards, Assistant Inspector General for Audits, Office of Inspector General, U.S. Department of Homeland Security; Ms. Janet Kasper, Director, Contracts and Assistance Agreement Audits, Office of Inspector General, U.S. Environmental Protection Agency; Mr. Elliot Lewis, Assistant Inspector General for Audits, Office of Inspector General, U.S. Department of Labor; Mr. John Lyle, Associate Deputy Assistant Secretary (Contracting), U.S. Air Force; Mr. H.L. Larry, Deputy Director of Air Force Services, U.S. Air Force.

October 24, 2014, 9:30 p.m. Full Committee hearing entitled, “The Ebola Crisis: Coordination of a Multi-Agency Response.” Witnesses: The Honorable Nicole Lurie, M.D., Assistant Secretary, U.S. Department of Health and Human Services; The Honorable Michael Lumpkin, Assistant Secretary of Defense, U.S. Department of Defense; Major General James M. Lariviere, Deputy Director, Political-Military Affairs (Africa), U.S. Department of Defense; The Honorable John Roth, Inspector General,

U.S. Department of Homeland Security; Deborah Burger, RN, Co-President, National Nurses United; Me. Rabih Torbay, Senior Vice President, International Operations, International Medical Corps.

November 18, 2014, 1:30 p.m. Full Committee joint hearing with the Committee on the Judiciary entitled, "Abuse of USPTO's Telework Program: Ensuring Oversight, Accountability and Quality." Witnesses: The Honorable Frank R. Wolf, U.S. House of Representatives; Ms. Margaret A. (Peggy) Focarino, Commissioner for Patents, U.S. Patent and Trademark Office; The Honorable Todd J. Zinser, Inspector General, U.S. Department of Commerce; Mr. Robert D. Budens, President, Patent Office Professional Association; Ms. Esther Kepplinger, Chief Patent Counselor, Wilson Sonsini Goodrich & Rosati; Mr. William F. Smith, Of Counsel, BakerHostetler.

November 19, 2014, 10:30 a.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census hearing entitled, "Examining Data Security at the United States Postal Service." Witnesses: Mr. Guy Cottrell, Chief Postal Inspector, United States Postal Service Inspection Service; Mr. Randy Miskanic, Vice President of Secure Digital Solutions, United States Postal Service; Ms. Tammy Whitcomb, Deputy Inspector General, United States Postal Service Office of Inspector General; Mr. Tim Edgar, Visiting Fellow, Watson Institute for International Studies, Brown University; and Mr. Charles E. Hamby II, Captain, Narcotics Enforcement Division, Prince Georges County Police Department.

Dec. 3, 2014, 9:30 a.m. Full Committee hearing entitled, "Transforming Federal Spending: Implementing the Digital Accountability and Transparency Act." Witnesses: The Honorable Mark Warner, United States Senator (D-VA); The Honorable Rob Portman, United States Senator (R-OH); The Honorable Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office; The Honorable David Mader, Controller, Office of Federal Financial Management, White House Office of Management and Budget; and Mr. David Lebryk, Fiscal Assistant Secretary, U.S. Department of the Treasury.

December 9, 2014, 9:30 a.m. Full Committee hearing entitled, "Examining ObamaCare Transparency Failures." Witnesses: The Honorable Marilyn Tavenner, Administrator, Centers for Medicare & Medicaid Services, Department of Health and Human Services; Jonathan Gruber, Ph.D., Professor, Massachusetts Institute of Technology; Mr. Ari Goldmann.

December 10, 2014, 9:30 a.m. Subcommittee on Energy Policy, Health Care and Entitlements hearing entitled, "Examining EPA's Management of the Renewable Fuel Standard Program."

December 10, 2014, 1:30 p.m. Subcommittee on Federal Workforce, U.S. Postal Service and the Census hearing entitled, "Addressing the Backlog in the Federal Employee Retirement Process."