STATEMENT

Of

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on H.R. 5811, the "Electronic Communications Preservation Act"

Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee
2154 Rayburn HOB

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Thank you for providing the opportunity for the National Archives and Records Administration (NARA) to provide our views on the proposed legislation in the Electronic Communications Preservation Act.

NARA is supportive of the goals of the proposed legislation – to ensure that electronic communications that constitute records are effectively managed and accessible throughout their life cycle.

Although the Federal government's work processes (and default recordkeeping practices) still operate in a mixed media environment – paper and electronic – the government's records are increasingly and overwhelmingly "born digital." This proposed legislation reflects the new paradigm. NARA conceptually supports managing electronic records within electronic recordkeeping systems in the Federal government. We also firmly believe that electronic record communications, as well as other forms of electronic records, need to be managed in accordance with sound records management and archival principles.

The two substantive sections of the bill address to two distinct statutes and their attendant organizations: the Federal Records Act (FRA), which applies to "Federal agencies" in all three branches of the Government; and the Presidential Records Act (PRA), which applies only to the President, the Vice President, and certain entities within the Executive Office of the President. We will address each section separately. Given the very important and complicated issues raised by these proposals, we can only offer our initial views. We remain available to work with the Committee as it attempts to address these issues.

I. *The Federal Records Act*

As the Federal Records Act and our current regulations require, Federal agencies must effectively manage their records (electronic and otherwise) to ensure adequate and proper documentation of agency activities. Federal agencies must identify what records they are creating; propose dispositions to the National Archives for records series regardless of format, according to their business needs to protect citizen rights and assure government accountability; manage their records according to NARA-approved established records schedules and NARA-promulgated regulations and guidance; and finally, after their business needs are completed, carry out appropriate disposition activities. The latter includes both proper destruction or deletion of temporary records that have no further value, as well as transfer of records of archival value to the National Archives to be preserved and made available for future generations.

In NARA's Strategic Directions for Federal Records Management, we state that NARA "will partner with stakeholders to ensure that:

- Federal agencies can economically and effectively create and manage records necessary to meet business needs
- Records are kept long enough to protect rights and assure accountability, and
- Records of archival value are preserved and made available for future generations

We believe the intent of this proposed legislation supports these broad goals. However, we have concerns regarding the intended scope and effect of the legislation.

1. NARA has issued guidance on the management of e-mail records and the term "electronic communications" may be too broad and ambiguous.

Current NARA regulations speak specifically to the management of e-mail records. See 36 CFR 1234.24. We have also issued recent guidance to agencies with respect to such new media as instant messaging and other Web 2.0 applications. See "Frequently Asked Questions about Instant Messaging" at http://www.archives.gov/records-mgmt/initiatives/im-faq.html; "NARA Guidance on Managing Web Records" at http://www.archives.gov/records-mgmt/policy/managing-web-records-index.html; and "Implications of Recent Web Technologies for NARA Web Guidance" at http://www.archives.gov/records-mgmt/initiatives/web-tech.html.

In light of this existing body of NARA guidance, we believe that further authority to issue regulations is not needed. However, we will continue to refine our guidance to ensure that electronic records are properly managed. Also, without more specific refinement, the term "electronic communications" in the scope of this legislation may be overbroad or ambiguous. This may be especially the case since the term is used in other legislation of a decidedly different scope, see, e.g., the Electronic Communications Privacy Act.

2. The meaning of the term "preservation" should be clarified.

The proposed legislation suggests all electronic communications that are Federal records as defined by Section 3301 shall be captured, managed, and preserved electronically. NARA's view is that, as is true for all Federal records, these types of records should only be captured, managed, and preserved consistent with the disposition requirements outlined in Sections 3302 and 3303 of Title 44 of the U.S. Code. With these requirements in mind, we wish to better understand the Committee's goals in this legislation regarding the requirement that "electronic records are readily accessible for retrieval through electronic searches," per proposed section 3108(a)(2):

- First, does the Committee believe that there can or should be a minimum time period required under the records laws that *all* electronic communications need to be preserved and accessible, merely for purposes of agencies conducting searches for information? Put another way, is it the intent of the Committee that electronic communications must be preserved solely for the purpose of facilitating searches, irrespective of how e-mail records may otherwise be managed as part of agency business processes? This is important, because many transitory e-mail records are not appropriate for preservation for more than a very short term retention period, as recognized in NARA's regulations at 36 C.F.R. 1234.24(b)(2).

- Second, does the Committee believe that electronic communications created in the course of governmental activities that also generate traditional hard copy records should nevertheless always be kept in electronic repositories, separate and apart from those related records in paper files or other electronic systems?

With respect to the first bullet above, NARA does not believe that *all* electronic communications records need to be preserved in perpetuity; rather, we believe that electronic records must be managed and understood within, or associated with, the work processes that generated the records. NARA further believes that there are significant challenges in this area, and that not every quick-fix technological solution may ultimately advance the goals of good records management. Indeed, depending upon the answers to these and related questions, there may be other technological solutions that could address this challenge. Also, imposing a technological solution that does not fit well with an agency's business processes or needlessly requires an agency store unimportant e-mails for longer than is necessary could be harmful to sound records management and may be costly.

Turning to the second bullet, from NARA's perspective, a critical aspect of "preservation" is preserving electronic communications not in isolation, but along with other records (electronic and paper) that arise from the same business context. Whenever a record type – like e-mail or web records, for instance – is managed outside of the business process that created the record, the authenticity of the records may be lessened, and the value of the record could be diminished. In other words, we believe the Committee should reconsider whether mandating that *all* government e-mail records be

preserved in electronic form is consistent with the greater goals of the Federal Records Act, where related records on a case or project continue to remain in traditional paper files as maintained in many Federal agencies.

3. The potential costs of this proposed legislation are enormous. Such costs are realized in two different dimensions.

In the first dimension, the costs of managing *all* Federal electronic communications in electronic records management applications (RMAs) – including e-mail records, but also potentially including in the near term instant messaging, wikis, blogs, and other record types that are emerging from web 2.0 social networking software applications- -- would likely be in the billions of dollars. At the National Archives, we spend approximately $450,000 annually to support the deployment of a records management application for e-mail and some other electronic record types for approximately 60 employees. We would need to do a further study to provide more accurate costs, but extrapolating our costs – and our anecdotal understanding of RMA costs in other agencies - across the Federal government results in potential astronomical outlays by Federal agencies if they were to be required to create and provide ongoing support for such RMAs.

A second dimension of the cost challenge is the financial and personnel investment Federal agencies would need to make in order to keep electronic records usable – or "readily accessible for retrieval through electronic searches" – over a long period of time.

Unless records and their metadata are filed correctly by agency staff, having electronic records in an RMA repository does not ensure that the records will be findable and usable. Effectively implementing an RMA in any agency takes a lot of effort and cannot be accomplished quickly.

Moreover, electronic records still in the custody of the Federal agency require continual maintenance, even if they are in an electronic RMA. Unlike paper records which can sit on a shelf in a box in good environmental conditions for years without significant degradation, electronic records must be more regularly and repeatedly described, inspected, migrated, and refreshed. And this challenge increases as electronic record types beyond e-mail are considered, like newer record types as well as more traditional e-mail attachment records.

4. While certified electronic RMAs are one method for managing electronic communication records in a recordkeeping system, there are likely to be a variety of other technological solutions.

Toward this end, we would recommend changing the definition at Section 3108(f)(16) to

(16) the term "electronic records management application" means a software system designed to manage electronic records within an information technology system, including categorizing and locating records***, ensuring that records are***

retained as long as necessary, identifying records that are due for disposition, and storing, retrieving, and ***disposition*** of records ***controlled by the application***.

The first suggested change – ***ensuring that records retained as long as necessary*** – adds the key requirement for managing records. The second suggested change – ***disposition*** – is to ensure inclusion of transfer of permanent records to the National Archives as well as appropriate disposal of temporary records. And the third suggested change – ***controlled by the application*** – substitutes a more general provision for one which is unnecessarily tied to a specific solution, "stored in the repository."

While RMA's that conform to the Department of Defense 5015.2 standard tend to store electronic records in separate, recordkeeping repositories, that is not the only way to accomplish the requirements for managing records.

For example, the Records Management Services concept, which NARA developed over the last two years in collaboration with other agencies and the private sector, defines an approach for managing records that remain stored in the systems used to conduct business. While this concept has not yet been translated into software that agencies can implement, it is an example of the alternatives that should be allowed in the legislation.

It is also important to note that technological solutions, such as RMAs and Records Management Services, may not always be the most effective means for ensuring the management and preservation of electronic communications and other electronic records. As alluded to above, in agencies where the work processes are not currently entirely electronic, a paper-based or hybrid approach may be the right solution. Also, in many of the smaller agencies, independent commissions, etc, it may be cost-prohibitive and otherwise impractical to implement sophisticated technological solutions where the recordkeeping and preservation requirements are modest in scope. In these cases, agencies should have the flexibility to determine the appropriate solution after analyzing their business needs and, if needed, consultation with NARA.

Regarding the proposed Section 3108 requirements for NARA to create regulations related to electronic communications, we have already promulgated extensive regulations for the preservation of electronic records, but concededly they do not reflect our current success in preserving those records that have the least reliance on hardware and software, nor do they mandate that agencies rigidly adopt electronic recordkeeping in a particular form.

That concludes our comments on the Federal Records Act related portion of the proposed legislation.

II. *The Presidential Records Act*

With respect to the Presidential Records Act, we would like to start by noting that the White House has been at the forefront of trying to manage electronic e-mail records electronically, even though the execution of this effort has presented NARA with

enormous challenges that we have done our best to overcome. In response to long-running litigation that began in the Reagan era, the Clinton Administration sought supplemental funding from Congress in 1994 for the building of a comprehensive e-mail recordkeeping system, known as the "Automated Records Management System" (ARMS). While there were serious technical issues to be resolved with ARMS toward the end of that Administration – including the need to restore some 2 million missing e-mails – it achieved the important result of preserving some 20 million presidential record e-mails, and 12 million Federal record e-mails for the entire Executive Office of the President. All of these e-mails presently reside in the National Archives of the United States as permanent records, including as part of the Clinton Presidential Library.

The Presidential Records Act was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

> The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent *under standards affixed in law*. * * *

H. Rep. 95-1487, at 2 (95th Cong., 2d Sess., Aug. 14, 1978) (emphasis added).

The House Report went on to note that "[t]o facilitate the compiling of a complete record and the orderly transfer of materials, the President is encouraged to implement *sound records management practices . . . .*" *Id.* at 4 (emphasis added).

Congress defined "Presidential records" under the PRA to mean "documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(2). In turn, Congress drew a parallel with existing recordkeeping practices under the Federal Records Act in conforming the definition of what constitutes "documentary material":

> . . . to include all types of written, recorded, verbal or visual communications regardless of the form or medium. The definition is an expansion upon the traditional notion of the form a government record may assume, but still relies heavily on the definition of the[] term 'record' in 44 U.S.C. section 301 and the practice that has evolved in the administration of Chapter 29 of that title. To the extent that certain categories of documentary materials are not considered to be records under that chapter, the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record.

H. Rep. 95-1487, at 10-11.

The PRA was crafted after very careful consideration concerning the delicate separation of powers balance between the Congress and the President, and the proper level of intrusion by the Archivist into the incumbent President's affairs. As the U.S. Court of Appeals for the District of Columbia explained in the case that led the White House to create the ARMS e-mail archiving system:

> Congress balanced the[] competing goals [in the PRA] by requiring the President to maintain records documenting the policies, activities, and decisions of his administration, but leaving the implementation of such a requirement in the President's hands. See 44 U.S.C. § 2203(a). For example, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision. The Archivist also lacks the authority under the PRA to inspect the President's records or survey the President's records management practices. Finally, the PRA does not require the Archivist to provide Congress with the annual reports on the President's recordkeeping policies and practices that he must submit for agencies.

Armstrong v. EOP, 924 F.2d 282, 290 (D.C. Cir. 1991).

Given the recognized history of the PRA and the delicately balanced scheme it represents with respect to issues of constitutional dimension, we believe that it would be highly appropriate for the Committee to seek the views of the Department of Justice regarding the separation of powers issues raised by section 3.

As the full Committee is aware from its prior hearing in February 2008, at which Archivist Allen Weinstein testified, there are substantial efforts underway by staff in the Office of Administration, Executive Office of the President, to ensure that as complete and comprehensive a record as possible of electronic mail messages will exist from this Administration. The full Committee also knows from that hearing that the Archivist has been vocal in expressing both his continued concerns that the efforts of the EOP are satisfactorily completed before the end of the current Administration, as well as his support for EOP's efforts to institute a new electronic archiving system that will better conform to best practices in the public and private sector. These more recent efforts by EOP staff are, in our view, consistent with the goals of the proposed bill to ensure that effective records management controls are maintained at the White House.

NARA believes that it is not unreasonable to presume that an incumbent President should and would attempt to adopt best practices in the area of electronic records management that parallel the efforts to be required of Federal agencies. To the extent the standards required under section 3(a) would generally track the new regulations required under section 2, NARA believes the provision is consistent with the original aims of the PRA.

However, in light of the above discussion, such standards would likely need to be non-binding on the incumbent President.

The further provisions of section 3(b) of the legislation, requiring NARA to make an annual certification that the records management controls established by the incumbent President meet newly established standards, and requiring a bi-annual report to Congress, can, in our view, only be successfully implemented were NARA to be able to conduct the type of oversight inspection that we are empowered to conduct under Title 44, Section 2904, of the Federal Records Act, including possibly needing to review presidential records along with the general automated processes and procedures EOP has put into place. However, such authority is unprecedented and would mark a significant departure from accepted and long-standing practice. It would likely be deemed intrusive to White House records management processes and an encroachment on the internal administration by the White House of records management compliance with the PRA. Again, we would defer to the Department of Justice on this issue.

Finally, section 3(c) of the legislation, adding a new subsection (4) to section 2203(f) of the PRA, would require a report by the Archivist after a President leaves office, regarding the volume and format of presidential records deposited into that President's archival depository. We do not believe this separate reporting requirement raises any constitutional issues and NARA should have no objection to providing Congress with the required report.

Thank you again for considering NARA's views on this important issue. We are available to answer any questions that you might have.