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Intelligence Reform and Terrorism Prevention Act of 2004: National Standards for Drivers' Licenses, Social Security Cards, and Birth Certificates

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Summary

In its comprehensive report to the nation, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) recommended that the federal government set national standards for the issuance of identification documents including drivers' licenses, social security cards, and birth certificates. The Commission noted that identification fraud is no longer simply a matter of theft, but now complicates the government's ability to adequately ensure public safety at vulnerable facilities including airport terminals, train stations, bus stations, and other entry points.

As the legislative process unfolded, both the House of Representatives' and the Senate's proposed versions of legislation included provisions intended to address this specific recommendation, however, their approaches varied both with respect to scope, as well as the suggested methodology that was to be used to bring the states into conformity with these new national standards. Generally, the House version opted to detail specific statutory requirements, while the Senate proposal chose to mandate regulation, but delegated broad discretionary authority to the relevant federal agencies.

The final legislation that was approved by Congress on December 8, 2004, and signed by the President on December 17, 2004, contained many of the provisions found in the Senate's original proposal with several significant additions from the House's proposed language. Many of the provisions that were considered controversial were not ultimately included, however, several Members indicated during the floor debate that these issues, specifically those that relate to drivers' licenses, would be revisited during the 109th Congress. In addition, because many of these provisions only delegate regulatory authority to federal agencies, several concerns that were raised during the legislation's deliberation, including access to birth certificates by genealogists or other historical researchers, are not specifically addressed by the statutory language, and will likely be the subject of agency action. This report will be updated as events warrant.

Contents

Introduction	1
Drivers' Licenses and Personal Identification Cards	2
Final Bill	2
House Proposal	3
Senate Proposal	5
Social Security Numbers	6
Final Bill	6
House Proposal	7
Senate Proposal	8
Birth Certificates	8
Final Bill	8
House Proposal	10
Senate Proposal	10

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Introduction

The 9/11 Commission's final report recommended that "the federal government should set standards for the issuance of birth certificates, and sources of identification, such as drivers' licenses."¹ Specifically noting the rising problem of identification fraud, the Commission concluded that "sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."² Prior to the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, the standards for drivers' licenses and birth certificates were determined on a state-by-state basis with no national standards in place. While states are currently required to obtain social security numbers from drivers' license applicants for child support collection purposes, it appears that most states were not requiring that the social security number be printed on a driver's license. However, in those states that still use social security numbers on drivers' licenses, it appears that an opt-out process was available.

Both the House of Representatives³ and the Senate⁴ proposed legislation designed to establish national standards, however, both chambers differed in their approaches. On one hand, the House of Representatives opted to legislate specific requirements, while the Senate chose to mandate regulation, and provided the appropriate federal agencies broad discretionary authority to address the various concerns identified in the statutory language. After a lengthy and contentious conference committee, the final product, the Intelligence Reform and Terrorism Prevention Act of 2004, contains numerous elements of both the House and Senate proposals.⁵ While many of the more controversial provisions were not included in

¹ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, 390 (2004).

² *Id.*

³ See H.R. 10, 108th Cong. §§ 3051-3076 (2d Sess. 2004).

⁴ See S. 2845, 108th Cong. §§ 1026-1028 (2d Sess. 2004).

⁵ Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-408 §§ 7211-7214, 118 Stat. 3638, 3825-3832 (2004). Both H.R. 10 and S. 2845 were passed by their respective houses, however, the conference committee elected to use S. 2845 as the (continued...)

the final bill, numerous Members made public promises to revisit several of the issues, specifically related to drivers' licenses during the 109th Congress. This report, therefore, includes descriptions of the provisions contained within the original House and Senate proposals, as well as what the final bill contains with respect to drivers' licenses, personal identification cards, social security numbers, and birth certificates.

Drivers' Licenses and Personal Identification Cards

Final Bill. The Intelligence Reform and Terrorism Prevention Act of 2004 delegates authority to the Secretary of Transportation, in consultation with the Secretary of Homeland Security, empowering them to issue regulations with respect to minimum standards for federal acceptance of drivers' licenses and personal identification cards.⁶

The new law requires that the Secretary issue regulations within 18 months of enactment that require each driver's license or identification card, to be accepted for any official purpose by a federal agency, include the individual's: (1) full legal name; (2) date of birth; (3) gender; (4) driver's license or identification card number; (5) digital photograph; (6) address; and (7) signature.⁷ In addition, the cards are required to contain physical security features designed to prevent tampering, counterfeiting or duplication for fraudulent purposes as well as a common machine-readable technology with defined minimum elements.⁸ Moreover, States will be required, pursuant to the new regulations, to confiscate a driver's license or personal identification card if any of the above security components is compromised.⁹

The statute also requires that the regulations address how driver's licenses and identification cards are issued by the states. Specifically, the regulations are required to include minimum standards for the documentation required by the applicant, the

⁵ (...continued)

blueprint for the final bill. Thus, S. 2845 became the vehicle that moved through the final stages of the legislative process.

⁶ See *supra* note 5, at § 7212. Whether limiting the standards to federal acceptance - as opposed to direct federal prescriptions on the states - obviates federalism concerns under Supreme Court jurisprudence, remains to be seen. The Court has held that in exercising its power under the Commerce Clause, Congress may not "commandeer" the state regulatory processes by ordering states to enact or administer a federal regulatory program. See *New York v. United States*, 505 U.S. 144 (1992). The Court has extended this principle by holding, in *Printz v. United States*, that Congress may not circumvent the prohibition on commandeering a State's regulatory processes "by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997). It may be possible to argue that, because the issuance of drivers' licenses remains a state regulatory function, the minimum issuance and verification requirements established in this bill, even if limited to federal agency acceptance, constitute an effective commandeering by Congress of the state regulatory process, or a conscription of the state and local officials who issue the licenses.

⁷ *Id.* at § 7212(b)(2)(D)(i)-(vii).

⁸ *Id.* at § 7212(b)(2)(E)-(F).

⁹ *Id.* at § 7212(b)(2)(G).

procedures utilized for verifying the documents used, and the standards for processing the applications.¹⁰ The regulations are, however, prohibited from not only infringing upon the “State’s power to set criteria concerning what categories of individuals are eligible to obtain a driver’s license or personal identification card from that State,”¹¹ but also from requiring a State to take an action that “conflicts with or otherwise interferes with the full enforcement of State criteria concerning the categories of individuals that are eligible to obtain a driver’s license or personal identification card.”¹² In other words, it would appear that if a State grants a certain category of individuals (i.e., immigrants, legal or illegal) permission to obtain a license, nothing in the forthcoming regulations is to infringe on that State’s decision or its ability to enforce that decision. The regulations are also not to require a single uniform design, and are to include procedures designed to protect the privacy rights of individual applicants.¹³

Finally, the Senate’s recommendation of negotiated rulemaking pursuant to the Administrative Procedure Act¹⁴ was adopted in the final language. This process is designed to bring together agency representatives and concerned interest groups to negotiate the text of a proposed rule. The rulemaking committee is required to include representatives from: (1) State and local offices that issue driver’s licenses and/or personal identification cards; (2) State elected officials; (3) Department of Homeland Security; and (4) interested parties.¹⁵

House Proposal.¹⁶ The House proposal called for the establishment of minimum document requirements, as well as verification and issuance standards for the acceptance of drivers’ licenses and personal identification cards by federal agencies. Specifically, the House proposal required that each driver’s license or identification card, to be accepted for any official purpose by a federal agency, include the individual’s: (1) full legal name; (2) date of birth; (3) gender; (4) driver’s license or identification card number; (5) digital photograph; (6) address; and (7) signature. In addition, the cards were to contain physical security features designed to prevent tampering, counterfeiting or duplication for fraudulent purposes as well as a common machine-readable technology with defined minimum elements.

The House proposal also required that, prior to issuing a document that conforms with these minimum standards, a state would have to verify with the issuing agency, the issuance, validity and completeness of: (1) a photo identification document or a non-photo document containing both the individual’s full legal name

¹⁰ *Id.* at § 7212(b)(2)(A)-(C).

¹¹ *Id.* at § 7212(b)(3)(B).

¹² *Id.* at § 7212(b)(3)(C).

¹³ *Id.* at § 7212(b)(3)(D)-(E).

¹⁴ *See* Negotiated Rulemaking Act of 1990, P.L. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. § 581 *et seq.*).

¹⁵ *See supra* note 5, at § 7212(b)(4)(A)-(B).

¹⁶ All references to the House proposal in this section can be found at H.R. 10, 108th Cong. §§ 3051-3060 (2d Sess. 2004).

and date of birth; (2) date of birth; (3) proof of a social security number (SSN) or verification of the individual's ineligibility for a SSN; and (4) name and address of the individual's principal residence. Pursuant to the House's proposed language, a state would not be able to accept any foreign document, with the exception of an official passport.

Moreover, states would also have been required to verify an individual's legal presence in the United States. The House proposal required that not later than September 11, 2005, states would enter into a Memorandum of Understanding with the Secretary of Homeland Security to routinely utilize the "Systematic Alien Verification for Entitlements" to verify the legal presence status of a person, other than a U.S. citizen. According to the House proposal, if an individual were to fall into one of six categories,¹⁷ a state could only issue a temporary driver's license or identification card with an expiration date equal to the period of time of the applicant's authorized stay in the United States. If there was an indefinite end to the period of authorized stay, the card's expiration date would have been one year. The temporary card was to clearly indicate that it was temporary and state the expiration date. Renewals of the temporary cards were to be done only upon presentation of valid documentary evidence that the status has been extended by the Secretary of Homeland Security.

In instances of renewal, duplication, or re-issuance of a driver's license or identification card, a state was to presume that the initial card was issued in accordance with the law, if at the time of application, the driver's license or identification card had not expired or been canceled, suspended or revoked. This presumption would have been inapplicable if the state is notified by a local, state or federal government agency that the individual seeking renewal, duplication or re-issuance was neither a citizen of the United States nor legally in the United States.

Furthermore, the House proposal would have required the states to have adopted procedures and practices to: (1) employ technology to capture digital images of identity source documents; (2) retain paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of ten years; (3) subject each applicant to a mandatory facial image capture; (4) confirm or verify a renewing applicant's information; (5) confirm with the Social Security Administration a SSN presented by a person using the full social security account number;¹⁸ (6) refuse issuance of a driver's license or identification card to

¹⁷ A person would only be eligible for a temporary drivers' license or identification card if evidence is presented that they: (1) have a valid, unexpired non-immigrant visa or non-immigrant visa status for entry into the United States; (2) have a pending or approved application for asylum in the United States; (3) have entered into the United States in refugee status; (4) have a pending or approved application for temporary protected status in the United States; (5) have approved deferred action status; or (6) have a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

¹⁸ In the event that a SSN is already registered to or associated with another person to which any state has issued a driver's license or identification card, the state shall resolve the
(continued...)

a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated the driver's license; (7) ensure the physical security of locations where cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced; (8) subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements; (9) establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards.

Senate Proposal.¹⁹ Like the House version, the Senate proposal attempted to establish national standards for federal agency acceptance of drivers' licenses and personal identification cards. However, the Senate proposal delegated the authority to set the minimum standards to the Secretary of Transportation, in consultation with the Secretary of Homeland Security.

The Senate proposed that the Secretary, within 18 months of enactment, establish minimum standards for drivers' licenses or personal identification cards issued by a State for use by federal agencies for identification purposes. The regulations would have been required to include standards for documentation, verification, and processing required for drivers' licenses and personal identification cards. In addition, the regulations were required to contain security standards to ensure that drivers' licenses and personal identification cards are resistant to tampering, alteration, or counterfeiting, and capable of accommodating and ensuring the security of a digital photograph or other unique identifier. Also, the regulations were to require states to confiscate a driver's license or personal identification card if any component or security feature of the license or identification card is compromised. Finally, the regulations were required to contain procedures designed to protect the privacy and civil rights of applicants for drivers' licenses and identification cards. To ensure compliance with these regulations, the Senate language required the States to certify to the Secretary of Transportation, at intervals to be determined by regulation, that their licensing procedures conform with the legislation's requirements.

The Senate proposal also imposed limitations on the Secretary's regulatory authority. Specifically, the regulations were not permitted to infringe on the state's power to set eligibility requirements or to fully enforce those requirements. In addition, the Senate proposed that the Secretary may not require a single national design for either drivers' licenses or personal identification cards.

In addition to the specific content requirements, the Senate proposal required that the regulations be promulgated under the negotiated rule-making process.²⁰ In this case, the Senate proposal directed that the negotiating group include

¹⁸ (...continued)
discrepancy and take appropriate action.

¹⁹ All references to the Senate proposal in this section can be found at S. 2845, 108th Cong. § 1027 (2d Sess. 2004).

²⁰ See *supra* note 14.

representatives from the state offices charged with issuing such documents, state elected officials, the Department of Homeland Security, organizations with technological and operational expertise in document security, and organizations that represent applicant interests.

Social Security Numbers

Final Bill. The Intelligence Reform and Terrorism Prevention Act of 2004 contains many of both the House and Senate provisions with respect to Social Security Numbers.

The law requires the Commissioner of Social Security to, within one year: restrict the issuance of multiple replacement social security cards to any individual to 3 per year and to 10 for the life of the individual, except where the Commissioner determines there is a minimal opportunity for fraud; create minimum standards for the verification of documents or records submitted to establish eligibility for original or replacement cards; require independent verification of all records provided by applicants for social security numbers other than at enumeration at birth; and add death and fraud indicators to the verification system for employers, State agencies and other verification routines considered appropriate by the Commissioner.²¹

In addition, the law directs the creation of an interagency task force to further improve the security of social security cards and numbers.²² Within 18 months the task force is to establish security requirements for safeguarding social security cards from counterfeiting, tampering, theft and alteration, verifying documents submitted for the issuance of replacement cards, and to have increased enforcement against the fraudulent issuance or use of social security numbers and cards.²³

The law also requires that the Commissioner undertake and improve the system that issues social security cards to newborn children. Specifically, the law requires the Commissioner to improve the following: (1) the assignment of social security accounts to unnamed children; (2) the issuance of more than one account number to the same child; and (3) any other opportunities to obtain a social security account by means of fraud.²⁴ The law also requires that the Commissioner submit a report to Congress within one year detailing the improvements made to the newborn applicant process.²⁵ In addition, the Commissioner is required to conduct a study to determine the most efficient options for ensuring the security of the enumeration at birth

²¹ See *supra* note 5, at §§ 7213(a)(1)(A)-(C) & 7213(a)(2).

²² *Id.* at § 7213(b). The task force is to include the Commissioner of Social Security in consultation with the Secretary of Homeland Security. *Id.*

²³ *Id.* at § 7213(b)(1)-(3).

²⁴ *Id.* at § 7213(c)(1)(A)-(C).

²⁵ *Id.* at § 7213(c)(2).

process, the results of which are due to Congress within 18 months of the date of enactment.²⁶

Finally, the law amends the Social Security Act to expressly prohibit the states or their political subdivisions from displaying, electronically or otherwise, a social security number, (or any derivative of such number) on any driver's license or motor vehicle registration, or on any other document issued by states to an individual for identification.²⁷

House Proposal.²⁸ The House proposal contained numerous changes to the Social Security Act²⁹ designed to protect the integrity and privacy of social security numbers.³⁰ The proposal called for a prohibition on the states or their political subdivisions from displaying, electronically or otherwise, a social security number, (or any derivative of such number) on any driver's license or motor vehicle registration, or on any other document issued by states to an individual for identification.

The House proposal also required the Commissioner of Social Security to promulgate a number of regulations with respect to the system for issuing social security numbers. First, regarding applications for social security numbers by individuals, other than for purposes of enumeration at birth, the Commissioner was instructed to require independent verification of any birth record provided by the applicant in support of the application, and may provide for reasonable exceptions in situations where the Commissioner determines there is minimal opportunity for fraud. Second, the Commissioner was directed to make improvements to the enumeration at birth program for the issuance of social security numbers to newborns. Such improvements were to be designed to prevent the assignment of social security numbers to unnamed children; the issuance of more than one social security number to the same child; and, other opportunities for fraudulently obtaining a social security number. Finally, the House proposal required the Commissioner to issue regulations restricting the issuance of multiple replacement social security cards to any individual to 3 per year and to 10 for the life of the individual, except where the Commissioner determines there is a minimal opportunity for fraud.

In addition, the House proposal contained a number of provisions requiring the submission to Congress of reports and recommendations including reports to Congress regarding the results of a study and legislative recommendations to test the feasibility and cost effectiveness of verifying all identification documents submitted by an applicant for a replacement social security card; the results of a study and legislative recommendations on the most efficient options for ensuring the integrity

²⁶ *Id.* at § 7213(d)(1)-(2).

²⁷ *Id.* at § 7214.

²⁸ All references to the House proposal in this section can be found at H.R. 10, 108th Cong. §§ 3071-3076 (2d Sess. 2004).

²⁹ Social Security Act of 1935, Title II, § 205, 49 Stat. 624 (codified as amended at 42 U.S.C. § 401 *et seq.*)

³⁰ *See* H.R. 10, 108th Cong. §§ 3071-3076 (2d Sess. 2004).

of the process for enumeration at birth and; the results of a study and legislative recommendations on the best method of requiring and obtaining photographic identification of applicants for old-age, survivors, and disability insurance benefits, for a social security number, or for a replacement social security card, including reasonable exceptions to any requirement for photographic identification of such applicants.

Senate Proposal.³¹ As was the case with respect to drivers' licenses, the Senate proposal took a different approach with respect to social security numbers. Like the House, the Senate proposal required the Commissioner of Social Security to issue regulations restricting the issuance of multiple replacement cards to minimize fraud and requiring independent verification of all records provided by applicants for social security numbers other than at enumeration at birth.

However, unlike the House, the Senate required the Commissioner to add death, fraud, and work authorization indicators to the social security number verification system within 18 months of the legislation's enactment. In addition, the Senate proposal provided for the establishment of an interagency task force to further improve the security of social security cards and numbers. Within one year the task force was to have established security requirements for safeguarding social security cards from counterfeiting, tampering, theft and alteration, verifying documents submitted for the issuance of replacement cards, and to have increased enforcement against the fraudulent issuance or use of social security numbers and cards. The Senate proposal did not appear to amend the Social Security Act, nor did it appear to have contained any of the study and recommendation provisions included within the House's proposed language.

Birth Certificates

Final Bill. With respect to birth certificates, the Intelligence Reform and Terrorism Prevention Act of 2004 delegated authority to the Secretary of Health and Human Services requiring that minimum standards for birth certificates for use by federal agencies for official purposes be completed no later than one year after the date of enactment.³² The regulations are directed to require the State or local issuing official to certify the birth certificate, and will also require that the state's utilize safety paper or alternative secure measures "designed to prevent tampering, counterfeiting, or otherwise duplicating the birth certificate for fraudulent purposes."³³

In addition to the security measures, the Secretary is instructed to establish requirements for "proof and verification of identity as a condition of issuance of a

³¹ All references to the Senate proposal in this section can be found at S. 2845, 108th Cong. § 1028 (2d Sess. 2004).

³² See *supra* note 5, at § 7211(b)(3); see also *supra* note 6 regarding potential federalism concerns raised by setting minimum federal standards with respect to traditionally state functions.

³³ *Id.* at § 7211(b)(3)(A).

birth certificate, with additional security measures for the issuance of a birth certificate for a person who is not the applicant.”³⁴ Concern has been expressed that this provision may have an impact on genealogical and other historical research involving access to birth records. However, what exactly that impact will be appears dependant on precisely how the regulation is ultimately drafted. For example, it is possible that the regulations could be drafted in such a way that will make it difficult for genealogical researchers to obtain birth certificates without express permission or authorization from the person or persons whose records they are seeking. This problem may be especially prevalent with respect to abandoned, foster-raised, or adopted children who may not have the ability to obtain proper authorizations from their direct decedents. While it appears possible for the Secretary to draft a regulation that both complies with the statute and provides an exception or special procedure for genealogical and historical access, this result is by no means guaranteed, nor is it mandated by the plain language of the statute. Furthermore, it is important to note that these regulations appear only to apply with respect to acceptance of a birth certificate by a federal agency for official purposes; therefore, if the birth certificate is to be used for any other purpose, it appears that these regulations will not apply and the states will retain control over procedures for issuing non-official birth records. That being said, it is also possible that either federal pressure to unify the standards may force states to move exclusively to federally-compliant birth records, thereby eliminating the storage and issuance of non-official birth certificates.

The statute does provide some limitations on the Secretary’s regulatory powers. Specifically, the regulations “may not require a single design to which certificates issued by all States must conform.”³⁵ The Secretary’s power is also limited by the requirement to “accommodate the differences between the States in the manner and form in which birth records are stored and birth certificates are produced from such records.”³⁶

Finally, the statute sets a timetable for implementation. As previously mentioned, the Secretary has one year to promulgate the regulations; however, the regulations will not go into effect until two years after they are promulgated.³⁷ The States will be required to certify that the State and all local government or other officials are in compliance with the standards at intervals established by the Secretary.³⁸ The statute also provides that grant funding be made available to assist the States in conforming to the standards that are created by the Secretary.³⁹

³⁴ *Id.* at § 7211(b)(3)(B).

³⁵ *Id.* at § 7211(b)(3)(D).

³⁶ *Id.* at § 7211(b)(3)(E).

³⁷ *Id.* at § 7211(b)(1).

³⁸ *Id.* at § 7211(b)(2)(C).

³⁹ *Id.* at § 7211(c).

House Proposal.⁴⁰ Similar to the driver's license provisions, the House proposal established minimum document, issuance, and verification standards for federal recognition of birth certificates. To meet the minimum document standards the House proposal required state and local governments to use safety paper, a custodian of records seal, and any other measures deemed necessary by the Secretary of Health and Human Services to prevent the tampering, counterfeiting, or unauthorized duplication of a birth certificate. The Secretary was instructed, however, not to require a single national design to which all states must conform.

Before issuing a duplicate certificate, a state, to comply with the minimum issuance standards, would have been required to verify the name on the birth certificate, the date and location of birth, the mother's maiden name and substantial proof of the requestor's identity. In cases where the requestor was not named on the birth certificate, states were to have required the presentation and verification of legal authorization before issuing a birth certificate. In addition, the House language would have required the Secretary to promulgate regulations establishing minimum standards for the issuance of birth certificates to authorized family members.

The House proposal would have also required states to establish minimum building security standards for both state and local vital records offices, implement other security and privacy protection measures, and establish a central database that can provide interoperative data exchange with other states and federal agencies. In addition, the House proposal required the Secretary to establish a common database and exchange protocol for electronic birth and death registration systems. This system would have been required to employ fraud prevention technology, utilize a common electronic system for issuing birth certificates, employ a common format for certified copies, and establish uniform field requirements for state birth registries.

Senate Proposal.⁴¹ As with standards for drivers' licenses and social security cards, the Senate measure proposed delegating regulatory authority – here, to the Secretary of Health and Human Services – to establish minimum standards for birth certificates for use by federal agencies for official purposes. The regulations promulgated by the Secretary were required to include certification by the state or local custodian of records, the use of safety paper, custodian's seal, and other features designed to prevent tampering, counterfeiting, or other unauthorized duplications for fraudulent purposes. In addition, the regulations were to establish requirements for both proof and verification of identity, as well as the processing of birth certificate applications to prevent fraud. Moreover, the Secretary was to be prohibited from requiring that a single national design be used, and was specifically required to accommodate the differences between the states with respect to the manner and form in which birth certificates are stored and produced.

⁴⁰ All references to the House proposal in this section can be found at H.R. 10, 108th Cong. §§ 3061-3067 (2d Sess. 2004).

⁴¹ All references to the Senate proposal in this section can be found at S. 2845, 108th Cong. § 1026 (2d Sess. 2004).