

1 STUART F. DELERY
 Assistant Attorney General
 2 KATHLEEN HARTNETT
 Deputy Assistant Attorney General
 3 MELINDA L. HAAG
 United States Attorney
 4 ANTHONY J. COPPOLINO
 Deputy Branch Director
 5 JOSHUA E. GARDNER
 Assistant Director
 6 District of Columbia Bar No. 478049
 BRIGHAM JOHN BOWEN
 7 District of Columbia Bar No. 981555
 KIMBERLY L. HERB
 8 Illinois Bar No. 6296725
 LILY SARA FAREL
 9 North Carolina Bar No. 35273
 RYAN B. PARKER
 10 Utah Bar No. 11742
 Trial Attorneys
 11 Civil Division, Federal Programs Branch
 U.S. Department of Justice
 12 P.O. Box 883
 Washington, D.C. 20044
 13 Telephone: (202) 305-7583
 Facsimile: (202) 616-8202
 14 E-mail: joshua.e.gardner@usdoj.gov

15 Attorneys for DEFENDANTS

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

20 VIETNAM VETERANS OF AMERICA, et al.,

21 Plaintiffs,

22 v.

23 CENTRAL INTELLIGENCE AGENCY, et al.,

24 Defendants.

Case No. CV 09-0037-CW (EDL)

Hearing Date: February 27, 2014

Time: 2 p.m.

Courtroom: 2, 4th Floor

Judge: Hon. Claudia Wilken

**DEFENDANTS' NOTICE OF MOTION
 FOR A STAY PENDING PLAINTIFFS'
 APPEAL AND CROSS-APPEAL BY
 DEFENDANTS; MEMORANDUM OF
 POINTS AND AUTHORITIES**

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RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202

E-mail: Joshua.E.Gardner@usdoj.gov

INTRODUCTION

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2 Defendants respectfully request that the Court stay its judgment and injunction pending
3 Plaintiffs' appeal and cross-appeal by Defendants. Such a stay is warranted here for a number of
4 reasons, none of which require the Court to find that its judgment and injunction were likely in
5 error. First, Plaintiffs have initiated appellate proceedings in this case by challenging the Court's
6 denial of their claim seeking health care. That appeal will now be heard by the Ninth Circuit on
7 an expedited basis, and the outcome of appellate proceedings (including the cross-appeal by the
8 Government) could therefore impact whether or to what extent any injunctive relief is warranted
9 here and, if so, the nature and scope of any such relief. Any attempt by the Government to
10 implement the Court's injunction in this unsettled environment would not only be inefficient, but
11 would impose potentially significant burdens and costs on the Government that may be obviated
12 or modified depending on the outcome of appellate proceedings. Second, the issues raised by the
13 final judgment and injunction are significant and novel, and therefore well worthy of further
14 review before the costs and burdens of compliance – and any further litigation in connection with
15 compliance – occur. The Supreme Court has recognized the propriety of stays generally “in cases
16 of extraordinary public moment.” *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). This case
17 clearly concerns important policy and legal questions that should be addressed further before
18 potentially complex compliance proceedings commence. Finally, because the Ninth Circuit has
19 expedited the appeal in this case and Plaintiffs have never sought any form of emergency relief at
20 any time since filing their lawsuit in January 2009, maintaining the *status quo* and staying the
21 injunction during the pendency of the appeal will not substantially prejudice Plaintiffs.

BACKGROUND

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23 In January 2009, Plaintiffs filed the instant lawsuit contending, among other things, that
24 pursuant to Section 706(1) of the Administrative Procedure Act (“APA”), Defendants had a non-
25 discretionary, discrete legal obligation to provide what Plaintiffs defined as “notice” and health
26 care to class members who participated in test programs that ended nearly thirty years earlier.
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1 Plaintiffs rooted their challenge primarily in Army regulation AR 70-25, a regulation that was
2 first promulgated in 1962.

3 On November 19, 2013, the Court entered judgment for Defendants on each of Plaintiffs'
4 claims with the exception of a portion of Plaintiffs' APA claim for notice. With regard to that
5 claim, the Court held that Defendant Department of the Army has "an ongoing duty to warn class
6 members of any information acquired after the last notice was provided, and in the future, that
7 may affect their well-being, when that information becomes available." Dkt. 546. The Court
8 entered an injunction requiring the Army to file with the Court, within ninety days of the entry of
9 the final judgment, a report that describes current and future efforts to locate what the Court
10 defined as "Newly Acquired Information," provide a plan for transmitting that information to
11 class members, transmit the "Newly Acquired Information" to class members within 120 days of
12 the final judgment, and provide periodic reports to the Court "regarding such future efforts" to
13 collect and transmit "Newly Acquired Information." Dkt. 545.

14 On November 26, 2013, Plaintiffs filed a notice of appeal, and indicated that they seek to
15 challenge the Court's decision rejecting their APA claim for health care from the Department of
16 the Army. App. Dkt. 7. The Ninth Circuit recently granted Plaintiffs' motion to expedite the
17 appeal. App. Dkt. 8. Furthermore, on January 21, 2014, the Government filed a notice of cross-
18 appeal of the Court's decision concerning the "ongoing duty to warn" under the APA. Dkt. 551.¹

19 ARGUMENT

20 **I. STANDARDS FOR A STAY PENDING APPEAL**

21 Courts have the inherent power to stay proceedings, *Landis*, 299 U.S. at 254, and the
22 exercise of that power is a matter of judicial discretion. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th
23 Cir. 2012). In determining whether to exercise the discretion to stay proceedings, courts examine
24 four factors: "(1) whether the stay applicant has made a strong showing that he is likely to
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26 ¹ Defendants met and conferred with counsel for Plaintiffs regarding this motion. Plaintiffs
27 indicated that they would not consent to a stay of the final judgment and injunction pending
28 Plaintiffs' appeal and cross-appeal by Defendants. *See* Declaration of Joshua E. Gardner at ¶ 2.

1 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
2 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
3 and (4) where the public interest lies.” *Golden Gate Rest. Ass’n v. City & Cnty. of S.F.*, 512 F.3d
4 1112, 1115 (9th Cir. 2008) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The Ninth
5 Circuit has further explained the relationship between these factors by grouping the first three into
6 “‘two interrelated legal tests’ that ‘represent the outer reaches of a single continuum.’” *Id.*
7 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). “‘At one end of the continuum,
8 the moving party is required to show both a probability of success on the merits and the
9 possibility of irreparable injury. . . . At the other end of the continuum, the moving party must
10 demonstrate that serious legal questions are raised and that the balance of hardships tips sharply
11 in its favor.’” *Id.* (quoting *Lopez*, 713 F.2d at 1435). “These two formulations represent two
12 points on a sliding scale in which the required degree of irreparable harm increases as the
13 probability of success decreases.” *Id.* (quoting *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d
14 859, 862 (9th Cir. 2007)). Furthermore, because the Court already has ruled on the issues that are
15 the subject of Defendants’ cross-appeal, “the court need not conclude that it is likely to be
16 reversed on appeal in order to grant the stay.” *CRS Recovery, Inc. v. Laxton*, No. C 06-7093 CW,
17 2008 WL 5170132, at *1 (N.D. Cal. Dec. 9, 2008) (citing *Strobel v. Morgan Stanley Dean Witter*,
18 2007 WL 1238709, at *1 (S.D. Cal. Apr. 24, 2007)). Instead, it “may grant the stay when it has
19 ruled on ‘an admittedly difficult legal question and when the equities of the case suggest that the
20 status quo should be maintained.’” *Id.* (quoting *Wash. Metro. Area Transit Comm’n v. Holiday*
21 *Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977)). Here, the factors weigh in favor of a stay.

22 **II. THE DEFENDANTS’ CROSS-APPEAL RAISES SERIOUS LEGAL QUESTIONS.**

23 The cross-appeal by the Government raises a number of serious legal questions. Those
24 questions all center on whether Section 706(1) of the APA provides a basis for judicial review
25 and enforcement of the “duty to warn” that the Court held is contained in the 1988, 1989 and
26 1990 versions of Army Regulation 70-25. For example, there is a substantial legal question as to
27 whether AR 70-25 may form the basis for a discrete legal obligation enforceable under Section
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1 706(1) of the APA. To the Government's knowledge, this Court's decision is the first to find that
2 AR 70-25 may form the basis of a cognizable claim under Section 706(1) of the APA and
3 obligate the Army to "warn" a broad class of individuals of a variety of information concerning
4 participation in test programs. The Court's decision raises serious and substantial questions as to
5 whether the duty to warn articulated in certain versions of AR 70-25 is discretionary such that it
6 may be enforceable under the mandamus-like standard of APA Section 706(1).²

7 Relatedly, the Court's decision also raises a serious question as to whether the Court
8 exceeded the proper scope of judicial review under Section 706(1). As the Court acknowledged,
9 "[a] claim under § 706(1) can be maintained 'only when there has been a genuine failure to act.'"
10 Dkt. 544 at 42 (citing *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir.
11 1999)). In *Ecology Center*, the Ninth Circuit "refused to allow plaintiffs to evade the finality
12 requirement [of the APA] with complaints about the sufficiency of an agency action dressed up as
13 an agency's failure to act." *Ecology Ctr.*, 192 F.3d at 926 (internal quotations omitted). Here, the
14 Court properly held that plaintiffs could not challenge pre-2006 notice efforts because this would
15 be an impermissible challenge to "how Defendants carried out their duty, not whether they did so
16 at all." Dkt. 544 at 43 (emphasis in original). Yet in granting Plaintiffs' partial summary judgment
17 motion for post-2006 notification efforts, the Court, in the Government's view, allowed the sort
18 of challenge to the sufficiency of the Army's actions that is prohibited under Section 706(1).
19 Specifically, the Court concluded that Plaintiffs could challenge what it characterized as "the
20 refusal of the Army to carry out its ongoing duty to warn, that is, after the original notice, and in
21 the future, to provide test subjects with information that is learned subsequently that may affect
22 their well-being." *Id.* at 43-43. The Court of Appeals will now consider whether this ruling is
23 inconsistent with *Ecology Center* because it effectively addresses the sufficiency of Army's
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25 ² Although the Government raised the issue of the inherently discretionary nature of the duty to
26 warn contained in AR 70-25 in both its cross-motion for summary judgment, Dkt. 495 at 22-23,
27 its reply brief, Dkt. 513-1 at 9-10, and in its response to the Court's proposed injunction and final
28 judgment, Dkt. 542 at 3-5, Plaintiffs have never persuasively responded to this argument. *See*
Dkt. 513 at 10. Similarly, the Court has never addressed this issue.

1 compliance with a duty of notice. In addition, the Court made no express finding that the Army
2 unreasonably delayed in providing a form of notice required under AR 70-25, and it is undisputed
3 that the Government has provided notice letters to all test participants for whom it could find
4 contact information (both before and after 2006), created a public website with pertinent studies
5 regarding health effects about the testing programs, and set up a 1-800 number to answer
6 questions from individual test participants and to provide participants with their service member
7 test files upon request. Dkt. 495 at 8-10. Thus, the cross-appeal will present the substantial and
8 significant question of whether an agency could be found to have “unreasonably delayed” an
9 agency action that was previously undertaken, as well as the propriety of an injunction that directs
10 an agency to build upon substantial prior actions indefinitely into the future.

11 The Court’s decision also raises substantial questions as to whether AR 70-25 provides a
12 legal obligation to provide notice in the manner found by the Court. The Court acknowledged that
13 AR 70-25 is ambiguous as to its application to the class members whose testing was completed
14 decades after the effective date of the regulation, *see* Dkt. 544 at 31-32, but nevertheless found
15 “more persuasive,” *id.* at 39, an interpretation of AR 70-25 that required notice to class members.
16 Because judicial review under Section 706(1) is only appropriate when an “agency’s legal
17 obligation is so clearly set forth that it could traditionally have been enforced through a writ of
18 mandamus,” *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010),
19 the Court’s imposition of liability where it acknowledges that the regulation is ambiguous raises
20 substantial questions as to the appropriate application of Section 706(1) under these
21 circumstances.

22 Finally, the Court’s injunction, which provides for continuous court oversight and
23 approval (both now and in the future) of the Army’s compliance with AR 70-25 raises serious
24 legal questions given the limited scope of judicial review under Section 706(1) for “unreasonable
25 delays” and the limitations upon the Court’s review of the sufficiency of agency action. The
26 proper remedy where a court finds an unreasonable delay in the performance of an unambiguous
27 legal obligation is to order the agency to perform that obligation. By contrast, the Court’s
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1 injunction provides for judicial oversight as to *how* the agency performs its obligation, and such
2 oversight continues indefinitely into the future. Yet the Court did not (and indeed, could not) find
3 that the agency would unreasonably delay in the performance of a notice obligation in the future.
4 The Court's injunction thus raises substantial and important legal questions.

5 Each of these reasons separately support the conclusion that the cross-appeal by the
6 Government presents "admittedly difficult legal questions," *CRS Recovery*, 2008 WL 5170132, at
7 *1, such that the "status quo should be maintained" pending appeal (and the Government submits
8 that, collectively, these reasons indicate that the Government's cross-appeal has a high probability
9 of success). A stay pending appeal is thus warranted.

10 **III. THE BALANCE OF HARDSHIPS FAVORS THE DEFENDANTS.**

11 The second and third elements of the stay test are whether the party moving for a stay will
12 be irreparably harmed absent a stay and whether a stay will substantially harm other parties to the
13 litigation. These two factors are often considered together and weighed against one another. *See*
14 *e.g., Golden Gate Rest.*, 512 F.3d at 1125.

15 In this case, the balance of hardships favors a stay pending appeal. Without a stay, the
16 Army will have to incur the burden, time and cost of compliance with the Court's injunction
17 while an appeal that may obviate the need to do so is pending. The Court's injunction requires the
18 Army to file a report with the Court within 90 days of the entry of the injunction (1) describing
19 the efforts it has undertaken to locate what it has defined as "Newly Acquired Information" about
20 the military testing programs at issue; (2) confirming such information has been located; (3)
21 explaining the plans it has developed for transmitting such information to class members; (4)
22 committing to transmit such information within 120 days from the date of the entry of the
23 injunction; and (5) outlining the plans and policies the Army has developed for the future
24 collection and transmission of such information and keeping the Court informed of its efforts.
25 Dkt. 545.

26 As described in the declaration of Dee Dodson Morris ("Morris Declaration"), compliance
27 with the injunction would impose a substantial burden on the Army. Although the burdens
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1 associated with compliance with the Court's injunction are difficult to quantify with precision
2 given the lack of clarity as to precisely what the Court's injunction requires, even a minimal level
3 of compliance will impose substantial monetary and manpower burdens on the Army. *See Morris*
4 Declaration at ¶ 5. For example, one possible option concerning compliance with the injunction
5 would be to contract with the Institute of Medicine ("IOM"), or some other private contractor, to
6 conduct new literature searches related to the pertinent test substances and compare the results of
7 those comprehensive searches previously conducted by the IOM to determine whether there has
8 been any material change in the state of the scientific literature. *Id.* at ¶ 9. The IOM has
9 informally estimated that the total cost for such a new analysis could be as much as \$8.8 million
10 and take five years to complete. *Id.* at ¶ 12. These costs do not include the time and cost necessary
11 for the Army to evaluate the results of the IOM's findings and conduct any follow-on analyses
12 that may be appropriate. *Id.* Nor does this estimate take into account the costs and burdens of
13 future updates, which appear to be mandated by the Court's injunction. *Id.*

14 Furthermore, if the Army were to conduct such an analysis itself rather than contract with
15 the IOM or a similar entity, the costs and burdens also would be substantial. For example, it is
16 estimated that new literature reviews and the analysis of the results of such reviews for just the
17 approximately one dozen biological substances and vaccines used during the test program could
18 cost as much as approximately \$860,000. *Id.* ¶ 16. These costs and burdens would obviously be
19 substantially higher if applied to the hundreds of substances used during the test program. *Id.* at
20 18. And under either of these options, the Army would need to expend substantial time and cost
21 to compare the results of the literature reviews to the specific test conditions experienced by class
22 members -- such as comparisons of dose and mode of administration -- to assess whether there is
23 an increased risk in adverse health effects to class members. *Id.* at 17.

24 In addition, under either option, substantial effort would be necessary to effectively
25 communicate the results of such additional scientific and medical literature searches should the
26 results suggest there is information that may affect the well-being of the test participants. *Id.* at
27 ¶ 19. To minimize creating unnecessary anxiety, the government would need to carefully develop
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1 an appropriate risk communication plan for every communication that will potential be
2 disseminated to test subjects. *Id.* at ¶ 20. When DoD and VA previously provided notifications to
3 test participants, those efforts were labor intensive and took approximately five months to
4 complete. *Id.* Here, to the extent different exposures result in different health effects, providing a
5 number of different notices based on those different exposures would necessarily require
6 substantially more time, at additional cost and use of manpower. *Id.* at ¶ 21.

7 Absent a stay, the Army will have to allocate substantial resources to meeting these
8 requirements despite the possibility that the injunction could be vacated, reduced, or modified by
9 the Plaintiffs' appeal or cross-appeal by Defendants. The Army's efforts to meet its other
10 obligations will be irreparably harmed by having to divert resources to complying with an
11 injunction that could ultimately be changed by the ongoing litigation.

12 Plaintiffs, on the other hand, will not be substantially prejudiced by a stay pending appeal.
13 First, the Ninth Circuit recently granted Plaintiffs' motion to expedite their appeal, App. Dkt. 8,
14 thereby minimizing the time the stay would be in place. Second, contrary to any notions of the
15 need to expedite the implementation of the injunction, Plaintiffs have never sought a temporary
16 restraining order or preliminary injunction at any point, despite filing their initial complaint in
17 January 2009. Indeed, Plaintiffs waited nearly twenty years from the issuance of AR 70-25
18 (1990), the regulation that the Court found imposed a duty to warn, in bringing this lawsuit.
19 Third, any prejudice to Plaintiffs in the temporary delay in implementation of the injunction is
20 mitigated by the fact that each of the named plaintiffs, as well as many other class members, has
21 already received his service member test file, which contains the information the Army has
22 concerning an individual's participation in the test program. Dkt. 393 at 15-16. In addition, as
23 discussed above, it is undisputed that the Government has engaged in substantial outreach efforts
24 both before and after 2006. Dkt. 495 at 8-10.

25 Accordingly, any potential prejudice to Plaintiffs in the stay of the injunction pending
26 appeal is minimal. As the Government will be substantially prejudiced absent a stay and a stay
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1 will not substantially prejudice Plaintiffs, the balance of hardships tips decidedly in favor of a
2 stay pending appeal.

3 **IV. A STAY IS IN THE PUBLIC INTEREST.**

4 The public interest also favors a stay. Typically, when the Government is a party, the
5 interests of the Government and the public merge. *Drakes Bay Oyster Co. v. Jewell*, -- F.3d --,
6 No. 13-15227, 2014 WL 114699, at *14 (9th Cir. Jan. 14, 2014). This overlap of interests has
7 occurred here. The public, like the Government, is interested in the efficient adjudication of
8 disputes and the conservation of scarce resources. Here, a stay promotes the public interest for
9 several reasons. First, the Ninth Circuit's decision on Plaintiffs' appeal of the Court's denial of
10 their APA health care claim could result in a modification to the Court's injunction. And to the
11 extent the Army is ordered to notify class members about the availability of health care from the
12 Army (as opposed to the Department of Veterans Affairs) should Plaintiffs prevail on appeal, the
13 Army would have to re-do any additional notification efforts it undertakes under the current
14 formulation of the injunction. Conversely, if the Government prevails on its cross-appeal, then
15 any additional notification efforts undertaken pursuant to the current injunction would be
16 unnecessary. Second, absent a stay, the parties may be forced to litigate whether the Army is
17 complying with the Court's injunction while the propriety of that injunction is still being litigated
18 on appeal. In short, a stay in this instance would relieve the Army of the burden of devoting
19 significant resources to complying with an injunction that may ultimately be vacated or modified
20 on appeal. Because a stay would preserve the resources of both the parties and the Court, the
21 public has an interest in a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 429 (2009) (noting
22 that a stay of an injunction during the pendency of an appeal "simply suspend[s] judicial
23 alteration of the *status quo*" while the case is resolved).

24 **V. IF THE COURT DENIES THE GOVERNMENT'S MOTION, THE DEADLINES
25 IN THE INJUNCTION SHOULD BE EXTENDED TO ALLOW APPEAL OF
26 THAT DECISION.**

26 In the event the Court does not grant the Government's motion and stay the injunction
27 pending the parties' appeals, the Court should extend the deadlines in the injunction by 60 days to
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1 maintain the *status quo* and allow the Government to seek a stay of the injunction in the court of
 2 appeals. Currently, under the terms of the injunction, the Army must submit a report to the Court
 3 outlining, among other things, its efforts to identify “Newly Acquired Information” and a plan to
 4 provide that information to class members within 90 days of the entry of the final judgment
 5 (which would be by February 17, 2014). *See* Dkt. 545, at ¶ 4. In addition, the injunction requires
 6 that the Army transmit any “Newly Acquired Information” to class members within 120 days of
 7 the entry of the final judgment (which would be by March 19, 2014).

8 The Government respectfully requests that the Court extend the 90-day deadline for the
 9 Army’s submission of a report to Court, as well as the 120-day deadline for the transmission of
 10 any “Newly Acquired Information” to class members, by 60 days. This enlargement of the
 11 deadlines contained in the injunction would provide the Government the opportunity to appeal the
 12 Court’s denial of the motion to stay pending appeal.

CONCLUSION

14 For the foregoing reasons, the Court should stay its judgment and injunction pending the
 15 parties’ appeals. In the alternative, the Court should enlarge the deadlines contained in the
 16 injunction by 60 days to allow the Government the opportunity to appeal the denial of the motion
 17 to stay pending appeal.

18 Respectfully submitted,

19 STUART F. DELERY
 20 Assistant Attorney General

21 January 22, 2014

KATHLEEN HARTNETT
 Deputy Assistant Attorney General

22 MELINDA L. HAAG
 23 United States Attorney

24 ANTHONY J. COPPOLINO
 25 Deputy Director, Federal Programs Branch

26 /s/ Joshua E. Gardner
 JOSHUA E. GARDNER
 27 Assistant Director
 BRIGHAM JOHN BOWEN
 28 KIMBERLY L. HERB

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LILY SARA FAREL
RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202

E-mail: Joshua.E.Gardner@usdoj.gov