

STATEMENT OF ANNE P. FORTNEY

BEFORE THE

**COMMITTEE ON FINANCIAL SERVICES
HOUSE OF REPRESENTATIVES**

ON

**EXAMINING THE NEED FOR H.R. 2885,
CREDIT MONITORING CLARIFICATION ACT**

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Statement of Anne P. Fortney

Chairman Frank, Congressman Bachus and members of the Committee, thank you for this opportunity to appear before the Committee on Financial Services.

I am a partner in the Washington, DC office of the Hudson Cook law firm. Our firm specializes in consumer financial services;¹ my practice focuses primarily on issues arising under consumer protection laws, including the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, the Credit Repair Organizations Act, and similar laws. I bring to this practice more than 30 years experience in the consumer financial services field, including service as Associate Director for Credit Practices at the Federal Trade Commission (FTC), as in-house counsel at a retail creditor and as a practitioner who counsels clients on compliance with the consumer protection laws. I also serve as a consultant and an expert witness in litigation involving these consumer protection laws.²

I first became aware of problems caused by credit repair organizations while at the FTC. We heard from consumers, as well as industry representatives, about the injury that these organizations inflicted. We learned that consumers typically paid thousands of dollars in advance based on false promises that these organizations could “clean up” or “repair” negative credit histories. The consumer reporting and credit granting industries were burdened with frivolous disputes generated by these organizations, and even the

¹ As explained on the firm’s website: “Hudson Cook, LLP was established in 1997 with a single purpose in mind - to provide the best possible service to companies needing advice and assistance in the ever changing and challenging world of consumer financial services law. Our wide-ranging services cover virtually all aspects of state and federal consumer financial services law. At some law firms, the consumer financial services practice is at best an adjunct to the litigation or general business or banking law practice. At Hudson Cook, consumer financial services law is what we do.” www.hudsoncook.com.

² A more detailed description of my background and experience is attached to this statement.

limited success of their tactics caused the loss of accurate consumer report data. While the FTC pursued credit repair organizations under its FTC Act powers, it became apparent that legislation was needed to directly address the tactics of these organizations. After I had left the FTC, in 1996, Congress enacted the Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679 *et seq.*

I commend you for holding this hearing on H.R. 2885, the Credit Monitoring Clarification Act (CMCA), to amend CROA.

Value of Credit Monitoring Products and Services

To provide context for the discussion about the need to amend CROA, it is important to recognize the value of credit monitoring services. Credit monitoring services notify consumers when there has been some activity that affects information in their consumer reports and to provide immediate access to that information. The products and services offered by these companies educate consumers about their credit practices and protect them against identity theft or from other problems that might negatively affect their credit. Credit monitoring services are often provided to consumers by companies that have experienced a data security breach.

Credit monitoring services are a proven means of notifying consumers that they are victims or potential victims of identity theft or other fraud. According to a Better Business Bureau study, 11% of fraud victims discovered the fraud through credit monitoring/reports.³ Consumers who subscribe to credit monitoring services might also learn that an inaccurate item was placed on their credit report. With this information,

³ See *e.g.* Better Business Bureau Report, *New Research Shows Identity Fraud Growth is Contained and Consumers Have More Control Than They Think*, January 31, 2006, www.bbbonline.org/IDtheft/safetyQuiz.asp.

consumers can protect their credit histories by disputing the fraudulent or inaccurate information to the consumer reporting agencies.

Credit monitoring services also educate consumers about how their credit decisions – such as paying bills late or on time, opening new accounts, exceeding their credit card limits – will impact their credit scores. Some consumers simply want the peace of mind that monitoring services will give them.

The FTC has also recognized that credit monitoring services can help consumers maintain accurate consumer report files and can give them valuable information to combat identity theft.⁴ Credit monitoring services are offered by consumer reporting agencies, their affiliates and resellers. Banks and other creditors also provide monitoring services for their customers. A consumer's ability to access these services from a variety of legitimate sources gives consumers an important measure of control over and knowledge about their credit files.

Purpose of CROA

CROA was enacted in 1996 in response to a narrow and predatory practice engaged in by companies referred to as “credit repair clinics” or “credit repair organizations” (CROs). The CROs represented that they would remove negative information from a consumer report – even if it was accurate – in exchange for a substantial fee paid in advance of services being performed. The only way a CRO could fulfill its promises in many cases was to flood the consumer reporting agencies with multiple disputes about the same negative information on the same consumer. The goal of the CROs was to clog or disrupt the consumer reporting industry's reinvestigation

⁴ Prepared Statement of Federal Trade Commission Before the Senate Committee on Commerce, Science and Transportation, U.S. Senate, July 31, 2007, p. 19-20.

process so that the information could not be verified within the statutory time period, with the result that consumer reporting agencies would be forced to delete negative but accurate information in a consumer's credit file.

CROs' practices had severe consequences for consumers, the credit reporting industry and creditors. From the credit industry's perspective, CROs threatened the accuracy, integrity and reliability of consumer report information because consumer reporting agencies were forced to delete negative but accurate information in the consumer report file. Credit grantors were injured when they extended credit to consumers based on incomplete credit report histories. The CROs' promises and acts injured the industry's reputation because consumers believed that they were entitled to have negative information removed when they submitted disputes regardless of whether the information was accurate. From the FTC and consumers' perspectives, CROs made false and deceptive misrepresentations that they had the ability to improve or repair a consumer's credit file when they did not. The FTC opposed the high fees CROs collected before performing any services requested; the FTC also objected to the false and deceptive advertising practices of many CROs.

The consumer reporting agencies, the credit granting industry, the FTC and consumer groups were aligned on the need to address the predatory practices of CROs. In 1996, the consumer reporting industry and the FTC urged Congress to pass a bill that they believed would effectively stop the deceptive practices of CROs.

The Scope of CROA

CROA includes a provision that prohibits CROs from collecting any fees before fully completing the promised credit repair service. 15 U.S.C. § 1679b(b). The statute also requires a written contract and a disclosure that was intended to convey a warning to discourage any consumer from entering into an agreement with a CRO for credit repair services. 15 U.S.C. § 1679c and § 1679d.

The CROA definition of credit repair organization was also drafted very broadly to ensure that credit repair clinics or organizations could not evade coverage of the restrictions. Under CROA, a “credit repair organization” includes any person who sells, or claims to be able to provide or perform, “any service” for the express or implied purpose of improving any consumer’s credit record, credit history, or credit rating, or assisting consumers in this regard. 15 U.S.C. § 1679a(3). The expectation was that such a broad definition would help reach a very specific business practice and eradicate its predatory and harmful acts.

When CROA was enacted, credit monitoring products had not been developed. Even as credit monitoring products were being developed, no one ever anticipated that CROA could be interpreted by apply to consumer reporting agencies that provided credit monitoring and ancillary educational products. Not only did consumer reporting agencies believe that CROA protected them the same way it protected consumers, they also believed that CROA’s purpose, findings and required disclosures simply would not apply to them or the products and services they would offer consumers.

Credit Repair Organizations Practices Do Not Include Credit Monitoring

Although CROA gave the FTC an important tool in prosecuting CROs, it had limited effect in preventing credit repair schemes. Because CROs operate by committing fraud and other deceptive acts and practices, many CROs simply modified their tactics. For example, a more recent variation of credit repair tactics involves the “sale” of positive credit report tradelines. Under this scheme, consumers purchase “authorized user” status on another consumer’s existing credit card. The buyer never obtains or uses the card but may benefit from the fact that creditors furnish to consumer reporting agencies trade line information on authorized users, as well as the primary account holders. Because the industry has taken steps to combat this tactic, consumers who often pay thousands of dollars for this authorized account user status do not derive the promised benefit. To the extent this fraud succeeds, it impairs the consumer credit system. No matter what the form of “credit repair,” the tactics are the same – fraud on consumers and fraud on the credit reporting and credit granting systems.

In addition, no CRO can offer credit monitoring services because no consumer reporting agency would give a CRO access to its credit reporting files.

Thus, there is no similarity between the valuable services offered by credit monitoring companies and the deceptive tactics of credit repair organizations. However, because credit monitoring services might be marketed as a tool that could assist consumers in improving their credit, and could help consumers achieve higher credit scores, they have been mischaracterized as credit repair activities.

The Interpretation and Application of the Statute Necessitates an Amendment to CROA

In the last several years, some have interpreted CROA to apply to companies that offer credit monitoring services and related educational products. The interpretation led to a wave of litigation against companies offering credit monitoring products and services. The argument proffered to support the application of CROA to credit monitoring is that these products and services are marketed in such a way that they could have the effect of improving a consumer's credit history. Some supporters of this interpretation have noted that the CROA definition of CROs does not depend on whether a company offering the service can, in fact, improve consumers' credit scores, histories or ratings in a legitimate manner, such as through monitoring credit report file information and educating consumers.

Credit monitoring companies now face the unexpected challenge of an interpretation that would bring them within the scope of a statute that simply does not apply to its services. Companies may offer credit monitoring services for a fee, usually on a monthly or annual subscription basis. If a company is found to be a credit repair organization, then it cannot accept advance payment for its services, even if it fully performs those services as promised. Moreover, many of CROA's provisions, including the disclosure requirements, do not make sense when applied to credit monitoring products and services because they do not and could not cause the type of harm that the CROA provisions were meant to prevent.

Credit monitoring companies have also faced unanticipated litigation, which has created even more confusion about compliance obligations. For example, in *Hillis v. Equifax Consumer Services, Inc.*, 237 F.R.D. 491 (N.D.Ga. Aug.18, 2006), the court

found that credit monitoring companies were not covered by CROA. However, other courts have not adopted this position, and have instead found that under the plain language of the statute, credit monitoring companies are covered by CROA. In contrast to *Hillis*, in the recent case of *Reynolds v. Credit Solutions, Inc.*, 2008 WL 835270 (N.D. Ala. Feb. 26, 2008) the court declined to follow relevant guidance in *Hillis* because it found that opinion strayed from the plain language of CROA. Still other courts have found that by merely advertising that credit monitoring products could improve a consumer's credit made the credit monitoring company subject to CROA. *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F.Supp.2d 254, 276 fn 20 (D. Mass. Jan. 7, 2008); *Helms v. Consumerinfo.com, Inc.*, 436 F.Supp.2d 1220 (N.D. Ala. Feb. 14, 2005). Some companies that have offered credit monitoring products and services have settled the cases. *See, e.g., Browning v. Yahoo! et al*, 2007 WL4105971 (N.D. Cal. 2007).

As the availability of new services has evolved, the law has remained unchanged. Circumstances have made CROA ambiguous. Over time, it has become clear that an amendment to CROA is needed in order to avoid further unintended consequences of a statute that was designed to protect both consumer reporting agencies and consumers. I believe that consumers should be able to make educated choices about valuable products and services. Businesses should be permitted to sell valuable products within the confines of the law.

HR 2885 Would Create a Narrow Exemption from CROA for Credit Monitoring and Related Products and Services

I believe that a narrowly tailored exemption is the best way to amend the CROA. CROA protects consumers against fraud, deception and misleading representations, and it

gives consumers the right to cancel a covered service. To preserve these protections, H.R. 2885 would exempt credit monitoring services from the CROA provisions that apply to credit repair organizations, but would also create comparable consumer protections applicable to credit monitoring services. These protections include the right to cancel the credit monitoring service and receive a pro-rata refund. There would also be a new disclosure requirement to inform consumers about credit monitoring services. This disclosure would make sense in light of the product offered.

H.R. 2885 would also protect consumers by narrowly drawing the exclusion for credit monitoring services so that the exclusion would not apply to anyone who makes representations or promises that are typical of a credit repair organization, such as claiming to be able to modify or remove adverse information that is accurate and not obsolete in the consumer's credit report. H.R. 2885 would also aid CROA enforcement by clarifying the scope of the nonprofit exemption, which some credit repair organizations have distorted or misused to evade coverage.

H.R. 2885 is not intended to create any loophole for CROs. In fact, if CROs found a way to work around the statute, then consumer reporting agencies and creditors as much as consumers would be victims. The proposed amendment to CROA would not change the application of CROA to real credit repair organizations. If an entity attempts to avoid CROA by claiming that it was a credit monitoring company, the FTC will still have enforcement authority under CROA, as well as the FTC Act.

Because H.R. 2885 resolves an unintended ambiguity in the scope of CROA and creates new consumer protections for credit monitoring services, it will benefit

consumers, as well as consumer reporting agencies. In this way, the bill will assure the continued availability of credit monitoring services and the consumer benefits they offer.

An amendment to CROA can address concerns of consumers and still enable companies offering credit monitoring services to provide valuable products without the threat or surprise of litigation. An amendment will benefit all parties. I, therefore, respectfully urge that the amendment to CROA be adopted.

*Anne P. Fortney
Curriculum Vitae*

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Employment

- 2003-Present Partner, Hudson Cook, LLP.
- 1997-2003 Managing Partner, Lovells, Washington, DC; Of Counsel (1997-1998).
- 1987-1997 Partner, Carlsmith Ball, Honolulu, HI and Washington DC; Of Counsel (1987-1989).
- 1982-1986 Associate Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Commission (FTC), Washington DC.
- 1976-1982 Attorney, JC Penney Company, Washington DC.
- 1973-1976 Attorney, Bureau of Consumer Protection, FTC, Washington DC.
- 1972-1973 Attorney Advisor, Commissioner Mary Gardiner Jones, FTC, Washington DC.
- 1969-1971 Associate, Cleary, Gottlieb, Steen and Hamilton, Washington DC.

Education

- 1985 Harvard University, John F. Kennedy School of Government, Senior Managers in Government Program.
- 1969 Georgetown University Law Center (Juris Doctor).
- 1966 Mary Washington College (Bachelor of Arts with Final Honors).
- 1965 Institute for American Universities, Aix-en-Provence, France.

Bar Admissions

- 1987 Hawaii State Bar Association.
- 1982 United States Supreme Court Bar.
- 1969 District of Columbia Bar.

Anne P. Fortney
Curriculum Vitae

Expert Witness in Litigation involving FCRA Issues

Ashby et al. v. Farmers Group, Inc., et al., Case No. CV01-1446-BR, U.S. District Court for the District of Oregon, 2004; 2006.

Beck v. Equifax Information Services, LLC, et al., Case No. 3:05CV091, U. S. District Court for the Eastern District of Virginia, Alexandria Division, 2005.

Brownstein v. Equifax Information Services, LLC and American Express Company, Case No. 05-1774, U. S. District Court for the Eastern District of Pennsylvania, 2006.

Bruce v. Keybank National Association, doing business as Champion Mortgage, Case No. 2:05-CV-330, U.S. District Court for the Northern District of Indiana, 2006.*

CSI Investment Partners II, L.P., et al., v. Cendant Corporation, et al, Case No. 00Civ.1422(DAB), U.S. District Court for the Southern District of New York, 2006.*

Cairns v. GMAC Mortgage Corporation, Experian Information Solutions, Inc., Equifax Information Services, L.L.C., and The Provident Bank d/b/a PCFS Mortgage Resources, CV-04-1840 PHX-DGC, U.S. District Court for the District of Arizona, 2005.

Collins v. IndyMac Bank, F.S.B., et al, Case No: SACV 06-100 DOC (ANx), U.S. District Court for the Central District of California, Eastern Division, 2007.

Cope v. Experian Information Solutions, Inc. et al., Case No. 04-CV-493-JE, U. S. District Court for the District of Oregon, 2005.*

Drew v. Equifax Information Services, LLC, et al., Case No. CV-07-00726-SI, in the U.S. District Court for the Northern District of California, 2008

In Re: Farmers Insurance Co., Inc. Fair Credit Reporting Act Litigation, MDL No. 1564, Case No. CIV-03-158-F, U.S.District Court for the Western District of Oklahoma, 2006.*

Ferrarelli v. Capital One Auto Finance, Inc. et al., pending under Case No. 1:07-CV-389 in the United States District Court for the Southern District of Ohio, Western Division.

Ferrarelli v. Federated Financial Corp., pending under Case No. 1:07-CV-685 in the United States District Court for the Southern District of Ohio, Western Division.

Geaney, et al. v. Equifax Information Services, LLC, et al., Case No. 1:05-CV-01629 REC-LJO, U. S. District Court for the Eastern District of California, Fresno Division, 2007.

Grizzard v. Trans Union, L.L.C. et al., Case No. 3 :04CV625, U. S. District Court for the Eastern District of Virginia, Richmond Division, 2005.*

In re: H&R Block Mortgage Corp., Prescreening Litigation, Case No: 2:06-MD-230 (MDL 1767), U. S. District Court for the Northern District of Indiana, 2007.

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Curriculum Vitae

Harris v. Circuit City Stores, Inc., Case No: 1:07-cv-02512, U. S. District Court for the Northern District of Illinois, Eastern Division, 2008.

Holmes v. TeleCheck International, Inc., et al., Case No. 3:05-0633, U.S. District Court for the Middle District of Tennessee, 2006; 2008.**

Mendoza v. Verizon Wireless, et al., Case No. H-02-2465, U.S. District Court for the Southern District of Texas, Houston Division, 2003.

Mark v. Valley Insurance Company and Valley Property and Casualty, Case No. 01-1575 BR, U.S. District Court for the District of Oregon, 2003.

Moseley v. Monogram Credit Card Bank of Georgia, Case No. CV05-0801-PHX-SRB, U.S. District Court for the District of Arizona, 2006.

Murray v. IndyMac Bank, F.S.B., Case No: 04-C-7669, U.S. District Court for the Northern District of Illinois, Eastern Division, 2007.

Rausch and Jason Reynolds v. The Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company, Case No. CV 01-1529 BR, U.S. District Court for the District of Oregon, 2003.

Razilov v. Nationwide Mutual Ins. Co. and Allied Group, Inc., Case No. 01-1466 BR, U.S. District Court for the District of Oregon, 2003.

Smith et al. v. The Progressive Corporation et al., Case No. 1:00-CV-210-MMP, U.S. District Court, Northern District of Florida, 2001.

Stillmock, et al. v. Rugged Wearhouse, Inc., et al., Case No.1:07-cv-01340-JFM, U.S. District Court for the District of Maryland, 2007.

Sweitzer v. American Express Centurion Bank, et al., Case No. 2:05-CV-650, U.S. District Court for the Southern District of Ohio, Eastern Division, 2007.*

Thomas v. Friends Rehabilitation Program, Inc. et al, Case No. 001012, Court of Common Pleas for Philadelphia County, 2006.

Wiesjahn v. Capital One Auto Finance, Inc., Capital One Services, Inc. et al., Case No: 2:06CV402, U.S. District Court for the Northern District of Indiana, Hammond Division, 2007.

Williams v. MBNA America Bank, NA, Case No. 2:06-CV-13910, U.S. District Court for the Eastern District of Michigan, 2007.

Willes v. State Farm Fire and Casualty Co. and State Farm Mutual Automobile Insurance Company, Case No. 01-1457 BR, U.S. District Court for the District of Oregon, 2003.

White v. First American Registry, Inc., Case No. 04 CV 1611 (LAK), U.S. District Court for the Southern District of New York, 2004.*

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Curriculum Vitae

Wood v. Capital One Auto Finance, Inc., Case No: 06-C-7, U.S. District Court for the Eastern District of Wisconsin, Milwaukee Division, 2008.

* Cases marked with an asterisk are those where I gave deposition testimony.

** I also testified at trial in this case.

Professional Activities

- Committee Counsel, American Financial Services Association Law Committee.
- Counsel to the Consumer Data Industry Association (formerly Associated Credit Bureaus).

Civic and Professional Associations

- 1982-Present Member, Consumer Financial Services Committee of the American Bar Association Business Law Section; Chair, Consumer Communications Subcommittee (1983-1986); Vice-Chair, Privacy Subcommittee (1991-1992); Chair, Privacy Subcommittee (1993-1995); Vice-Chair, FTC Activities Subcommittee (1997-2000); Chair, Federal and State Practice Subcommittee (2000-2003).
- 1995-Present Member, Governing Committee of the Conference on Consumer Finance Law; Vice-President (1999 - 2007); President (since 2007).
- 1996-Present Founding Member, American College of Consumer Financial Services Lawyers.
- 1992-1995 Vice-Chair, Financial Services Committee of the American Bar Association Administrative Law Section.

Recent Presentations at Industry Conferences and Programs

- American Bar Association Consumer Financial Services Committee (multiple times, 1997-2008).
- American Conference Institute (multiple times, 2001-2006).
- American Financial Services Association (multiple times, 1989-2008).
- Consumer Bankers Association (March and Aug. 2001).
- Conference on Consumer Finance Law (multiple times, 1995-2004).
- Consumer Data Industry Association (multiple times, 1997-2008).
- Consumer Industry Research Council (multiple times, 2000-2005).
- Credit Card Bank Compliance Association (multiple times, 2002-2007).
- Experian Law Conferences (multiple times, 1998-2008).
- Hudson Cook Housing and Auto Finance Workshop (multiple times, 2004-2007).
- National Association of Dealer Counsel (multiple times, 2006-2007).
- National Automobile Dealers Association (2007).
- National Retail Federation (“NRF”) (Aug. 2000).
- NRF Credit Managers Division (Sept. 1997 and Sept. 2000).
- Practicing Law Institute (multiple times, 1998-2000).

Publications Since 1996

- *A Dealer Guide to Adverse Action Notices*, National Automobile Dealers Association Management Series (2007).
- *Federal Laws Applicable to Consumer Data Security Breaches*, 59 Consumer Fin. L. Q. 229 (2005).
- *Uniform National Standards for a Nationwide Industry – FCRA Preemption of State Laws under the FACT Act*, 58 Consumer Fin. L. Q. 259 (2004).
- *Auto Finance Litigation Under the Equal Credit Opportunity Act*, 57 Consumer Fin. L. Q. 227 (2003).
- *Selected Fair Credit Reporting and Privacy Issues and Developments*, 56 Consumer Fin. L. Q. 58 (2002).
- *How to Comply With the Fair Credit Reporting Act* (Associated Credit Bureaus, Inc. 2000).
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- *Fair Lending Law Developments*, 55 Bus. Law. 1309 (2000).
- *Fair Credit Reporting Act Potential Liability of Furnishers and Users of Consumer Reports*, 1114 PLI/Corp 361 (April-May 1999).
- *Fair Lending Law Developments*, 54 Bus. Law. 1329 (1999).
- *Recent Fair Lending Developments Affecting Auto Lenders and Lessors*, 52 Consumer Fin. L. Q. 358 (1998).
- *The New Fair Credit Reporting Act – New Duties; New Liabilities; New Questions*, 52 Consumer Fin. L. Q. 17 (1998).
- *Fair Credit Reporting Act Duties of Furnishers and Users of Consumer Reports*, 1048 PLI/Comm 9 (April-May 1998).
- *Fair Credit Reporting Act Creates New Duties for Employers*, Credit World (May/June 1998).
- *An Argument for Retaining the Uniform Commercial Code*, 51 Consumer Fin. L. Q. 315 (1997).
- *Privacy, Consumer Credit Reporting, and Fair Lending Developments*, 51 Consumer Fin. L. Q. 41 (1997).
- *Fair Lending Issues Affecting Subprime Credit Markets*, 50 Consumer Fin. L. Q. Rep. 290 (1996).

United States House of Representatives
Committee on Financial Services

“TRUTH IN TESTIMONY” DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name: <i>Anne P. Fortney</i>	2. Organization or organizations you are representing: <i>Hudson Cook LLP</i>
3. Business Address and telephone number: <i>1020 19th Street N.W. 7th Floor Washington, DC 20036</i>	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2005 related to the subject on which you have been invited to testify? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2005 related to the subject on which you have been invited to testify? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
6. If you answered “yes” to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.	
7. Signature: <i>Anne P. Fortney</i>	

Please attach a copy of this form to your written testimony.