



February 2, 2017

**VIA CERTIFIED MAIL**

Ms. Catherine McCabe  
Acting Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Ms. Ann Dunkin  
Chief Information Officer  
National Freedom of Information Office  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, D.C. 20460

**Re: Federal Records Act Notification and Freedom of Information Act Request**

Dear Acting Administrator McCabe and Ms. Dunkin:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, CoA Institute is investigating instances where government officials have used personal devices, personal email accounts, or other alternative methods of communication, such as instant messaging, to conduct official agency business.

According to a recent report, a “small group of career [Environmental Protection Agency (“EPA”)] employees”—fewer than a dozen—“are using an encrypted messaging app” called “Signal” to discuss how to respond to officials appointed by President Trump.<sup>2</sup> Specifically, these employees are communicating about work-related issues such as how to prevent political appointees from “undermin[ing] their agency’s mission to protect public health and the environment” or “delet[ing] valuable scientific data.”<sup>3</sup> It is unknown whether Signal is being used on EPA-issued devices or personal devices. One employee, though, is reported to have “joked about getting a ‘burner phone,’” and to have obtained a “new, more secure cell phone.”<sup>4</sup>

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<sup>1</sup> See CAUSE OF ACTION, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Oct. 5, 2016).

<sup>2</sup> Andrew Restuccia, Marianne Levine, & Nahal Toosi, *Federal workers turn to encryption to thwart Trump*, POLITICO (Feb. 2, 2017), <http://politi.co/2km4Qrb>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

CoA Institute is concerned that these officials may be using Signal to avoid transparency laws in an effort to conceal their communications from internal and external oversight. Under the Federal Records Act, the EPA has a legal obligation to preserve records evidencing employees working on government business, no matter the medium of their communication. This obligation is all the more important if employees are using personal devices or accounts for that work-related business. Such messages should also be made available under the Freedom of Information Act.

Based on the foregoing, CoA Institute is submitting this Freedom of Information Act request and notifying Acting Administrator McCabe of her obligation under the Federal Records Act to ensure that all work-related Signal messages are retained or retrieved by the EPA.

**I. NOTIFICATION OF ACTING ADMINISTRATOR MCCABE’S OBLIGATION UNDER THE FEDERAL RECORDS ACT TO PRESERVE WORK-RELATED SIGNAL MESSAGES.**

The Federal Records Act (“FRA”) refers to the collection of statutes and regulations that govern the creation, management, and disposal of the records of federal agencies.<sup>5</sup> The FRA was enacted to ensure the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government” and the “[j]udicious preservation and disposal of records.”<sup>6</sup> Among other matters, the FRA requires agency heads to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,”<sup>7</sup> and to establish “safeguards” against the removal or loss of records, including notifications to agency officials and employees that records may not be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.”<sup>8</sup>

Under 44 U.S.C. § 3106, the FRA also requires the “head of each Federal agency”—in this case, Acting Administrator McCabe—to notify the Archivist of the United States “of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]”<sup>9</sup> In addition to notification, the FRA requires that an agency head, with the assistance of the Archivist, “shall initiate action *through the Attorney General* for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency.”<sup>10</sup> Unlawful removal of records is defined as “selling, donating, loaning, transferring, stealing, or

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<sup>5</sup> See 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220–39.

<sup>6</sup> 44 U.S.C. §§ 2902(1), (5).

<sup>7</sup> *Id.* § 3102; see also *id.* § 3301 (defining federal records); 36 C.F.R. § 1220.18 (The definition of record includes any material, “regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”).

<sup>8</sup> 44 U.S.C. § 3105; see also 36 C.F.R. § 1230.10 (requiring agency heads to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records”); *id.* § 1230.12 (“The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both (18 U.S.C. 641 and 2071).”).

<sup>9</sup> 44 U.S.C. § 3106(a) see also 36 CFR 1230.14 (providing that “[t]he agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration” and outlining the content of such a report).

<sup>10</sup> 44 U.S.C. § 3106(a) (emphasis added).

*otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.”*<sup>11</sup>

In any situation where the head of the agency does not initiate action through the Attorney General for the recovery of unlawfully removed records, the Archivist is required to request the Attorney General to initiate such action and to notify Congress of that request.<sup>12</sup>

In this case, to the extent that EPA employees have communicated about work-related issues on Signal, an instant messaging application, they have created federal records as defined by the FRA. Those records belong to the EPA and must be retained for preservation. Acting Administrator McCabe has a further obligation under 44 U.S.C. § 3106 to recover any work-related Signal that are outside the custody of the EPA, including messages that reside on personal devices.

If the records at issue have indeed been alienated, the FRA mandates that Acting Administrator (1) notify the Archivist of the United States that federal records belonging to the EPA have been unlawfully removed from the agency; and (2) initiate action through the Attorney General for the recovery of those federal records.<sup>13</sup> As the D.C. Circuit Court of Appeals has held, the obligation to initiate action through the Attorney General to recover unlawfully removed records is a mandatory obligation, not subject to agency discretion.<sup>14</sup> Any attempt to evade that obligation by claiming that the EPA lacks the legal authority to recover the records at issue cannot be countenanced.

We look forward to Acting Administrator McCabe complying with her statutory obligations in this matter and to providing public notice that she has done so.

## II. FREEDOM OF INFORMATION ACT REQUEST

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records. The time period for all items of this request is January 20, 2017 to the present.<sup>15</sup>

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<sup>11</sup> 36 C.F.R. § 1230.3(b) (emphasis added).

<sup>12</sup> 44 U.S.C. §§ 2905(a), 3106(b).

<sup>13</sup> 44 U.S.C. § 3106(a); *Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) (“[T]he Federal Records Act establishes only one remedy for the improper removal of a ‘record’ from the agency’: the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency.”) (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980)).

<sup>14</sup> *Armstrong*, 924 F.2d at 295 (“Because the FRA enforcement provisions leave *no* discretion to determine which cases to pursue, the agency head’s and Archivist’s enforcement decisions are not committed to agency discretion by law. In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action.”).

<sup>15</sup> For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency

1. All records created or received by any EPA employee on Signal.<sup>16</sup>
2. All records reflecting any permission, clearance, or approval granted to EPA employees by the agency, Archivist and/or the National Archives and Records Administration for the use of Signal, or other instant messaging applications, for the conduct of official EPA business.
3. All records concerning EPA efforts to retrieve, recover, or retain records created or received by EPA employees on Signal.

### **Request for Expedited Processing**

CoA Institute requests expedited processing of its request because (1) it is “primarily engaged in disseminating information” and (2) the requested records concern “actual or alleged Federal government activity,” about which there is an “urgency to inform the public.”<sup>17</sup> The following statement, which CoA Institute certifies to be true and correct, explains the basis for this request.<sup>18</sup>

***1. CoA Institute is primarily engaged in disseminating information as a representative of the news media.***

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>19</sup> CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

***2. There is an urgency to inform the public about actual federal government activity.***

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a FOIA requester properly satisfies the “urgency to inform” standard.<sup>20</sup> Those factors include: (1) whether a request concerns a “matter of current exigency to the American public”; (2) whether the consequences of delaying a response would “compromise a significant recognized interest”; (3) whether the request concerns “federal government activity”; and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”<sup>21</sup>

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may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

<sup>16</sup> Records of official EPA business that are saved on private employee accounts or devices still qualify as “agency records” under the FOIA, even if they are not in the immediate possession of the EPA. *See Competitive Enter. Inst. v. Office of Sci. & Tech. Pol’y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (“If the agency head controls what would otherwise be an agency record, then it is still an agency record[.]”).

<sup>17</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 40 C.F.R. § 2.104(e)(1)(ii).

<sup>18</sup> 40 C.F.R. § 2.104(e)(3).

<sup>19</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

<sup>20</sup> 254 F.3d 300, 310–11 (D.C. Cir. 2001).

<sup>21</sup> *Id.*

In this case, the requested records concern agency officials possibly violating federal laws and agency rules and regulations concerning the preservation of records. This issue has been covered by the news media and congressional interest in the subject is naturally expected. CoA Institute does not seek records of merely “newsworthy” topics, but rather “subject[s] of a currently unfolding story.”<sup>22</sup> The records requested here unquestionably concern the activity of the federal government, insofar as they reflect communications between EPA officials about possible responses to the incoming Administration and its policy goals. The records may also reveal potential impropriety in the manner and content of the correspondence, as well as in agency efforts, or lack thereof, to recover the work-related Signal messages. Other agencies have granted CoA Institute its requests for expedited processing of requests concerning FRA issues.<sup>23</sup>

Delay in the production of this request would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”<sup>24</sup> The ability of a “watchdog” group like CoA Institute to secure records such as those sought in this request for the purposes of government accountability,<sup>25</sup> especially where a current exigency and unfolding story exists, weighs in favor of expedited processing.

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the EPA shall furnish the requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>26</sup>

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to EPA employees used an instant messaging

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<sup>22</sup> *Al-Fayed*, 254 F.3d at 311.

<sup>23</sup> See Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Oct. 27, 2016) (granting expedited processing of request F-2016-13712) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Jan. 28, 2015) (granting expedited processing of request NGC16-124) (on file with CoA Inst.); Email from Adrienne M. Santos, Gov’t Info. Specialist, OSD/JA FOIA Office, Dep’t of Def. (Dec. 24, 2015) (granting expedited processing of request 16-F-0338) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Oct. 2, 2015) (granting expedited processing of request NGC15-648) (on file with CoA Inst.); Email from Joseph A. Scanlon, FOIA & Privacy Officer, Nat’l Archives & Records Admin., to CoA Inst. (Mar. 30, 2015) (granting expedited processing of request NGC15-159) (on file with CoA Inst.); Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Apr. 14, 2015) (granting expedited processing of request F-2015-4785) (on file with CoA Inst.).

<sup>24</sup> *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

<sup>25</sup> See *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) (“[O]btaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”); see also *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

<sup>26</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1); see *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

application, Signal, to conduct official business, as well as efforts by the agency to retrieve those records for proper preservation. Disclosure will “contribute significantly” to public understanding because, to date, the public has not known the details of how the EPA attempted to retain these records, if at all. Public interest is particularly acute in light of scandals surrounding record preservation and former Secretaries of State Colin Powell and Hillary Clinton, the heads of the Departments of Defense and Homeland Security, as well as broader congressional efforts.<sup>27</sup>

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>28</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under the FOIA.<sup>29</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>30</sup> CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>31</sup> These distinct works

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<sup>27</sup> See, e.g., Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://goo.gl/pnWJvM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://goo.gl/A6WoLB>; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://goo.gl/b3xlaZ>; Rachel Witkin, *Sec. Jeh Johnson: ‘Whoops’ on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://goo.gl/KH3SA7>.

<sup>28</sup> See also *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>29</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(b)(6).

<sup>30</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>31</sup> See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

are distributed to the public through various media, including CoA Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via email.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>32</sup> In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute as a news media organization in connection with its FOIA requests.<sup>33</sup>

### **Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>34</sup>

### **Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

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<sup>32</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>33</sup> See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep't of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep't of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014).

<sup>34</sup> See 40 C.F.R. § 2.106; 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records."); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

If you have any questions, please contact me by email at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org) or by telephone at (202) 499-4232. Thank you for your attention to this matter.



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COUNSEL

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