**Democratic Views to Accompany**
**H.R. 5520, the "Veterans Identity Protection Act"**

We offer these views to explain the nature of important Democratic Amendments offered at full committee markup, including a Substitute Amendment which would have significantly strengthened the bill.

On May 22, 2006, almost three weeks after the theft, the Administration informed the public that the sensitive data of over 26 million veterans, including their names, Social Security numbers and dates of birth as well as some disability ratings, were stolen from the home of a Department of Veterans Affairs (VA) employee. While H.R. 5520 attempts to provide a mechanism to compensate those harmed by this egregious data breach, the bill is a half-hearted way to address the problem.

**Description of Legislation**

H.R. 5520 establishes an independent executive branch agency, the "Office of Veterans Identity Protection Claims," to process claims and reimburse injured veterans.[1] Within forty-five days after enactment, the Director of the Office is to promulgate and publish interim final regulations for the processing and payment of claims in the Federal Register.[2] Funds provided to the Office are authorized to be appropriated as necessary and may also be used to reimburse other federal agencies for claims processing support and assistance.[3]

Injured individuals have up to two years after "regulations are first promulgated" to submit a claim for injuries. Mr. Scott offered an amendment at full committee markup, agreed to by voice vote, changing the standard to a maximum of two years after "an injured person knows or has reason to know a claim has arisen. . ." Payments are limited to actual compensatory damages; punitive damages are not allowed under the act. An injured person can either elect to seek reimbursement from the Federal Government by submitting a claim under the Act, filing a claim or bringing a civil action under the Federal Tort Claims Act (FTCA), or bringing a civil action under any other provision of law. The bill places a cap on attorneys' fees at ten percent of the amount of any payment on the claim. Finally, starting six months after the promulgation of

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[1]The bill was introduced on May 25, 2006 by Representative Heather Wilson (R-NM).

[2]The Act requires that veterans affected by the data breach be made aware of the protections the legislation confers. For example, the bill specifies that when final regulations are promulgated, an explanation of potential claimants' rights under the Act and procedures and rules that apply to filing a claim be published in major newspapers in the each of the States and the District of Columbia in English and Spanish, as well as in brochures, pamphlets, radio, television, and other media likely to reach prospective claimants.

[3]With respect to funding, Rep. Scott offered an amendment at full committee markup, agreed to by voice vote, that provides additional funding to the Department of Justice for the investigation and prosecution of crimes resulting from the illegal use, possession, or transfer of personal information that was part of the VA data breach.

regulations, and every six months after that, a report is to be submitted to various House and Senate Committees, including the Judiciary Committees, describing the claims submitted to the Office in the previous six months.

Although H.R. 5520 offers a procedure to financially compensate injured veterans, monetary compensation is only one of a number of remedies to protect veterans from the VA data breach. The bill does not provide the tools veterans need to remedy the situation at hand and to prevent identity theft. For example, H.R. 5520 does not provide free credit monitoring and free credit reports to the affected veterans. The bill does not require the VA to provide substantive notification to veterans whose sensitive personal information was compromised by the data breach. It tells the 26.5 million veterans to deal with the problem themselves. The Majority did not hold a single Committee hearing to consider the mechanism offered by the bill or to discuss other appropriate remedies. Therefore, Democratic members offered a number of amendments at the full committee markup to correct the various shortcomings of the bill.

**Defeated Democratic Amendments**

First, Rep. Conyers offered a Substitute Amendment to the bill that retains the compensation scheme inherent in H.R. 5520, but which adds additional reimbursement and remedies to injured veterans. These remedies include the following tools, available upon request of the veteran, to assist veterans with recovery from the breach and to protect their identity: 1). credit monitoring services upon request for a period of one year, as well as a free credit report annually for two years in addition to any free reports currently required under law; 2). fraud alerts for any veterans affected for one year at no cost[4]; and 3). security freezes for any veterans affected for one year at no cost.[5] In addition, the substitute requires substantive notification to veterans, including a "description of the personal identifying information" that was stolen, so that they are aware of the full extent of the sensitive information compromised.

In addition, veterans, who are victims of identify theft caused by the Administration's negligence, already have a remedy under FTCA. The Conyers Substitute makes it less burdensome, less costly and less time-consuming for veterans to recover compensation. The substitute removes the requirement that only those veterans who can prove that they suffered an injury qualify for relief under the bill. Finally, the substitute raises the ten percent cap placed on attorneys' fees under the bill. A ten percent attorneys' fee denies veterans the representation they deserve. Capping attorneys' fees at ten percent will leave injured veterans without quality legal representation because attorneys, in many circumstances, would not be able to recover the costs of pursuing this type of claim at that rate. The Substitute Amendment was ultimately ruled as non-germane after Rep. Lamar Smith raised a point of order.

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[4]A fraud alert tells creditors to follow certain procedures before they open new accounts in one's name or make changes to one's existing accounts.

[5] A security freeze can help prevent identity theft by limiting the ability of creditors to access credit reports. Most businesses will not open credit accounts without first checking a consumer's credit history.

Second, Rep. Weiner introduced an amendment which places emphasis on the background behind the VA breach and the Administration's accountability for not only allowing the breach to take place, but more importantly, for failing to respond appropriately. First, the amendment finds that the Administration provided inadequate security protocols to protect the personal identifying information of veterans. This is an important finding as the Administration has yet to answer questions such as why sensitive personal data was allowed to be placed on a laptop, and why was that laptop allowed outside of VA facilities. The Inspector General of the VA has admitted that the analyst who lost the data had routinely taken such data home since 2003.[6] Moreover, in every year since 2001, the Inspector General had pointed to the VA's information security as a "material weakness" that created a substantial risk of a data breach.[7] The GAO made similar findings with respect to the Department's data security protocols as it has noted, "[s]ignificant concerns have been raised over the years about VA's information security . . .[w]e have previously reported on wide-ranging deficiencies in VA's information security controls."[8]

In addition, the Weiner Amendment finds that the Administration's response to the data breach has been inadequate. For example, some department officials were notified of the breach almost immediately, but the public was not notified until almost a full three weeks later.[9] Not only did the Administration delay notice to the public for up to three weeks, to make matters worse, the Administration waited two weeks to notify the Department of Justice and FBI. To add insult to injury, the Administration released information in bits and pieces rather than taking decisive, appropriate and responsible action. For example, the Administration originally said that the lost data involved 26.5 million veterans discharged from 1975 onward. Later it said that a relatively small number of active-duty personnel might be included in the 26.5 million. After that, the Administration disclosed that the actual number of active-duty, Guardsmen and

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[6] Christopher Lee, *Worker Often Took Data Home*, The Washington Post, May 26, 2006, at A19.

[7] *VA Data Privacy Breach: Twenty-Six Million People Deserve Answers*: Joint Hearing of the United States Senate Committee on Veterans' Affairs and the United States Senate Committee on Homeland Security and Governmental Affairs, 109th Cong., 2nd Sess. (2006) (statement of George J. Oper, Inspector General, Department of Veteran's Affairs).

[8] See GAO, *Veterans Affairs: Leadership Needed to Address Information Security Weaknesses and Privacy Issues*, GAO-06-866T (June 14, 2006); GAO, *Personal Information: Agency Reseller Adherence to Key Privacy Principles*, GAO-06-421 (Apr. 4, 2006). Moreover, in an analysis prepared by the House Committee on Government reform, the VA received a grade of F for computer security in 2004. *Federal Computer Security Report Card*: Report by the H. Comm. on Government Reform (February 16, 2005), available at http://reform.house.gov/uploadedfiles/2004%20Computer%20Security%20Report%20Card%202%20years.pdf

[9] David Stout, *Democrats Question Handling of Data Breach*, The New York Times, June 8, 2006. During a hearing before the Senate Committee on Veterans Affairs, the VA's inspector general stated that the Administration had been unable to formally notify the affected veterans because "we don't have 26 million envelopes." *VA Data Privacy Breach: Twenty-Six Million People Deserve Answers*: Joint Hearing of the United States Senate Committee on Veterans' Affairs and the United States Senate Committee on Homeland Security and Governmental Affairs, 109th Cong., 2nd Sess. (2006).

reservists included in the data may well be over two million.[10] The Administration has yet to inform the public of the full extent of the sensitive data compromised or whose personal data was lost, whether it was only veterans, active-duty or family members.

Finally, the Weiner Amendment finds that the claims program established by H.R. 5520 is necessary to compensate injured persons as a result of the inadequacies of the Administration's security protocols and response. Unfortunately, the Weiner Amendment was defeated on a party-line vote.

Third, Rep. Conyers offered a stand alone amendment raising the current cap placed on attorneys' fees under the bill from ten percent to twenty-five percent. As mentioned, capping attorneys' fees at ten percent will leave injured veterans without quality legal representation. Moreover, injured veterans already have a remedy under FTCA, which employs the twenty-five percent attorneys' fee standard. Therefore, the amendment would offer injured veterans a reasonable choice between pursuing a claim under the current system or choosing the remedy provided by H.R. 5520. This amendment was defeated on a party-line vote.

Rep. Nadler offered an amendment that would exempt veterans who had been forced into bankruptcy as a result of the loss of their information by the VA from the onerous requirements of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[11] Congress recognized the special needs of veterans and active duty military personnel by exempting them from portions of BAPCPA.[12] Too often victims of identity theft are forced to file for bankruptcy because of the damage done by the perpetrators of that theft. Just as Congress has provided protection in BAPCPA for veterans and active duty military, so too, where the financial catastrophe is a direct result of the government's malfeasance, those veterans should not be subjected to the extra burdens of the new law. Rep. Nadler's amendment was non-germane following a point of order raised by Rep. Lamar Smith.

**Conclusion**

H.R. 5520 provides a mechanism for financial compensation to injured veterans, including those that will become victims of identity theft resulting from the VA data breach. However, the bill does not provide tools to help veterans prevent such identity theft. The Conyers Substitute offered comprehensive protection to veterans, including the provision of fraud alerts, credit monitoring, and security freezes.

As alluded by the Weiner Amendment, when it comes to the largest loss of personal data in U.S. government history, it is unacceptable that the Administration did not immediately notify

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[10] Ann Scott Tyson, *Data Theft Affects Most in U.S. Military*, The Washington Post, June 9, 2006.

[11] Pub.L.No. 109-8, 119 Stat. 23 (2005).

[12] *See e.g.* sec. 102, 119 Stat. 23, 29, 11 U.S.C. 707(b)(2)(B)(i) and (D); 119 Stat. 23, 31, 11 U.S.C. 707(b)(7).

the DOJ and the FBI in an effort to track down the stolen information. Even more inexcusable is that our veterans were left totally exposed, unaware that their personal information had been compromised. H.R. 5520 does not go far enough in addressing this problem. It is a rushed bill that creates a false hope of a remedy without providing vets the tools they need to deal with data breaches and identity theft.

## Description of Amendments Offered by Democratic Members

During the full committee markup, there were six amendments offered by Democratic members. Two amendments offered by Rep. Conyers, two by Rep. Scott, one by Rep. Weiner and one by Rep. Nadler.

1. Scott Amendment

Description of Amendment- Rep. Scott offered an amendment to provide additional funding to the Department of Justice in the amount of "$2,000,000 for each of fiscal years 2007 through 2011 for the investigation and prosecution of any person involved in the illegal use, possession, or transfer of personal identifying information that was part of the data of the Department of Veterans Affairs that was stolen from the home of an employee of the Department on or around May 3, 2006."

Vote on Amendment: The Amendment was agreed to on a voice vote.

2. Conyers Substitute Amendment

Description of Amendment-The Conyers Substitute Amendment adds additional reimbursement and remedies to injured veterans, including 1). "a fraud alert in the file of the injured person with each nationwide consumer reporting agency...."; 2). "application of a security freeze to the file of the injured person with each nationwide consumer reporting agency . . ."; 3). "credit monitoring services and copies of the consumer report of the injured person . . ." In addition, the Substitute offers substantive notification to veterans including a "description of the personal identifying information" that was stolen and "a telephone number that the person may use, at no cost to such person, to contact the Office to inquire about the theft of such data or the information about that person that was contained in such data, as well as to obtain assistance in addressing identity theft issues . . ."

The Substitute strikes the following language from the definition of "injured person" from the act: "who suffered an injury as a result of the unauthorized use, disclosure, or dissemination of personal identifying information that was included in the data . . ." Finally, the Substitute raises the current cap placed on attorneys fees under the bill from ten percent to twenty-five percent.

Vote on Amendment: The Amendment was ruled as not germane by the Chair.

3. Conyers Amendment

Description of Amendment- This Amendment raises the current cap placed on attorneys' fees under the bill from ten percent to twenty-five percent.
Vote on Amendment: The Amendment was defeated on a party-line vote of 19-13. Ayes:

Representatives Conyers, Boucher, Lofgren, Nadler, Sanchez, Schiff, Scott, Van Hollen, Wasserman Schultz, Watt, Waters, Weiner, Wexler. Nays: Representatives Coble, Goodlatte, Gallegly, Inglis, Sensenbrenner, Smith, Jenkins, Chabot, Lungren, Cannon, Hostettler, Green, Flake, Forbes, Franks, Feeney, King, Pence, Gohmert.

4. Weiner Amendment

Description of Amendment- This amendment adds a "Findings" section which reads: "The Congress finds as follows:
(1) The Bush administration has provided inadequate security protocols to protect the personal identifying information of veterans.
(2) The Bush administration's response to the theft of data containing the personal identifying information of veterans has been inadequate.
(3) The claims program established by this Act is necessary to compensate injured persons for the inadequacies of the Bush administration."

Vote on Amendment: The Amendment was defeated on a party-line vote of 18-11. Ayes: Representatives Conyers, Lofgren, Nadler, Sanchez, Schiff, Van Hollen, Wasserman Schultz, Watt, Waters, Weiner, Wexler. Nays: Representatives Coble, Goodlatte, Gallegly, Inglis, Sensenbrenner, Smith, Jenkins, Chabot, Lungren, Cannon, Hostettler, Green, Flake, Forbes, Franks, Feeney, King, Gohmert.

5. Scott Amendment

Description of Amendment-This Amendment revises the time period within which to file a claim under the Act from not later than two years after the date on which "regulations are first promulgated" to two years after "an injured person knows or has reason to know a claim has arisen. . ."

Vote on Amendment: The Amendment was agreed to on a voice vote.

6. Nadler Amendment

Description of Amendment-This Amendment would insert the following section at the end of the bill: "Notwithstanding any other provision of law, a case filed under title 11 United States Code by a veteran who becomes a debtor as a result of being an 'injured person' as defined in section 3 of this Act shall be subject to title 11 as in effect prior to the effective date of Public Law 109-8"

Vote on Amendment: The Amendment was ruled as not germane by the Chair.

John Conyers, Jr.
Howard L. Berman
Rick Boucher
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Sheila Jackson Lee

Maxine Waters
William D. Delahunt
Adam B. Schiff
Linda T. Sanchez
Chris Van Hollen