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SUBVERSION OF DRUG TESTING PROGRAMS

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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SUBVERSION OF DRUG TESTING PROGRAMS

TUESDAY, MAY 17, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2123, Rayburn House Office Building, Hon. Ed Whitfield (chairman) presiding.

Members present: Representatives Whitfield, Bass, Walden, Ferguson, Burgess, Blackburn, Barton (ex officio), Stupak, and Inslee.

Staff present: Mark Paoletta, chief counsel; Alan Slobodin, majority counsel; Clayton Matheson, research analyst; Chad Grant, clerk; and Chris Knauer, minority investigator.

Mr. WHITFIELD. Today's hearing is entitled Subversion of Drug Testing Programs, and I certainly want to welcome the first panel of witnesses. We look forward to your testimony.

Before we give our opening statements, we do have about a 2- or 3-minute segment that was on a television station in Texas that sort of illustrates the subject matter of this hearing today. So—I'm sorry. It was Connecticut, not Texas and 1998 and not today. Hopefully, our technology will work; and, with that, we will begin the video. If someone would dim the lights.

[Video shown.]

Mr. WHITFIELD. Well, I hope you enjoyed that brief news clip. We are going to have our opening statements now, and I'm going to submit my entire opening statement for the record.

[The prepared statement of Hon. Ed Whitfield follows:]

PREPARED STATEMENT OF HON. ED WHITFIELD, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

There's an old saying: "What you don't know can't hurt you." Today's hearing on the subversion of drug testing programs will show that adage may not always be true. We will learn about a furtive world of masking agents and prosthetic devices that keeps us from knowing who in safety-sensitive jobs or in probation programs are using illegal drugs. This may be the case that what you don't know can hurt you—and not only hurt you, but actually put your life and others' lives at risk.

We know that the problem of illegal drug use is enormous and persistent. The Substance Abuse and Mental Health Services Administration (SAMHSA) 2003 National Survey on Drug Use and Health tells us that 19.5 million Americans ages 12 and older reported using an illicit drug in the month before the survey was conducted. According to the same survey, if asked about illicit drug use during the year before the survey was conducted, 35 million Americans age 12 and older reported illicit drug use.

We don't know the precise number of people subject to drug testing who are using drugs, but some of today's witnesses will present data on positive test results and other kinds of results that indicate a significant problem of people who continue to use drugs, even when they are subject to a drug-testing program.

We know that over the past decade, a quickly expanding industry has evolved around products that help illicit drug users subvert drug tests. A myriad of companies currently sell dozens of products that are designed to mask the presence of illegal drugs in users' urine, hair, blood, and saliva. These products are ubiquitous and are sold primarily over the Internet, in "head shops," and even in health food stores. Additionally, there are products that deliver substitute "clean" or drug-free urine warmed to body temperature. They have catchy names such as the "Urinator" and the "Whizzinator." These products have even been in the news. Just last week, we learned about an NFL player caught with a Whizzinator. We will see print ads and Internet ads that blatantly advertise and guarantee that when used according to instructions, "You Will Pass Your Drug Test or Double Your Money Back!" The Committee has obtained some information on the finances and operations of a couple of companies, a sub-sample of this mysterious industry. What we have learned is that the bottom lines of these companies is consistent with a trend of an industry that is growing and making millions of dollars. However, we don't know the overall size of this industry. At today's hearing, we will have an opportunity to gain some insight from three witnesses in this industry who will appear before the Subcommittee.

We know that drug-testing programs are being defrauded. Adulteration, substitution, and other forms of deception are used in attempts to falsify drug test results. We know that because some people have been caught trying to substitute urine specimens. We will hear from two prosecutors whose offices have prosecuted such cases. One of the prosecutors who will be testifying is George Moore, a Commonwealth's Attorney from my home state of Kentucky.

We also know that some specimens are adulterated with chemicals to mask drug use. We will hear from SAMHSA, a major diagnostic testing company, and a scientific expert about lab results that substantiate the problem of adulteration.

What we don't know is the total number of drug tests where there has been an attempt to falsify the result. However, the test result data show a combined rate of adulteration, dilution, and substitution that extrapolated to the total population subject to drug testing would mean tens of thousands of drug specimens susceptible to subversion.

We know subversion of drug tests occurs. We don't know how many illicit drug users have successfully avoided detection. But we know some users have been successful. Today the Subcommittee will hear from one witness, who is in a correctional institution, who will testify about his experiences with using various products to avoid detection by workplace testing programs, even though this individual continued to use illicit drugs.

However, we know many thousands, if not millions, of users of illicit drugs are escaping detection and putting the public at risk.

We will learn from some of our witnesses that some of these masking products actually work, and some of these products don't work at all, even if instructions are followed. However, there are many anti-testing products that have not been tested by the government or independent laboratories. We have no idea whether some of these masking products pose a real problem or not.

We know that the basic principle underlying the federal workplace drug testing program and other drug testing programs is that an illicit drug user in a safety-sensitive position such as driving a school bus or flying an airplane can put the public at risk. Illegal drug use in the workplace contributes to decreased productivity and increased absenteeism, accidental injuries and deaths, and violence. We will hear testimony and tape-recorded conversations presented by the Government Accountability Office (GAO) showing how easily an individual seeking a safety-sensitive, or a security position, in the federal government can obtain masking products. Other witnesses will also report about incidents that further illustrate the point about how public safety is placed at risk. We will also hear from witnesses about the added costs to do validity testing, which is enhanced urine specimen testing that picks up some of the falsification attempts.

We know, and will learn from some of today's witnesses, about the laws in 14 states that in some form address the problem of drug testing subversion. What we don't know is whether the federal drug paraphernalia statute can be used effectively against the sale or marketing of anti-drug testing products.

There is much we know about the problem of drug testing subversion. I hope today's hearing will advance our knowledge about the nature of these masking products and the industry that makes them, markets them, and sells them. But there is still much more we don't know.

The question before the Subcommittee is this: Will we know enough to reach a conclusion about whether subversion of drug testing programs is a significant problem, and whether Congress must act?

I want to thank all of today's witnesses for appearing at this hearing. I look forward to the testimony. I also want to thank Chairman Joe Barton for his request to the GAO last August that started this investigation, and his longstanding leadership on drug testing issues. I want to thank my predecessor, Jim Greenwood, for his work and interest on drug testing issues when he headed this Subcommittee. Finally, I want to express my appreciation to the Ranking Member of the Subcommittee, my good friend from Michigan Bart Stupak, for his support in the subpoena vote last week, and his commitment on the issue of curbing drug abuse. I look forward to working with him on this issue of drug testing subversion and other issues of mutual concern.

Mr. WHITFIELD. But I would point out that that clip was run in 1998 on a TV station in Connecticut. At that time, Texas, I believe, was the only State with a law prohibiting the sale of those types of products in the marketplace. Today, there are 14 States.

One of the focuses of today's hearing from experts like you all—we have some government witnesses here today, we have some private witnesses here today, and we are going to have a witness on the screen from a correctional institution who was on parole and was found to be using a product known as the Whizzinator and was sent back to prison. We are going to have a very good hearing.

I think the primary focus of our hearing today is going to be whether or not we do need a Federal approach to solving this problem. We have a Federal workforce drug testing program. We have mandatory drug testing for airline pilots, for railroad employees, for school bus drivers, nuclear workers. To protect the public health and welfare, it is essential that people in those positions not be under the influence of drugs; and these products that are being manufactured, marketed and sold for the purpose of helping people disguise the use of drugs I think quite clearly endanger the public. So we look forward to your testimony today.

With that, I will recognize the gentleman from Michigan, Mr. Stupak.

I would also like to thank the chairman of this committee who sent out the initial letters on this I believe last August, and I want to thank Mr. Stupak for his support in issuing the subpoenas that were necessary to obtain three witnesses from the companies that manufacture these products.

With that, I recognize Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman.

Today's hearing will examine a variety of devices and substances that purportedly enable the masking of various tests used to detect illegal drugs. The committee's present knowledge about these products and the companies that sell these products remain somewhat sparse because this is a largely unregulated, undocumented industry. Basic measures about what is sold, how much is being sold and who is using these products remain unclear. We hope to further our understanding of this important public health matter in today's hearing by the many excellent witnesses that will provide testimony.

A number of people have asked and are asking, why are we having this hearing? While some of the products that will be discussed today have been the subject of late night comedians and sarcastic columnists, there are serious implications underlying these. Whereas some may chuckle about the NFL player that tried to defeat his drug test by using a product called the Whizzinator, the laughs quickly end when one considers that such a product could be used

by persons operating nuclear power plants, driving thousand foot supertankers into ports or a bus driver bringing our children to school.

The purveyors of these products that sell these products and who have been subpoenaed to appear here today should ponder on their flights home how they would feel if their pilot was allowed to operate the aircraft impaired because of the products they sell. I hope they think about that at about 30,000 feet.

Society does have legitimate reasons for drug tests. If some do not believe that certain kinds of jobs do not require such tests, fair enough. That's a debate we can have another time. The fact of the matter is that those making considerable sums of money by selling these products will try to hide behind the mantra that their products allow many Americans to safeguard their privacy from drug testing intrusion and that many are not even designed to thwart illegal drug use. The fact is, however, that these purveyors have no ability to control who uses their products nor for what purposes.

While I find it amusing that many of these products will have a lawyer drafted disclaimer such as, quote, product not to be used with a lawfully administered drug test, end of quote, it is clear that such vendors have no clue how their products are being used or what problems they are causing to society. I really wonder if they sleep well at night knowing that the habitual drug offenders are able to routinely avoid confronting the horrors of addiction because they now have a method to avoid a judge's court order that they stay clean and enter a drug treatment program. I wonder if these purveyors even think about who and where in society these individuals are placing others at risk because their products are allowed to circumvent an important workplace safety control such as a substance abuse test.

Mr. Chairman, we have had only minimal understanding of what harm these masking products may be causing. It is possible that such tests are being used by a relatively small segment of the population and that their use is having minimal impact on public health and safety. If that's the case, then perhaps they should continue to be the primary regulators of these products through State law.

Nevertheless, these companies appear to be distributing their products through a complicated web of activities that cross numerous State jurisdictions; and, as most of the witnesses will argue today, Federal legislation is needed. I likely agree. Mr. Chairman, as you know, I have supported the committee's effort in this investigation and will continue to support additional efforts to find meaningful solutions, whether through regulation or new legislation.

Nevertheless, as mentioned last week and with you in private conversations, I also look forward to continuing our investigation into another major health threat which is directly related to today's subject, rogue Internet pharmacies, particularly those selling the variety of drugs that some of these tests are trying to mask.

This committee has investigated the issue of controlled substances and other dangerous drugs being sold on the Internet for years. This public health threat has only gotten worse. We still have not found an effective approach to shutting down the most

dangerous Web sites, mainly those selling schedule II drugs without a prescription.

To further make my point, I have a few slides that depict the volume of products that enter the U.S. daily through this method. These slides were taken last year and the year before that, and it's my understanding that such volume continues today.

We have the slides right up here, Mr. Chairman. The first two slides are from Miami international airport and show Dizapam or valuium. This bin contains thousands of shipments. The first two are from Miami, and you can see that, when you open it, it says valuium. You don't know what is in those packets. That's one of them.

The next slides are from JFK International Airport and show a range of schedule II drugs. For every packet that gets caught, I'm guessing about a dozen get through. We have been to Dulles, we have been to Los Angeles and JFK and Miami; and these are shipments and shipments that come in not properly addressed and not properly earmarked. We don't know what's in these drugs other than what they purport to be. That is 1 day's supply coming into our country, and there are 11 different stations around this country where these drugs come in at these receiving points.

Mr. Chairman, I expect as we move forward with today's hearing that we will show the same level of vigor in going after those rogue sites that we see in these slides that I just showed you and go after the rogue sites. Such an effort may require the assistance or issuance of subpoenas not only for those that own and run illicit Internet sites but those who make illegal transactions possible. This would include consignment carriers that ship the drug, the Web hosts such as Google that allow the listing of such sites despite the fact they promised us 2 years ago they would put an end to it and, of course, the credit card companies that are making such transactions possible.

We have seen evidence to suggest that controlled substances are continuing to flood into the United States via the Internet, and I will remind this committee we still do not have a handle to address this important issue nor have we passed any Federal legislation that will give regulators desperately needed tools such as injunctive relief.

Our friend from Oregon, Mr. Walden, has mentioned to us last week that he has legislation to address this issue. Some of the provisions and ideas in his legislation mirror what I tried to do more than a decade ago when I wrote the first piece of legislation on this matter. While not perfect, the Walden legislation represents another outstanding opportunity to finally pass meaningful legislation in this area so we can better protect the Nation's public health. I welcome the opportunity to sit down with you, Mr. Chairman, and Mr. Walden to further study this bill.

As you know, the staff of this committee has years of experience in this area. I hope this is the year that we can finally start making progress in solving this daunting task.

I commend your efforts in this fight. Mr. Chairman, I do want to conclude by commending you and your staff in the way your side has conducted this investigation. While we had some disagreement over yesterday's oil-for-food hearing and the underlying investiga-

tion, today's efforts have been conducted with considerable professionalism. Your staff has made an outstanding effort to keep us informed and plugged into the process on all meetings, phone calls and related documents; and such efforts should not go unrecognized. I look forward to today's hearing and working with you to determine what additional legislation is needed for today's subject and the subject of rogue pharmacies selling dangerous controlled substances on the Internet.

Before I yield back my time, I want to compliment our staff. Some of the information came in last night; and, once again, our staffs worked most of the night to be prepared for today's hearing. I look forward to working with you and to today's hearing. Thank you.

Mr. WHITFIELD. Thank you, Mr. Stupak, and thanks for raising some very important issues that we look forward to working with you on.

At this time, I recognize the gentleman from New Jersey, Mr. Ferguson, for his opening statement.

Mr. FERGUSON. Thank you, Mr. Chairman, for holding this hearing about an important topic that is becoming more and more of a problem as our Nation tries to battle illicit drug use in our workplaces.

The presence of masking devices and other means of subverting drug tests have become really high-profile in recent years. Even as we look to the world of sports, we see egregious examples of test subversion, as the chairman and ranking member have both already pointed out, most recently by Minnesota Vikings running back Ontario Smith.

Just this week, another subcommittee of this full committee, the Commerce, Trade, and Consumer Protection Subcommittee of our committee, will convene a hearing on tougher steroids testing, testing that can possibly be deceived by the very subversion methods which we will discuss today. But that isn't nearly as significant as the problem of drugs in our workplace and the need to have true and transparent testing and the means to have testing without fear of foul play. That's the subject of today's hearing, and I'm pleased we will be pursuing that further.

I also want to welcome Dr. Barry Sample, who is the Director of Science and Technology for the employer solutions business unit of Quest Diagnostic. Quest is a major presence in my home State of New Jersey. Dr. Sample supervises the Atlanta laboratory, which is accredited by the International Olympic Committee and provided the doping control services for the 1996 centennial Olympic games. I welcome Dr. Sample here today and the rest of our panel. I look forward to his suggestions and from hearing from our witnesses today on what we can do to battle this scourge of drug tests subversion.

Thank you again, Mr. Chairman. I yield back.

Mr. WHITFIELD. I recognize Mr. Inslee of Washington for his opening statement.

Mr. INSLEE. I just would like to say baseball home run production is down 10 percent this year, and that's just fine with me. Thank you.

Mr. WHITFIELD. Thank you, Mr. Inslee.

At this time, I recognize Dr. Burgess of Texas for his opening statement.

Mr. BURGESS. Thank you, Mr. Chairman.

You know, I do have a statement that I will submit for the record.

There's not much more I can say after Mr. Stupak's opening statement. I agree with everything he said except that I hope the purveyors of these tests will think about what they're doing not when the plane is at 31,000 feet but while its on short final in a rainstorm.

I, too, want to take the opportunity to welcome the Honorable Susan Reed, District Attorney from my home State of Texas and San Antonio; and Dr. Dasgupta from Houston, Professor of Pathology and Laboratory Medicine at the University of Texas, Houston, my alma mater. Welcome to you both and look forward to your testimony today.

Mr. WHITFIELD. Thank you, Dr. Burgess.

At this time, I recognize Mr. Bass of New Hampshire.

Mr. BASS. Thank you, Mr. Chairman. I will submit an opening statement for the record.

I appreciate you holding this hearing. This is a very difficult issue that should have been addressed a long time ago. I can't think of an issue we should get out of this committee more quickly than to prohibit the sale and use of anti-drug testing pharmaceuticals. There is absolutely no public good that can be derived from this activity, and I think it's an unfortunate by-product of society that we have an element that wants to make money off of endangering the lives of Americans, subverting the process of professional sports and other areas where illicit drugs may or may not be used.

So I thank you for having this hearing, and I look forward to hearing from our witnesses.

Mr. WHITFIELD. At this time, I recognize Mrs. Blackburn from Tennessee.

Mrs. BLACKBURN. Thank you, Mr. Chairman; and I want to say thank you to our committee for being here today.

I know I join everyone else on this panel, Democrat and Republican on both sides of this, the majority and minority, saying we are quite concerned about this issue. All of us are concerned for our constituents, and we are concerned for our safety in the workplace, and we are concerned for the safety of our children. So we appreciate your taking the time be here.

Illegal usage, illegal drug usage certainly is of concern. The fact that we, as a Federal Government, give over 200,000 drug tests a year; 99 percent of those are found to be negative. The workplace, over 40 million drug tests a year.

The cost of drug abuse within the system is $181 billion. That is what it is projected to cost our society. And, you know, the fact that we have individuals who would try to circumvent this process to make it easier for individuals to break the law, to harm society is of tremendous concern to us. So I thank you all for your willingness to be here today to visit with us today and to cover these issues.

Mr. Chairman, I yield back.

Mr. WHITFIELD. Thank you, Mrs. Blackburn.

Without objection, I would like now to place the document binder for this hearing into the record. This is—you all have copies of this, Mr. Stupak. And so ordered.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Mr. Chairman, I commend you for holding this very timely hearing on subversion of drug testing programs.

For starters, let's call these products what they are: lying, cheating, and stealing.

It's lying because you can use one of these products to test clean even if you use illegal drugs. As an ad in High Times magazine puts it: "Live Positive. Test Negative."

It's cheating because these masking products permit a drug user to get a job that he wouldn't otherwise get. And it could be the sort of job no sane person would want a drug user to have, like driving a school bus or flying an airplane.

Finally, it's stealing because subversion of drug tests can divert resources from business activity when companies are forced to conduct additional testing to see if their drug tests are working.

Now what kinds of products are we talking about? Mr. Chairman, consider this device that was in the news last week. A professional football player was stopped at an airport and found carrying something called the Original Whizzinator. This Whizzinator is a device used to subvert drug tests through an artificial bladder that stores and delivers substitute urine. If you don't get the idea, just go to its Website where the product is touted as "Undetectable! Foolproof! Re-usable!" Here's their warranty: "We use only the best synthetic urine on the market. Guaranteed to pass any lab analysis! Over 40,000 samples sold!" If that isn't clear enough, some of the ads offer a cartoon construction worker. He's wearing a cannabis shirt and standing at a urinal. He winks as a man, in a lab coat checks him off the list and says, "Next!"

Incidentally, the company marketing the "Live-Positive-Test-Negative" product tells the Committee there is nothing unlawful going on. This firm says it simply wants to help you remove any unwanted toxins from your body. The company says the product also can be used to euthanize pet fish, instead of flushing the fish down a toilet.

Mr. Chairman, how much of this nonsense are we going to tolerate?What possible legitimate purpose is there for the Whizzinator other than to help drug users beat a drug test? This thing is pretty funny, but the damage caused by the Whizzinator and other products that hide drug use is no joke.

It isn't very funny when the truck driver bearing down on you from behind is the guy who used a Whizzinator to falsify his test result. It is not a joke if an air traffic controller guiding your pilot is impaired from drug use that was masked by these products. It is not a joke if a homeland security worker is living positive and testing negative as he screens for terrorists.

The bottom line is that something must be done to prevent these masking products from causing a disaster in the future.

We are here today because subversion of drug testing programs is a dangerous reality, one that today's hearing may show must be addressed immediately, legislatively if necessary. The Congress cannot stop every American from smoking marijuana or taking heroin. If necessary, however, we should be able to act against an industry that makes it possible to do drugs and go undetected. We don't need people who use illegal drugs to fly airliners or drive our children to school.

I thank the witnesses and look forward to the testimony.

Mr. WHITFIELD. At this time, I want to welcome the first panel. We genuinely appreciate your willingness to be here today and to provide testimony that will give us some insight into the steps that we should be taking in the future in this Energy and Commerce Committee.

We have a distinguished panel today. We have Mr. Robert Cramer, who is with the Office of Special Investigations at the Government Accountability Office.

We have Mr. Robert Stephenson, who is with the Substance Abuse and Mental Health Services Administration.

We have The Honorable Susan Reed, who is the District Attorney from Texas who was introduced.

I'm very proud we have with us George Moore, who is a Commonwealth Attorney from my home State of Kentucky, although he was not in my district. He was instrumental in passing legislation in Kentucky to prohibit these products and welcome to you.

In addition, we have Dr. Jill Captain, who is with the Drug and Alcohol Testing Industry Association.

We have Mr. Jeff Simms with the Substance Abuse Program Administrators Association.

We have Dr. Barry Sample, who is the Director of Science and Technology with the Employee Solutions Division of Quest Diagnostics, Inc.

We have Dr. Amitava Dasgupta, who is a professor at the Department of Pathology and Laboratory Medicine at the University of Texas, Houston.

And we have Mrs. Josephine Kenney, Senior Vice President of Compliance with the Employment Screening Services Division of First Advantage Corporation.

So welcome all of you. We look forward to your testimony.

You're aware that the committee is holding an investigative hearing; and, when doing so, we have had the practice of taking testimony under oath. Do you have any objection to testifying under oath?

The Chair then advises you that under the Rules of the House and the rules of the committee you're also entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today? In that case, if you would rise and raise your right hand, and I'll swear you in.

[Witnesses sworn.]

Mr. WHITFIELD. You are now under oath. Your entire statement will be admitted into the record, and you may give a 5-minute summary of your written statement.

Mr. Cramer, we will recognize you to begin.

TESTIMONY OF ROBERT J. CRAMER, OFFICE OF SPECIAL INVESTIGATIONS, GOVERNMENT ACCOUNTABILITY OFFICE; ROBERT L. STEPHENSON II, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION; HON. SUSAN D. REED, DISTRICT ATTORNEY, BEXAR COUNTY JUSTICE CENTER; HON. GEORGE MOORE, COMMONWEALTH'S ATTORNEY, 21ST JUDICIAL CIRCUIT; JILL F CAPTAIN, DRUG AND ALCOHOL TESTING INDUSTRY ASSOCIATION; JEFF SIMMS, THE SUBSTANCE ABUSE PROGRAM ADMINISTRATORS ASSOCIATION; BARRY SAMPLE, DIRECTOR OF SCIENCE AND TECHNOLOGY, EMPLOYEE SOLUTIONS DIVISION, QUEST DIAGNOSTICS, INC.; AMITAVA DASGUPTA, PROFESSOR, DEPARTMENT OF PATHOLOGY AND LABORATORY MEDICINE, UNIVERSITY OF TEXAS—HOUSTON; AND JOSEPHINE E. KENNEY, SENIOR VICE PRESIDENT OF COMPLIANCE, EMPLOYMENT SCREENING SERVICES DIVISION, FIRST ADVANTAGE CORPORATION

Mr. CRAMER. I'm pleased to be here today to discuss the ease with which people can buy products that are designed to enable users of the illegal drugs to pass drug tests such as those administered in the Federal Workplace Drug Testing Program. I'll refer to these products today as masking products. Paul Desaulniers, who conducted this investigation, is with me today and will assist in our presentation.

To determine how businesses market masking products, we conducted an Internet search using the words "pass drug test." We quickly found many Web sites that offer a variety of drug masking products and brazenly tout that their products enable people who use illegal drugs to pass drug tests. For example, one Web site claimed that passing a urine drug test has never been easier, while another boasts it offers a variety of detox products that will beat the drug test or you get 200 percent of your purchase price back. Yet another advises prospective customers that its product formulas change every 6 to 9 months to stay ahead of new validity tests performed by drug testing laboratories that seek to determine whether there are masking products in urine specimens tested.

Some Web sites provide an interactive format for perspective customers to find out which products best meet their individual needs. For example, one Web site provides a question and answer format for customers and then recommends certain products based on the responses.

To further investigate how these vendors market their products, our investigator placed telephone calls to several of them that he identified through the Internet. He posed as a Federal employee who was looking for ways to hide his cocaine and marijuana use in an impending drug test, and he asked the sales representatives for each vendor for information on products that would enable him to pass his drug test.

While each vendor offered a number of products, most of the sales representatives tailored the particular type of product that they recommended to information that they elicited from him about his purported drug use. They asked, for example, how often he used drugs, when he had most recently used them. They also asked about testing procedures, such as whether tests are conducted ran-

domly or are announced in advanced and if individuals providing samples are closely monitored.

In some conversations, our investigator described himself as a casual cocaine and marijuana user who undergoes announced drug tests. In those conversations, sales representatives recommended that he purchase products that are ingested orally prior to the test. For example, one of the vendors said, if you can stay clean for at least 2 days, we have a detox drink that you would drink on the day of the test. It will keep you clean for 5 hours. For $35, our investigator purchased the detox drink.

After telling another vendor that he used cocaine during the past week and had a drug test scheduled the following week, the vendor said, the good news is we have a detox program. It's a 4-day program; and, basically, if you do that, you'll be okay for the test. For $79, our investigator purchased the detox program which came with a urine test kit that can be used at home to conduct a pretest before submitting to a workplace drug test.

In other conversations, our investigator said that he used cocaine and marijuana on a daily basis and undergoes random drug testing. In that situation, vendors recommend that he purchase synthetic urine or adulterant products. Recommending a synthetic urine product, a representative told our investigator, you won't have to be as careful with our product, but you can still get away with it and people do get away with it. He purchased the product for $32.

At the suggestion of two other sales representatives, our investigator placed orders for adulterants. For $29.95, he purchased one adulterant designed for people who use drugs daily and are subject to random drug testing. This product consisted of two small vials containing liquids that are added directly to the urine specimen before it is submitted for testing. He spent $32 for another adulterant that is designed to be used at the drug test location. This product is a bag that contains two chemicals. One chemical is supposed to destroy the drug toxins and the other purports to destroy traces of the first chemical so it won't be detected in the drug testing process.

In sum, we found that products to defraud drug tests are easily obtained. They are brazenly marketed on Web sites by vendors who boast of periodically reformulating their products so they will not be detected in the drug testing process.

In addition to an array of products designed to dilute, cleanse or substitute urine specimens, approximately 400 different products are available to adulterated urine samples. The sheer number of these products and the ease with which they are marketed and sold through the Internet present formidable obstacles to the integrity of the drug testing process.

Mr. Desaulniers will now play for you two brief excerpts of his conversations with two vendors of these masking products. In these conversations, Mr. Desaulniers posed as a Federal employee who uses marijuana and cocaine, was facing a drug test and was looking for products that would permit him to pass it.

[Audio tape played.]

Mr. CRAMER. That completes our presentation, and we would be happy to take questions at the appropriate time.

[The prepared statement of Robert J. Cramer follows:]

PREPARED STATEMENT OF ROBERT J. CRAMER, OFFICE OF SPECIAL INVESTIGATIONS, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. Chairman and Members of the Committee: I am pleased to appear before you today to discuss the ease with which the public can obtain products that are marketed, designed, and sold to defraud urine drug use screening tests such as those administered in the Federal Workplace Drug Testing Program.[1] For purposes of my testimony, I will refer to these products as masking products and will discuss ways in which some businesses peddle them on the Internet. Masking products fall into one of four categories: (1) dilution substances that are added to a urine specimen at the time it is collected or are ingested before an individual submits a urine specimen; (2) cleansing substances that detoxify or cleanse the urine and are ingested prior to the time that an individual submits a urine specimen; (3) adulterants that are used to destroy or alter the chemical make-up of drugs and are added to a urine specimen at the time that it is provided for testing; and (4) synthetic or drug-free urine that is substituted in place of an individual's specimen and provided for testing. My testimony today summarizes our findings.

We began our work by searching the Internet to obtain an overview of the array of products available to mask drug use and located several Web sites that tout products that are used to mask the presence of illegal drugs when a urine drug test is administered. Then one of our agents, posing as a federal employee in a sensitive position who uses marijuana and cocaine and was looking for products that would allow him to pass an impending drug test, placed telephone calls to businesses we identified in our Internet search and purchased drug masking products from them. Through our Internet search, we also identified and visited a retail store in the Washington, D.C. metropolitan area that sells these products. Additionally, we interviewed officials at the Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, (HHS) to obtain information on the operation of the Federal Drug Testing Program and the types of products or methods that are used by individuals to deceive drug tests. Finally, we obtained information from the Department of Justice (DOJ), and the Drug Enforcement Agency (DEA) and about federal laws relating to the sale of masking products and researched state laws on this issue. We conducted our investigation from August 2004 through March 2005 in accordance with quality standards for investigations set forth by the President's Council on Integrity and Efficiency. We are referring the results of our investigation to appropriate law enforcement authorities and thus are not naming the sources from which our purchases were made.

In summary, we found that products to defraud drug tests are easily obtained. They are brazenly marketed on Web sites by vendors who boast of periodically reformulating their products so that they will not be detected in the drug test process. In addition to an array of products designed to dilute, cleanse, or substitute urine specimens submitted to testers by drug users, approximately 400 different products are available to adulterate urine samples. The sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process.

The sales representatives of the businesses we contacted assured our investigator that the products they sold would enable him to pass an impending drug test despite his purported use of marijuana and cocaine. While all of the businesses offered products designed to defraud drug tests, the sales representatives recommended different types of masking products based on how frequently our investigator purportedly used drugs, whether he was subjected to drug tests that are announced or conducted randomly, and whether testing administrators closely monitored the collection of urine specimens. When our investigator said that he occasionally used marijuana and cocaine, the representatives recommended he purchase herbal supplements and minerals to be taken orally prior to the drug test. According to the sales representatives, these products act as cleansers or detoxifiers. When our investigator reported that he used marijuana and cocaine on a daily basis and that he was subjected to random drug tests, they recommended that, if he would not be closely monitored when he provided a specimen, he purchase synthetic urine or adulterants that are added to a urine specimen. The prices of the products that the sales representatives recommended ranged from about $30 to $79.

[1] Drug tests can be performed on urine, saliva, perspiration, hair, and blood. Currently, the federal government relies solely on urine drug tests, which have a high degree of accuracy, low costs, and relatively unobtrusive method of collection.

Currently, there are a variety of laws related to the sale of drug masking products. Under federal law, if such products are determined to be "drug paraphernalia," an individual may be prosecuted for selling them pursuant to 21 U.S.C. § 863.[2] However, we have not found any reported federal cases in which individuals have been prosecuted for such sales. In contrast, some states specifically prohibit the manufacture, marketing, or distribution of drug masking products. For example, New Jersey, Florida, and Kentucky broadly outlaw the sale of any product designed to defraud or falsify a drug screening test.[3] In some states, such as Louisiana and Texas, it is illegal for an individual to knowingly or intentionally deliver or manufacture substances designed to falsify or alter drug test results.[4] Additionally, at least nine other states (Arkansas, Illinois, Maryland, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina and Virginia)[5] have outlawed the sale of urine or adulterants for the purpose of passing drug tests. Of the nine states, only one—South Carolina—has prosecuted at least two individuals for marketing and selling masking products: one who sold urine substitution kits over the Internet[6] and another who advertised that his store carried products that are used to pass drug tests by cleansing the system.[7] Also, of the nine states, Illinois and Kentucky have made the offense punishable as a felony; South Carolina and North Carolina have made a second offense punishable as a felony; it is a misdemeanor offense in the remaining states.

Background

Pursuant to Executive Order 12564, dated September 15, 1986, the federal government established the Federal Workplace Drug Testing Program. It is administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) for the purpose of preventing and deterring the use of illicit drugs in the federal workplace, and to ensure that as the federal government maintains employee productivity. In 2004, SAMHSA revised the Mandatory Guidelines for Federal Workplace Drug Testing Programs to require that specimen validity tests be conducted on all urine specimens collected.[8] Noting that there has been a recent increase in the number of chemical adulterants that are marketed on the Internet and in certain magazines, SAMSHA officials stated that validity tests are intended to produce accurate, reliable, and correctly interpreted test results and to decrease or eliminate opportunities to defeat drug tests. According to SAMHSA, approximately 400 different products are available to adulterate urine samples, and companies that market masking substances periodically offer new formulations of their products to avoid detection.

Internet Businesses Tout Success of Masking Products

To determine how businesses market drug masking products on the Internet, our investigator conducted an Internet search using the words "pass drug test." He quickly found many Web sites that brazenly tout products and related information that enable users of illegal drugs to pass drug tests. For example, one Web site claimed that "passing a urine drug test has never been easier," while another boasts that it offers a "variety of detox products [that] will beat the drug test or you'll get 200% of your purchase price back." Yet another site advises prospective customers that its product formulas change approximately every 6 to 9 months to stay ahead of new validity tests performed by drug testing laboratories. These Web sites offer a full array of drug masking products.

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[2] Drug paraphernalia is defined, among other things, as any equipment, product or material . . . primarily intended or designed for use in . . . concealing . . . a controlled substance. 21 U.S.C. § 863.

[3] N.J. Stat. Ann. § 2 C:36-10 (West 2004); Fla. Stat. Ann. § 817.565 (West 2000); and Ky. Rev. Stat. Ann. § 516.108 (Michie 1999 & Supp. 2004).

[4] La. Rev. Stat. Ann. § 14:133.3 (West 2004) and Tex. Health and Safety Code Ann. § 481.133 (Vernon 2003).

[5] Ark. Code Ann. § 5-60-201 (Michie 2003);; 720 Ill. Comp. Stat. § 5/17-28 (WESTLAW through 2004 legislation); Md. Code Ann., Crim. Law § 10-111 (2003); Neb. Rev. Stat. § 48-1908 (2002); N.C. Gen. Stat. § 14-401.20 (2003); Okla. Stat. Ann. Tit. 63, § 7002 (2005); 18 Pa. Cons. Stat. Ann. § 7509 (West 2000); S.C. Code Ann. § 16-13-470 (Law. Co-op. 2003); and Va. Code Ann. § 18.2-251.4 (Michie 2004).

[6] *State v. Curtis,* 591 S.E.2d 600.

[7] *State v. Rothchild,* 569 S.E.2d 346.

[8] Initial validity screening of a urine specimen includes tests for color, odor, creatinine level, specific gravity, and pH level. When these test results do not fall within an acceptable range, more comprehensive testing is undertaken to assess the general validity of the specimen and confirm the presence of adulterants such as oxidants, nitrites, glutaraldehyde, chromate, and surfactant.

Additionally, our investigator found some Web sites that provide an interactive format for prospective customers to find out which products best meet their individual needs. For example, one Web site provides a question and answer format for prospective customers and then recommends certain products based on the responses. Among these questions were:

- How many times per week do you smoke or take other substances?
- Are you watched when providing the sample?
- Will you have at least an hour to prepare?
- Are you taking a Department of Transportation regulated test?

After a purchaser clicks on the most appropriate responses to these questions, the site presents pictures and descriptions of recommended products that are available for purchase. This Web site offers a "one-price-fits-all" approach and charges $32 for each of its products. It also provides a store locator that helps prospective customers find out whether retail stores in their local area carry these products.

To further investigate how these businesses market drug masking products, our investigator placed telephone calls to some of them. Posing as a federal employee looking for ways to hide his purported cocaine and marijuana use in an impending drug test, our agent asked the sales representatives for each of these vendors for information on products that would enable him to pass a drug test. While each vendor offered a number of products, most of the sales representatives tailored the particular type of masking product they recommended to information they elicited from the investigator about his purported drug use. They asked, for example, how often he used drugs, and when he had most recently used them. They also asked about testing procedures, such as whether tests are conducted randomly or are announced in advance, and whether individuals providing urine samples are closely monitored.

When our agent described himself as a casual cocaine and marijuana user who undergoes announced drug tests, sales representatives recommended that he purchase cleansing products that are ingested orally prior to the test. According to the vendors, these substances detoxify or cleanse the urine if taken before a test is conducted. For example, one of the sales representatives said to our investigator, "if you can stay clean for at least two days, we have a detox drink that you would drink on the day of the test. It will keep you clean for five hours." For $35,[9] our investigator purchased the "detox drink." After telling another sales representative that he had used cocaine during the past week and had a drug test scheduled the following week, the representative told him "...the good news is we have a detox program...It's a four day program, and basically if you do that, you'll be OK for the test." For $79, our investigator purchased the "detox program," which came with a urine test kit that a buyer can use at home to conduct a pre-test before submitting a specimen for a drug test.

When our investigator told the sales representatives that he uses cocaine and marijuana on a daily basis and undergoes random drug testing, they recommended that he purchase either synthetic urine or adulterant products. Recommending a synthetic urine product, a representative told our investigator, "you won't have to be as careful with our product. But you can still get away with it and people do get away with it." Our investigator purchased the product for $32. Another representative told our investigator that his company sells synthetic urine and that it is "better suited for random situations because the urine is premixed in the bag, sealed off, and irradiated so that it won't go bad." Our investigator paid $49.95 for this product.

At the suggestion of two other sales representatives, our investigator placed orders for two adulterants. For $29.95, he purchased one adulterant that is designed for people who use drugs daily and are subject to random drug testing. This product consists of two small vials containing liquids that are added directly to the urine specimen before it is submitted for drug testing. Additionally, he spent $32 for another adulterant that is designed to be used at the drug test location. This product is a bag that contains two chemicals: one chemical is supposed to destroy the drug toxins and another purports to destroy traces of the first chemical. According to the product instructions, a urine specimen should be poured into the bag, mixed with the chemicals, and then poured into the specimen cup.

Using the store locator function on one of the Web sites, we identified a store in the Washington, D.C. area that sells drug masking products. Posing as someone needing information on products that would ensure passing an impending drug test, we visited the store and observed a variety of masking products displayed for sale. The owner of the store told us that he has sold masking products for the past 11

[9] For purposes of our testimony, we are providing the actual price of the product, which does not include shipping and handling costs.

years, and that on some days he sells up to 4 detox products. Additionally, he told us that he has repeat customers. For one of his customers, he special orders certain products. While the store also carries synthetic urine, the owner advised us that the detox drinks are more popular and sell better.

Laws Regarding the Sale of Drug Masking Products Vary

Under federal law, it may be illegal to sell drug masking products if the products are determined to be "drug paraphernalia." Specifically, under federal law, it is unlawful for any person to sell drug paraphernalia, which is defined as any equipment, product, or material . . . primarily intended or designed for use in . . . concealing . . . a controlled substance.[10] The following factors may be taken into consideration in determining whether an item constitutes drug paraphernalia, including the instructions provided with the item concerning its use; descriptive materials accompanying the item which explain or depict its use; national or local advertising concerning its use; the manner in which the item is displayed for sale; and the existence and scope of legitimate uses of the item.[11] However, officials from DOJ and DEA advised us that there have not been any federal cases in which an individual has been prosecuted for selling drug masking products under this statute and our independent research of federal case law databases did not find any.

In contrast, some states have statutes that specifically prohibit the manufacture or distribution of drug masking products. For example, a New Jersey statute specifically prohibits individuals from manufacturing, selling, or giving ". . . any instrument, tool, device, or substance adapted, designed or commonly used to defraud the administration of a drug test."[12] Under the New Jersey statute, a person may be prosecuted if he or she submits a substance that purports to be from a person other than its actual source or otherwise engages in conduct intended to produce a false or misleading outcome of a drug test.[13] Similarly, in Florida and Kentucky, it is illegal to manufacture, market, or distribute products intended to defraud any lawfully administered urine test designed to detect the presence of controlled substances.[14] In some states, such as Louisiana and Texas, it is illegal for an individual to knowingly or intentionally deliver or manufacture substances designed to falsify or alter drug test results. [15]

In some other states, laws relating to drug masking practices are narrower. For example, in Nebraska it is illegal to provide bodily fluids for the purpose of altering the results of tests to determine the presence of drugs. In some states, such as Pennsylvania and Virginia, it is illegal to sell drug-free urine, but there is no specific prohibition on the sale of adulterants. In contrast, in some states such as South Carolina, Arkansas, North Carolina, Oklahoma, Illinois, and Maryland, it is illegal to sell urine or adulterants. However, of these states, only Illinois and Oklahoma prohibit the sale of synthetic urine.

In our research of reported cases we found two cases in South Carolina in which individuals have been prosecuted for the sale of masking products. In one case that was decided in August 2002, the South Carolina Supreme Court upheld a conviction for violation of a statute that prohibits the possession of adulterants intended to defraud a drug test. In that case, the vendor placed an advertisement in a magazine for a novelty store he owned which read: "Taking a drug test? Want to cleanse your system? We carry Readi-Clean, Carbo-Clean Plus, Quick Tabs, One Hour, Zydot, One Hour Klear, Body Flush." An undercover agent purchased an adulterant Zydot after the store clerk assured him that the product would allow him to pass a drug test for marijuana. In upholding the conviction, the Court relied on, among other things, the advertisement the defendant placed rather than a determination whether the product effectively masks drug use.[16] Additionally, the South Carolina Supreme Court upheld the conviction of another vendor who sold urine substitution kits on the Internet.[17] Included on the defendant's Web site were claims that, "Our Complete Urine Test Substitution Kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes."

Mr. Chairman, this concludes my statement. We will then answer any questions that you or other members of the Committee may have.

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[10] 21 U.S.C. § 863.
[11] 21 U.S.C. § 863(e).
[12] N.J. Stat. Ann § 2 C:36-10(b).
[13] N.J. Stat. Ann § 2 C:36-10 (a).
[14] Fla. Stat. Ann. § 817.565 and Ky. Rev. Stat. Ann. § 516.108.
[15] La. Rev. Stat. Ann. § 14:133.3 and Tex. Health and Safety Code Ann. § 481.133.
[16] *State v.* Rothchild, 569 S.E.2d 346.
[17] *State v.* Curtis, 591 S.E.2d 600.

Contacts

For further information regarding this testimony, please contact Robert J. Cramer at (202) 512-7445 or Paul Desaulniers at (202) 512-7435.

Mr. WHITFIELD. Thank you very much.

Mr. Stephenson, going to be giving a 5-minute opening? Or is that his part?

You are recognized for 5 minutes, Mr. Stephenson.

TESTIMONY OF ROBERT L. STEPHENSON II

Mr. STEPHENSON. Good morning, Mr. Chairman and members of the committee. My name is Robert Stephenson. I'm the Director of the Division Workplace Programs at the Center For Substance Abuse Prevention. On behalf of my administrator, Mr. Charles Curie, Substance Abuse and Mental Health Services Administration, we thank you for convening this hearing and for inviting us to provide testimony.

We have prepared written testimony, which we have submitted; and we also have this presentation as a power point presentation. We would like to give you a copy of that for the record.

In talking about these issues, our Federal program history, experience and concern will certainly help define the nature of the problem we're talking about today. Our full statement certainly provides documentation of our efforts and our findings. However, the Federal program's limited authority and scope will require input from others to accurately define the true size of the national problem.

This program for Federal agency workplace drug testing started and was established by executive order in 1986 and mandated by Public Law in 1987 and today covers 1.8 million nonmilitary Federal employees and job applicants in 120 Federal agencies. Four hundred of these are in testing-designated positions, which basically covers the national security and public safety jobs.

There are 210,000 forensic workplace urine tests done under this program for Federal employees per year. But that isn't the end of the story, because our standards and laboratory certification processes are used by others and under their own separate authorities. Almost 6.8 million Federal and federally regulated specimens were tested in the HHS-certified labs from May 2004, to April 2005.

It's important to note we believe this is only 15 to 25 percent of the total number of drug tests that are performed in a number of different applications beyond our program authority or oversight.

Of the specimens that we tested in our labs, about 140,000, 2.1 percent, tested positive for drugs. About 10,000 of them,.15 percent, were found to be adulterated, substituted or invalid. Unfortunately, there were an unknown number of successfully adulterated substituted specimens that went through our system.

Evidence has shown that even Federal employees in the national security and public safety testing designated positions do try to beat their drug tests. In fiscal year 2003, there were 13 adulterated, 15 substituted and 14 invalid specimens identified and reported. Every one of those adulterated, substituted and invalid tests represents a potential threat to national security and/or public safety.

For example, in September 2003, our agency was contacted by the Perry nuclear power plant east of Cleveland, Ohio. Management discovered evidence in a trash can that job applicants had attempted to use Minuteman, which is a synthetic urine substitute, to beat the required workplace drug test. Specimens from that entire day's applicants were recollected and tested and nine tested positive for marijuana use.

Just last week, there was another story that hit the press. USA Today had a story about a Minnesota Vikings professional football player caught with a test and some cleansing products to beat a drug test. It was in his carry-on bag at the airport.

Marketing continues to try to beat the drug test. When you look at what we did back in 2002 with the Google search, we got 158,000 hits. When we repeated that test earlier this month, we got 1.2 million hits. When we slightly changed the wording this month to pass a drug test, we got 3.5 million hits.

As of May 2005, programs identified over 400 products that are marketed to beat a drug test. We have prepared that and submitted it for the record. These products are available in magazines, head shops, dietary supplement retailers and Web sites.

Our program monitors currently over 50 Web sites on an ongoing basis. The products are different types that you find here. These internal productions are dilution or cleansing products. External products, the adulterated additives that are put into the urine specimen after it leaves the body or a substitute specimen, which is a product that you use instead of the specimen from the donor.

This is one of those cleansing products.

Here are a number of examples of other kinds of formulas, pills, drinks and so forth.

Here is one of the products out there. It shows the 200 percent money back guarantee. Look at the size of the quarter and the size of the two vials. They are very small and will permit being hidden on the body successfully to be used in a private area when you are providing the urine specimen.

This is an example of the product of the synthetic urine used that was used at the Perry nuclear power plant. The containers are very small compared to the quarter.

Big thing here about adulterant effectiveness is—and we have done our own test, too, just like the TV example we saw. We have done that in our program area, too. Some products are effective, but they are also detectable. There are other products that are effective but not yet detectable or they disappear on their own after they have had an effect on a specimen. Some products are not effective but are still marketed and sold as being able to beat a drug test.

This is an example of changing formulations of one particular product. In 2001, the blue bar shows it was about 40 percent effective for marijuana metabolites and effective across the board for the other drug classes that we test for in the Federal program. But 1 year later, the program was able to check a formulation where it had gone up over 60 percent effective. Three months later after that, it had gone to 90 percent effective in masking marijuana metabolites; and it was very difficult to detect.

Here is an example of one of the products that isn't effective. These are the ones we would like to see people buy. But, unfortunately, these are the ones being offered for sale to the gullible person but have no effect.

This whole issue has been kind of a moving target for us. Validity testing in the Federal program has been time limited because, as new adulterants are introduced, at first some of them work. When they are detected by us and identified and a countermeasure established in a testing protocol, the products change.

It isn't limited just to urine. This is a product that's offered for hair.

Here's another one for hair that offers to get to the root of the problem.

When we look at oral fluid testing, you have a spit and clean capsule and a mouthwash and a quick fizz mouthwash.

So in closing, again, I want to thank you for holding the hearing. We pledge our help in finding the answers that you seek. Our concern is that we are in a never-ending cat-and-mouse chase with those who wish to beat the drug test. To us and our Federal agencies, every one of the adulterated, substituted and invalid tests we see out there represents a potential threat to public safety and national security.

That concludes my oral remarks.

[The prepared statement of Robert L. Stephenson II follows:]

PREPARED STATEMENT OF ROBERT L. STEPHENSON II, DIRECTOR, DIVISION OF WORKPLACE PROGRAMS, CENTER FOR SUBSTANCE ABUSE PREVENTION, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. Chairman, and Members of the Subcommittee, I am Robert L. Stephenson, the Director of the Division of Workplace Programs at the Center for Substance Abuse Prevention in the Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services (HHS). On behalf of Charles Curie, SAMHSA Administrator, we thank you for holding this important hearing. We welcome this opportunity to provide testimony about our experience with and knowledge about products that claim to prevent detection of certain substances by drug testing programs.

THE DRUG TESTING RESPONSIBILITIES OF THE DIVISION OF WORKPLACE PROGRAMS

The Federal Agency Drug-Free Workplace Program was established by Executive Order 12564 in 1986, and mandated by Public Law 100-71 in 1987. Together they assigned major responsibilities for the establishment and operation of the Federal Drug-Free Workplace Program to HHS.

Most of the responsibilities for day-to-day operation and oversight were delegated to what is now the Division of Workplace Programs. SAMHSA is responsible for certifying laboratories that perform accurate reliable forensic drug testing in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs.

These Mandatory Guidelines were first published as a Final Notice in the Federal Register on April 11, 1988, and the first 10 laboratories were certified to perform drug testing in December 1988. These Guidelines provide critical support for the overarching Federal Drug-Free Workplace Program that today covers 1.8 million non-military Executive Branch federal employees in 120 Federal agencies.The Guidelines include requirements for the chemical analysis of urine specimens from selected Executive Branch job applicants and employees to determine whether that specimen contained the parent drug or specific metabolic byproducts from marijuana, cocaine, opiates (with the focus on heroin), amphetamines, and phencyclidine.

Even in 1988, based on information from other drug testing programs already in existence, it was known that some non-federal employee specimen donors used household products and chemicals to try to beat the drug test and mask the presence of illicit drugs in their urine.A few examples of commonly used household products used at that time were drain cleaners (sodium hydroxide), vinegar from the

kitchen (dilute acetic acid), and soothing eye drops (a dilute salt solution). Since the late 1980's, many more sophisticated products have been developed and marketed by those in business to sell products to illicit drug users to beat their drug test.The increased use of the Internet in the mid-1990's brought an explosion of new products to the marketplace, openly sold for the sole purpose of defeating a drug test.

THE SCOPE OF THE FEDERAL AGENCY WORKPLACE DRUG TESTING PROGRAM

Within the Executive Branch, currently about 400,000 of the 1.8 million non-uniformed services employees are in Testing Designated Positions, based on their agency or department mission and approved drug testing plan. Since the events of September 11, 2001, increased national security concerns have increased federal agency workplace drug testing from 100,000 to over 210,000 tests per year. The vast majority, well over 99 percent, of those tested are negative on their drug tests. In Fiscal Year 2003, in total only 13 Federal agency employee specimens were reported as adulterated; 15 were reported as substituted; and 14 were reported as invalid (i.e., containing an unidentified adulterant, containing an unidentified interfering substance, having an abnormal physical characteristic, or having an endogenous substance at an abnormal concentration that prevents the laboratory from completing testing or obtaining a valid drug test result). Although these numbers are a very small percentage of the total tested, every one of those adulterated, substituted, and invalid tests represents a potential threat to national security and/or public safety. Further, the existence of any use of adulterants requires us to test the remaining 99 percent, at great added cost in time and resources. Perhaps most important is the fact that there are individuals subject to federal workplace drug testing who are not being deterred from beginning or continuing to use illicit substances. These individuals and numerous young adults soon to enter our national workforce may turn to adulterants, masking agents, and substitution products in the mistaken belief that they can beat any drug test that they may be required to take.

Under separate authorities, other Federal Government programs require workplace drug testing using the Mandatory Guideline-certified laboratories for their covered populations, including industries regulated by the Department of Transportation and the Nuclear Regulatory Commission. There are over 11 million employees and job applicants covered by these federally mandated workplace drug tests.

Many of the same drug testing products and testing procedures are also used for criminal justice testing, school-based student testing, testing in the Uniformed Services, the U.S. Postal Service, and non-federal public and private sector employers, with some portion voluntarily tested under our Mandatory Guidelines. It is estimated that between 20 to 40 million drug tests are performed each year, with the accuracy of many of these test results particularly vulnerable to undetected adulterant use by those being tested.

ADULTERANTS—THE MARKETPLACE

SAMHSA's experience with and knowledge about products marketed to "beat the drug test" came through its national leadership role of setting standards for urine drug testing and certifying laboratories to perform accurate and reliable drug testing.Drug testing has become a necessity for job applicants and workers in jobs that directly impact public safety and positions requiring security clearances.This widespread application of drug testing has created quite a market for products to beat a drug test, so that illicit drug users can continue their drug use AND be hired into, and stay employed in, jobs where drug testing is a requirement. SAMHSA's National Survey on Drug Use and Health clearly shows that 74.3% of current illicit drug users aged 18 years old or older are employed (2003 NSDUH, published in 2004).

These products are primarily focused on beating the drug test for marijuana, since marijuana is America's favorite illicit drug. We know this information by looking at the percentage of U.S. workforce specimens that test positive for marijuana. Using information provided publicly by one very large laboratory drug testing system, of all the specimens that test positive in the general U.S. workforce, 55% test positive for marijuana. Cocaine positive drug tests make up 15% of the total and opiates (focused on heroin) follow with 6% of the total (Quest Diagnostics Drug Testing index, 2004). Millions of employed persons in Federal service and employees of federally regulated private sector companies are drug tested, and their urine specimens must be tested in laboratories certified by SAMHSA.

MONITORING OF ADULTERANT PRODUCTS

Since January 2002, SAMHSA has identified more than 400 products marketed to beat a urine, saliva, hair or blood drug test. These products are advertised in

print media, available in "head shops', though dietary supplement retailers, and through the Internet. A copy of our compiled list is being submitted as part of our written testimony.

In September 2002, an online Google search of "beat a drug test" revealed 158,000 hits in 0.4 seconds. In May 2005, that same search revealed 1,210,000 hits in 0.21 seconds; a Google search of "pass a drug test" revealed 3,570,000 hits in 0.06 seconds.

We developed and now maintain a spreadsheet of available products by website, in order to track the availability and evolution of these products over time.

INTERNET PRODUCT ADVERTISING AND AVAILABILITY

Internet advertising and access to information on these products primarily focuses on those job applicants and workers who use marijuana. In fact, some internet sites have an interactive questionnaire, and ask the inquirer several questions: 1) what type of drug test?— Urine, Blood/Sweat/Saliva, Hair, or Don't Know, 2) Will you know the exact date and approximate time of the test, 3) then guide the inquirer through more questions to gather enough information to be able to recommend products to use to beat the particular type of drug test (e.g., how much of which product to add to the urine specimen, or how to wash the hair with specialized shampoos) and to be successful in beating the drug test.

Concerning marijuana use, the questionnaires ask just how much marijuana he or she uses and how frequent that use is to better advise them on which product to use and how much of that product to use. Advice is given to heavy drug users to use more product to beat the test, compared to light users. Additionally, some advertisements on Internet home pages state that the products work for all toxins and every testing method. They are so confident in the effectiveness of their products that they offer a 200% Money Back Guarantee!

THE TYPES OF ADULTERANTS

Since urine drug testing has been used in the civilian Federal and federally regulated workplace since the 1980's, several product types have developed over the years focused specifically on beating the urine drug test. There are four major product types: 1) dilution products; 2) cleansing products; 3) adulteration additives; and 4) substitute urines with actual reservoirs, catheters and life-like prosthetic delivery devices.

1. Dilution Products

Efforts to dilute urine include those that add water to a small volume of the donor's urine and natural diuretics to expedite the elimination of urine from the body. Simply trying to dilute the urine internally to reduce the concentration of drug below the testing cut-off can be done by drinking very large quantities of water, on the order of 120 oz of fluid. This is a very effective method of beating the drug test, especially when the donor knows when the drug test specimen will be collected, as in the case of a pre-employment drug test.

2. Cleansing Products

Cleansing products, such as internal colonics, golden seal, psyllium husks, and specially formulated cleansing drinks, are marketed to "cleanse the body of toxins", more specifically in this case, illicit drugs. As an example, one product is advertised as a dietary supplement, guaranteed to "work" in less than an hour. The ingredients label lists very common items in many other drinkable fluids, such as filtered water, fructose, maltodextrin, natural and artificial flavors, citric acid, potassium citrate, potassium benzoate, potassium sorbate, ascorbic acid, red 40, and riboflavin. These cleansing products likely work along the same lines as products advertised to dilute the urine.

3. Chemical Adulterants

Some products are actually very caustic and corrosive chemicals, such as acids and aldehydes, chemical oxidants such as nitrites, chromium VI (a carcinogen), and bleaches. These harsh chemicals must be added to the donor's specimen, which is easily accomplished when the donor is given the privacy of a restroom stall to provide their specimen. These chemicals are purposely sold in easily concealable small vials and tubes, so they can be brought into the collection site bathroom concealed in the donor's socks or underwear.

4. Prosthetic Devices Delivering Synthetic or Drug-free Human Urine

The most cumbersome, yet highly effective, way to beat a urine drug test is to use a physical belt-like device hidden under the clothing which contains a reservoir

to unobtrusively hold real human urine from another person that is free from drugs, and deliver that bogus specimen into the collection container through a straw-like tube, or through a prosthetic device that looks like real human anatomy, color-matched. This last described device is heavily marketed for workplace drug testing and criminal justice urine collection situations that require directly observed urine specimens to be provided. Synthetic urine can be used in place of real human drug free urine.

CONCERNS TO THE FEDERAL WORKPLACE DRUG TESTING PROGRAM—THE NEED TO REQUIRE SPECIMEN VALIDITY TESTING AND PROPOSE DRUG TESTING ALTERNATIVE SPECIMENS

In the late 1990's, it became evident that increasing numbers of federally regulated donor specimens contained chemicals intended to mask or beat the drug test. These compounds were identified through routine drug tests that were conducted but gave unusual and unreasonable chemical results. It then became necessary for SAMHSA to establish general testing criteria and issue guidance to laboratories to ensure more consistent analysis of chemicals added to the urine by donors with the intent of beating the drug test. In 1998, testing criteria and guidance were initially provided to the laboratories in an informal manner, with final comprehensive urine specimen validity testing requirements published in the Federal Register on April 13, 2004. This Notice also required that each and every Federal job applicant or employee urine specimen be tested not only for illicit drugs, but also to determine if the specimen provided is a valid one, i.e., consistent with normal human physiology. These criteria did not solve the problem entirely, because the very nature of some of the products, particularly those that deliver synthetic urine or drug free human urine, produce specimens that actually test negative for illicit and pass specimen validity tests because they are testing drug-free urine. Since the April 13, 2004, publication of SAMHSA's new testing requirements, the advertising for this prosthetic type of device has increased. Additionally, the number of specimens now being reported as "invalid" specimens by laboratories has also increased significantly. This is because the companies who produce and market the chemical masking agents know the chemistry of the specimen validity tests that are now required for Federal employee drug testing (and optional for DOT regulated industry drug testing programs). These firms are formulating new versions of the adulterants so they are not detected by these newly required specimen validity tests.

THE EFFECTIVENESS OF SPECIMEN VALIDITY TESTING

The effectiveness of required specimen validity testing has been limited because, as adulterants were identified and reported by laboratories and tests developed for them, the products themselves were changed by their manufacturers to avoid being detected. One example is the chemical oxidant potassium nitrite, an active ingredient in many adulterants. As soon as the Federal drug testing program established methods to detect potassium nitrite and thresholds beyond which to report it in specimens, new formulations of adulterants were released that had lower concentrations of that compound, so it would not be detected. And now the product contained more acid to make that formulation more effective—and not detected. Other marketers of adulterant products containing potassium nitrite chose to actually change the active component to one that the laboratories could not detect.

In a September 1999 *Washington Post* newspaper article, a staff writer captured the following interview: "They detect it and we move on," (blank) is an additive that allegedly fools the tests." "Beating the labs is like fighting the federal government—they're so big and slow . . . They can't detect the current formula."

One of the most disconcerting calls received by SAMHSA staff was from Perry Nuclear Power Plant located east of Cleveland, Ohio. In September 2002, staff at a drug test collection site at the Plant found evidence in a refuse container from a specific adulterant product. This product contains a small plastic bottle with a temperature indicator strip attached, two small plastic vials of white crystalline material, and instructions for use. Per the instructions, the user adds a microvial of urine to water and the product and mixes to dissolve. In about 30 seconds, the drug-free sample is ready to provide in place of the donor's own specimen. Since it was unclear who or how many applicants used this product, that entire day's applicants were retested, and 9 of them drug-tested positive for marijuana use. If it had not been for the careless discard of the package in a trash can near the collection site, the use of this product to beat the drug test, which was required as part of a pre-employment fitness for duty test in order to gain access to a nuclear reactor, would have gone undetected.

THE EFFECTIVENESS OF THE PRODUCTS

In order to know what is in products currently marketed to beat a urine drug test, SAMHSA purchases them and tests them according to package direction to evaluate their effectiveness. If the specimen adulterant is effective, the agency performs chemical analyses on them to identify their active ingredients. The goal of most drug test masking agents is to "fool" the initial screening test into showing that there is no drug present in the specimen, so that it does not go on to further confirmatory testing. In order to keep our specimen validity testing procedures current and capable of detecting the ever-changing formulations of adulterant products that are being openly sold in the marketplace, SAMHSA developed a way to assess the potential effect of specific urine adulterants on specimens tested in the federally regulated drug testing program.

SAMHSA devised an experiment to evaluate how effective some of these masking agents really are. Certified negative urine was "spiked" with marijuana metabolite (THCA, delta-9-tetrahydrocannabinol-9-carbozylic acid), cocaine metabolite (benzoylecgonine), phencyclidine, opiate metabolite (morphine), and methamphetamine. The concentration of each analyte was twice the screening test cutoff. This standard analytical approach, taken with each substance that was added to the donor's specimen, was applied to more than 30 products purchased.

Several versions of one particular product were tested and found to be able to significantly mask a positive drug test, especially for marijuana and morphine. What is most noteworthy is that each successive version of this product is more effective in masking the drug test. Each version of that product has been somewhat effective in masking the presence of marijuana, cocaine, morphine, phencyclidine, and methamphetamine. The chemical composition of each of these versions also changes, which was pointed out in its marketing as an asset.

One adulterant manufacturer changes their product formula approximately every 6 to 9 months to stay ahead of the drug testing labs. It has openly stated that if a certain formula stays on the market too long, its product would be reverse-engineered by the labs and eventually become detectable. Older formulations are exchanged for a current formulation free of charge.

One product that was purchased in April 2001 contained chromate, an oxidant that became known after it had been used for a time. Another version, which was purchased in April 2002, contained hydrofluoric acid, a powerful acid that can etch glass, and sodium nitrite, a strong oxidant. Again, after a time, this combination became known, and the formulation again changed. A subsequent product, purchased July 2002, was a newly designed system, this time consisting of two vials of chemicals added sequentially to urine in the donor's specimen collection cup. One of the vials contained an iodine-containing compound, the other vial contained hydrochloric and hydrofluoric acids. The most recent version of the product is currently available and being evaluated by our staff.

- Some products focus on both marijuana and opiates
- Some products do not affect the initial screening, but affect the mass-spectrometry process used to confirm a positive result from the initial screening, as is required by the Mandatory Guidelines
- Some products are effective, and then disappear on their own
- Ironically, some products are marketed and sold as being able to beat a drug test but have no effect at all.

CONTINUED IMPACT OF ADULTERANTS ON PUBLIC HEALTH AND SAFETY

These products are marketed with the intent to beat a drug test and are used with a "catch me if you can" attitude by donors who use illicit drugs and want to continue that illicit drug use while engaged in a public health and safety sensitive job. The marketplace for products to beat a drug test, whether a urine, hair, or oral fluid test, is growing. Products and suppliers are proliferating, as is the information about the use of these products. As noted previously, the Internet serves to advertise, market, and provide testimonials as to just how effective these products are, in addition to serving as a point of purchase.

UNLESS STOPPED, THE NEXT MARKETING OPPORTUNITY FOR ADULTERANT SALES WILL TARGET DRUG TESTING AND SPECIMEN VALIDITY OF HAIR, ORAL FLUID, AND SWEAT

SAMHSA's current knowledge of the myriad of products to beat drug tests has forced the Agency to add specimen validity testing requirements for hair, oral fluid, and sweat in our proposed expanded Federal drug testing program. This is necessary because products are now being marketed and sold to beat any drug test, no matter what specimen is collected.

- There is a growing list (7) of products designed and marketed to remove drugs from hair.
- There is another list of (4) products designed and marketed to remove drugs from oral fluid.

ONGOING CONCERNS

In closing, I want to repeat my earlier concern that although there were relatively few federal agency employee specimens reported in Fiscal Year 2003 as adulterated, substituted, and invalid, there is a clear trend showing an increase in the use of non-urine and "clean urine" substitutions to foil workplace drug testing programs.
—Although the numbers are a very small percentage of the total tested, every one of those adulterated, substituted and invalid tests represents a potential threat to national security and/or public safety.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to provide this information to you. I would be happy to answer any questions you may have.

Mr. WHITFIELD. Ms. Reed, you are recognized for 5 minutes.

TESTIMONY OF SUSAN D. REED

Ms. REED. Thank you very much, Mr. Chairman, members of the committee.

Let me introduce myself again. I'm Susan Reed. I'm the Criminal District Attorney for Bexar County, Texas. As a landmark, Bexar County includes—one of its municipalities is San Antonio.

Mr. WHITFIELD. Our chairman of the full committee has come in, Joe Barton; and he is from Texas as well.

Ms. REED. Nice to see you, sir.

Mr. BARTON. You don't have to tell a Texan's he's from Texas.

Ms. REED. I brought another Texan with me, Cliff Herberg. He is the head of my White Collar Division.

For the other members who aren't quite as familiar with Bexar County, let me give you just a little background information as a wherewithal of what I'm going to be talking about.

We are a jurisdiction of 1.4 million people. Last year, we had 28,000 people on probation. Of those, we gave 21,000 drug tests. Now only 13,000 of those—only is not the right word, but half of them were on probation for drug offenses. So some of the people tested and are on probation and some are on for a drug offense, some aren't. What we found is that 30 percent of the people were flunking their drug tests.

Now as a little more background, I was a district judge for 12 years, and I used to order people on probation, order them to have to drug test, order them not to do drugs during their period of probation. Now I can tell you, all of you members, that you don't ask a drug user, are you still using, are you clean? You just don't believe them. So the only valid way of knowing whether they are complying with their probation and if they are in fact being rehabilitated is to drug test them. So when the products come on the market that are designed to defeat the drug test, they are a disservice to the judiciary, to the system, to the other citizens and to the society we're trying to protect and do something for.

In Texas, we do have a law that deals with substances or devices that are designed to falsify a drug test. Now our law provides that if you possess such an item, it's a class B misdemeanor. A class B misdemeanor gets you 6 months in jail and maybe a $2,000 fine. If you manufacture or distribute such a device, it's a class A mis-

demeanor, and gets you a year and maybe $4,000 in a fine. But we do, and we are one of the 14 States now that have such a law.

Now a couple years ago, our probation office discovered somebody with one of these Whizzinators. So we did a little investigation into that.

And let me explain to you, if you don't know what the Whizzinator is. It is a device that is something like a jock strap that comes with a fake penis attached to it, and it comes in all different sizes and colors. It is—also, when you order the kit, you get the synthetic urine and a heat pack.

So when we discovered this in the Probation Department, we charged—we had two that we discovered within 2 weeks, two of them. We charged each of those, and they got the maximum sentences under the law.

But I will tell you that I have one of the most aggressive White Collar Crime Divisions in the State, I believe, in my DA's office, so I said, let's go after the people who are selling this stuff. Because they are benefiting, as we saw the guy driving the Cadillac, and they are also giving a false hope to gullible people on the Internet who think they can still take drugs and defeat the test, which is there for a purpose.

So being an economics major I am—I always like to go to the supply if I can to do something about it. So we did some investigation into technology, the seller of the Whizzinator. Found they are a limited partnership in California. But because we were dealing with misdemeanor laws, I was unable to go through our corporate penal code provisions to catch the company. I would have had to have just gotten to the individuals and for a misdemeanor and the difficulty in proving that individual's participation from eight States away or however far away California is, Chapel Hill, it's just not economically feasible for us. So we were unable to go after the company in a corporate fashion or on an individual fashion because they were selling out of California.

That is why I would strongly recommend that there be some Federal legislation, either through use of the mail, through use of the Internet, prohibitions, whatever, for devices that are designed to defeat drug testing and be able to get at the corporations that are making the money off of it. I think that is where you really get to part of the root of the problem.

I thank you very much for inviting me here allowing me to express my opinion, and I will certainly be willing at the appropriate time to answer any questions you might have.

[The prepared statement of Susan D. Reed follows:]

PREPARED STATEMENT OF SUSAN D. REED, CRIMINAL DISTRICT ATTORNEY, BEXAR COUNTY, TEXAS

Mr. Chairman Whitfield and members of the committee: I am Susan Reed, the Criminal District Attorney of Bexar County, Texas. For a familiar landmark to you, Bexar County includes San Antonio, Texas. I want to thank you for inviting me to testify before the committee. I am accompanied today by Mr. Cliff Herberg who is the head of my White Collar Crime Division and who oversees the type of offenses we are going to talk about.

The subject matter of the hearing today concerns products that claim to prevent detection of certain substances by drug-testing programs. As you can well imagine, the office of the district attorney is very interested in techniques or devices designed to circumvent court ordered drug testing.

As background, Bexar County has a population of approximately 1.4 million people.

In March of 2005, 28,073 individuals were on probation. This number includes both felony and misdemeanor probationers. As of April 2005, 13,724 probationers are on probation for a "drug offense". In the category of drug offenses, I included 6,879 probationers who had DUI offenses. Based on these figures, roughly 48.8% of probationers are there due to a drug offense. And of that number, 50.1% are on probation for a DUI offense.

As a little more background, I was a District Court Judge for 12 years before becoming the District Attorney. My ultimate goal in placing someone on probation for a drug offense was to address the addiction that accompanies drug usage. As a District Attorney my goal is to enforce the laws established through the legislature. Drug testing is a valid and important tool in accomplishing this objective.

To determine if a probationer is successfully abstaining from drug use, they must be tested. The last thing you want to do is take someone's word that they are clean and drug free.

In 2004, the following represents the drug testing in our county:

Statistics for time period 2/01/2004-2/28/2005

	Total	Positive	% Positive
Defendants Tested	21,520	6,544	30.4
Specimens Collected	70,501	11,367	16.1
Tests Performed	250,135	13,009	5.2
Cost estimate of Lab operations including salaries and supplies for FY 2005 $426,576.			

Please allow me to explain these statistics. There are more tests than defendants because multiple tests will be done on one sample to isolate different types of drugs. There are more specimens than defendants because some defendants are required to test more than once.

The first step in drug testing is collection. Testing is then performed on the collected urine sample. The tester tries to authenticate the collection by personally observing the probationer as they provide the urine specimen. Physical observation of the probationer is an absolute necessity. Otherwise, probationers could simply poor drug free urine into the sample cup and avoid detection. This "physical observation" requirement has caused some probationers to go to great lengths to try to outsmart probation departments.

I believe the reason that I was invited to appear and testify arises from two prosecutions my office handled and I directed in the summer of 2002.

A probationer, after reporting to his supervising officer, was taken into custody for a prior probation violation. Thereafter he was searched for weapons. What was found was not a gun, but a Whizzanator. You can probably guess from the name what the device was designed to do. A Whizzanator is designed to fool the person observing the drug test. It is designed like a jock strap but with a realistic looking phallic device attached. Also included in the $150 package is synthetic urine and a heat pack, which is used to make the synthetic urine feel as though it has just left the probationer's body.

Upon encountering the Whizzinator in this first instance, our probation department alerted its entire staff to be on the lookout for its use. Within two weeks, a second probationer was caught trying to use the device to fool the drug testing procedures.

Texas has a statute designed to prohibit and penalize this type of activity:

Texas Health & Safety Code § 481.133 entitled: Offense: Falsification of Drug Test Results states:

(a) A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use any substance or device designed to falsify drug test results.
(b) A person commits an offense if the person knowingly or intentionally delivers, possesses with intent to deliver, or manufactures with intent to deliver a substance or device designed to falsify drug test results.
(c) In this section, "drug test" means a lawfully administered test designed to detect the presence of a controlled substance or marihuana.
(d) An offense under Subsection (a) is a Class B misdemeanor.
(e) An offense under Subsection (b) is a Class A misdemeanor.

Today in Texas, a Class A misdemeanor is punishable under Texas Penal Code § 12.21 which states:

An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(1) a fine not to exceed $ 4,000;
(2) confinement in jail for a term not to exceed one year; or
(3) both such fine and confinement.

A Class B misdemeanor is punishable under Texas Penal Code § 12.22 which states:

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

(1) a fine not to exceed $2,000;
(2) confinement in jail for a term not to exceed 180 days; or
(3) both such fine and confinement.

The two men found to have purchased these devices were each charged and convicted of the possessing these devices with the intent to falsify drug test results. They received the maximum sentences of 180 days in jail and $2000 fine.

Where does one get this device? It is sold on the Internet through a business called Puck Technology. Our investigation showed it was, at the time, located in Signal Hill, California. Of course the site carries the disclaimer the device be used in accordance with all "Federal, State and Local Laws." But, from the "Testimonials" on its website, it is clear that Puck Technology and everyone else knows that the devices are being used to defeat drug testing.

Puck Technology and its Whizzinator are still going strong. A casual search on the Internet reveals that in 2003, after our cases in Bexar County, officials in Lubbock County, Texas encountered at least five instances of probationers attempting to use the Whizzinator. In February of this year, actor Tom Sizemore was caught trying to use the device while he was on probation for drug use.

Fortunately, Texas is one of the few states that have made it against the law to possess such a device. Other states, such as New Jersey and Pennsylvania have also passed laws to address the problem. However, to really deal with the issue, the person shelling out the money to buy it shouldn't be the only one dealt a penalty. The individual or company that makes a profit working to defeat drug laws and our national drug policy should be held accountable for its actions. And, be aware, there are many businesses besides Puck Technology that are doing this. Businesses with websites such as Passyourdrugtest.com and pretestedurine.com sell numerous products and devices to circumvent drug tests. Each of these businesses profits from their wrong.

Unfortunately, under existing state laws it is very difficult to prosecute out of state manufacturers and sellers of these devices. Each of them asserts that the products are only for legitimate purposes. They are not manufactured or distributed in the local jurisdiction. Resources are not available to travel between states to investigate the businesses and their operators. As a practical matter, the businesses can claim that they did not manufacture or distribute the device in our jurisdiction. They merely mailed it upon the request of a customer and are "shocked" to learn it was used illegally. While common sense tells us this is false and ridiculous, prosecutors must prove the case to a jury beyond a reasonable doubt. Proof beyond a reasonable doubt requires that we have evidence to defeat these claims.

Local law enforcement would greatly benefit from federal legislation. Congress can act to make the interstate sale and distribution of these devices illegal. Congress can make it a crime to use the mail to ship such devices or use the wires to sell and distribute these devices. And, Congress could also enact legislation providing concurrent jurisdiction to both federal and state prosecutors to enforce the law. This will give local law enforcement, with the assistance of federal law enforcement agencies such as the FBI and DEA who have regional offices across the country, both the law and the practical ability to investigate and prosecute these offenders. With comprehensive federal legislation and the use of federal investigative manpower, local law enforcement can act to protect the integrity of the drug testing process, enforce its own laws and probation polices, and protect the public interest.

In closing, I wish to thank you for the opportunity to testify before you today and to share my experiences.

I will be glad to answer any questions you may have.

Mr. WHITFIELD. At this time, we will have Mr. Moore.

You have 5 minutes for your opening statement.

TESTIMONY OF HON. GEORGE MOORE

Mr. MOORE. Thank you, Mr. Chairman and members of the committee. I want to begin by thanking each of you for the opportunity to appear before you this morning.

My name is George Moore, and I'm the Commonwealth's Attorney for a four county district, a rural district in eastern Kentucky. One of my duties and privileges is to work with the general assembly in Kentucky on behalf of the prosecutors and victims of crime in trying to get legislation passed.

Two years ago, the Kentucky general assembly passed and Governor Ernie Fletcher signed Senate Bill 86. This was a bill that was sponsored by Senator Gary Tapp and its intent was to prohibit the knowing manufacture, marketing or distribution of any product which has, by its design, the intent to defraud or defeat alcohol or drug tests.

I want to express my appreciation to Senator Tapp for being willing to sponsor this bill, for Senate Judiciary Chairman Robert Stivers and House Judiciary Chairman Gross Lindsay being willing to call it in their committee and to Attorney General Greg Stumbo for their help.

I think it's interesting to note that Senate Bill 86 passed both houses of the Kentucky general assembly without a single negative vote, showing extensive bipartisan support for this matter that when I first began to discuss it with members was the topic of humor. But as we began to explore it, they began to realize how serious it was. Because some people will ask why in the world would any governmental body be interested in looking at a topic that seems, frankly, to be the topic for late night humor.

Published figures would suggest that perhaps 8 percent of the negative drug test results are produced by adulterated samples. I don't claim to have any empirical evidence to support my opinion, but it is this country boy's feeling that it's a lot higher than that 8 percent figure.

Typing in the simple phrase "pass the urine test" into an Internet search engine produces thousands of hits and response. Just the other day, as an experiment, I typed that in and got 657 possible hits to go explore for information. These Web sites provide information on a plethora of chemical and organic substances designed to mask narcotic residue in urine samples provided for testing. For as little as $29.95, you can obtain a package of urine certified to be free of narcotics along with the heat units to keep that sample at body temperature.

Many of these sites claim that they are not concerned about preventing reasonable or responsible law enforcement but rather are dedicated to the vigilant protection of the cherished constitutional claim of privacy. Such noble claims fail, though, with basic consideration of the true conduct that is being facilitated by the compromise of prudent drug testing.

Initially, my interest in this arose from Ms. Reed's comments about the people in my district and the felons in my district that I had on probation and coming to understand that the conditions I had placed on them were simply not being complied with. The court and my office assumed that when probation and parole officers tested probationers we were receiving reliable test results, but

anecdotal evidence that began to come in to us showed that numerous individuals were using substances primarily obtained through the Internet to thwart the testing.

I was shocked when I first discovered the existence of all kinds of exotic named substances which could be ingested to mask drug tests, but I found myself being amused at the Whizzinator and other similarly named devices to deliver urine into a cup when visual observation was required. But all of this gave way to alarm as I came to the realization that there was absolutely no assurance, no assurance of any legitimacy to the monitoring that had been ordered by the courts in my district.

That was shocking in and of itself. As I began to discuss with our people and began to talk to law enforcement personnel, I came to understand that I was just looking at the tip of the iceberg. Interstate 64 runs through a rural Kentucky district. We have a weigh station, and more and more drivers of commercial trucks were found to be found under the influence or in possession of controlled substances.

I remember the day that we took a fellow out of an over-the-road truck whose skin was just pockmarked from methamphetamine use. It was obvious that he had been eaten up with his use of methamphetamine, and yet he had to be passing drug tests because he was driving for a nationally recognized carrier. And I knew they were being tested. I drive that interstate every day, as do my wife and my children; and those tens of thousands of pounds of freight being carried on those trucks at 70 and sometimes faster than that were being driven by people who were impaired.

Members of law enforcement also began to point out to me that even the men and women entrusted to protect our communities and carry guns were also susceptible using these tests to defeat drug tests. The list of occupations where employers and government assumed they were being diligent in testing for illegal drug use grew as we pondered the situation.

Senate bill 86 was not a panacea, but it was a good first step. I have to confess that I take a good deal of pride that many of the Web sites I have now become familiar with bear a legend at the bottom notifying potential customers that they will not ship to Kentucky or a few of the other States that have passed these laws.

I would be proud to see Congress adopt legislation designed to restore some integrity and confidence to random drug testing programs adopted by courts and employers. It's not a matter of invading the privacy of private citizens. It is a matter of protecting those innocent citizens from the danger that comes to them at the hands of impaired individuals who are driving trucks, carrying guns and doing all kinds of other things.

I also would join with Mr. Stupak's concern about Internet drug pharmacies and note that Kentucky has just passed a very good bill on that, and I would be happy to answer questions at the appropriate time.

[The prepared statement of Hon. George Moore follows:]

PREPARED STATEMENT OF HON. GEORGE MOORE, COMMONWEALTH'S ATTORNEY 21ST JUDICIAL CIRCUIT

Mr. Chairman and members of the Committee I want to begin by thanking you for the opportunity to appear before you this morning. My name is George Moore

and I am the Commonwealth's Attorney for a four county district in Eastern Kentucky. One of my duties and privileges is to work with the General Assembly of Kentucky on issues of concern to prosecutors, and victims of crime. Two years ago the General Assembly passed and Governor Ernie Fletcher signed Senate Bill 86. The Bill was sponsored by Senator Gary Tapp and its intent was to prohibit the knowing manufacture, marketing, or distribution of any product which is intended to defraud an alcohol or drug test. Before continuing I want to express my appreciation to Senator Tapp, Senate Judiciary Chairman Robert Stivers, and House Judiciary Chairman Gross Lindsay for their support and cooperation in consideration of this bill. Senate Bill 86 passed both house of the General Assembly without a single negative vote, showing remarkable bipartisan support.

Some would ask why a bill is needed to address sale of packaged urine and chemical substances that modify the results of urine testing. Published figures suggest that perhaps eight per cent of negative urine tests performed are produced by adulterated samples. While I have no empirical evidence to support my opinion, I suspect the number far exceeds that estimate. Typing the simple phrase "pass the urine test" into any internet search engine produces thousands of "hits" in response. One recent effort on my part yielded 657,000 possible web sites for review.

These web sites provide information on a plethora of chemical and organic substances designed to mask narcotic residue in urine samples provided for testing. For as little as $29.95 you can obtain a package of urine certified to be free of narcotics along with heat units to keep the sample at body temperature. Many of these sites make a point to claim they are not concerned about preventing reasonable law enforcement, but rather are dedicated to the vigilant protection of cherished constitutional claims of privacy.

Such noble claims fail with very basic consideration of the true conduct being facilitated by the compromise of prudent drug testing. Initially my interest in this topic arose from a growing realization that mandated drug testing of convicted felons on probation in my circuit was simply unreliable. The Court and my office assumed that when Probation and Parole Officers tested probationers we were receiving reliable test results. Anecdotal information continued to come to us that numerous individuals were using substances obtained primarily over the internet to thwart testing. I must confess I was shocked when I first discovered the existence of all kinds of exotic named substances which could be ingested to mask drugs in the test samples. Initial amusement at a Whizzinator and other similarly named devices used to deliver urine into a cup when visual observation was required, gave way to alarm as I came to the realization that there was absolutely no assurance of legitimacy to the monitoring ordered by the Court.

In discussions with law enforcement personnel I came to understand I was just looking at the tip of the ice berg. Interstate 64 runs through my rural Kentucky District. We have a weigh station in Rowan County and more and more drivers of commercial trucks were found to be under the influence of or in possession of controlled substances. It was troubling to learn that the drivers of these trucks carrying tens of thousands of pounds of cargo along highways used by every citizen of my community were also availing themselves of these products, and thereby defeating the drug tests used to insure they were sober while behind the wheel of these big rigs.

Members of law enforcement pointed out to me that men and women entrusted to protect our communities and carry guns were also capable to using the same substances to conceal narcotics use which could seriously impair their abilities. The list of professions and occupations where employers and government assumed they were being diligent in testing for illegal drug use grew and grew as we pondered this situation.

Senate Bill 86 is not a panacea, but it is a good first step. I must confess I take a good deal of pride when many of the web sites I have now become very familiar with bear a legend at the bottom of the page notifying potential customers that they will not ship to Kentucky and a few other states that have adopted meaningful statutes to control this industry. I would be even more proud to see Congress adopt legislation designed to restore some integrity and confidence to random drug testing programs adopted by Courts and employers. It is not a matter of invading the privacy of innocent citizens, it is a matter of protecting those innocent citizens from danger at the hands of impaired individuals.

Mr. WHITFIELD. Thank you, Mr. Moore.

Dr. Captain, you are recognized for 5 minutes for your opening statement.

TESTIMONY OF JILL F CAPTAIN

Ms. CAPTAIN. Thank you, Mr. Chairman. I am here on behalf of the drug-and-alcohol-testing industry Association. We are also known as DATIA. DATIA supports a Federal solution to ending the manufacture, sale and distribution of products meant to thwart a drug test. The piecemeal approach of individual States' attempts to punish the sellers and users of these products is inadequate. E-commerce has perpetuated the distribution of these products and further impaired the ability of law enforcement agencies to track down violators. These products pose a public safety risk and impose a serious financial burden on American businesses.

More than 12 million employees are subject to mandatory drug testing under the Department of Transportation guidelines. These employees are in safety-sensitive positions, including truck drivers, airline pilots, bus drivers, mass transit operators, railroad engineers, pipeline workers, mariners and related safety-sensitive personnel. Each drug user who successfully evades testing using these products poses a serious safety risk to the public.

The DOT published the DOT Omnibus Transportation Employee Testing Act of 1991, and from those guidelines, DATIA has developed industry standards that promote the integrity of the entire drug-testing process, including ensuring the privacy of donors, the security of the collection process, chain of custody trails, verification of accurate reports and protecting employees from flawed interpretation of results. DATIA has provided standards and training that ensures a sound testing process.

I have been asked to give a brief outline of a drug test. I think this outline does outline the practices that are followed by employers, and it also shows the procedures that are required that we do to prevent drug-testing fraud.

The process can be broken down into three distinct parts: the collection; testing, which is onsite testing at a certified laboratory; and reporting of results. I will highlight the efforts required to prevent and detect adulteration and substitution. This outline refers only to urine drug screen collection regulated and approved by the DOT.

Before a donor arrives at a collectionsite, the collectionsite is secured. It is a bathroom. It has no running water supply available to the donor. Excess equipment, such as trash cans and paper towel holders, are removed, because those devices can be used to conceal products prior to the collection, and the water in the toilet has a bluing agent added so they can't scoop toilet water.

As part of the collection process, the donor is asked to remove any extra outer garments such as jackets, coats or coveralls or heavy boots. No further disrobing is required.

The donor is asked to empty pockets to check for containers that might contain substances used to adulterate specimens.

The donors then wash their hands, again to remove any surface contaminants that may be brushed into the specimen.

A sealed collection container is handed to the donor, and they are instructed to go into the bathroom and urinate. They are allowed to urinate behind a closed door, absent the evidence of prior substitution or adulteration.

They are prohibited from flushing, because flushing can obviously destroy evidence. When the donor exits the bathroom, there

is a temperature strip on the container to make sure that the temperature is between 90 and 100 degrees. This is to detect the addition of water or other liquids. And the collector observes the specimen for color and odor.

There is a paperwork chain of custody which has detailed information about the collection event. It is recorded, and copies are distributed to lab, collector, donor and the medical review officer.

At the testing laboratory, and I am sure that the laboratory people can describe this better, but I know the basic outline, when the specimen arrives at the lab, it is double checked to make sure the ID numbers of the specimen match up with the paperwork. The specimen undergoes several steps of validity testing. It is checked for specific gravity, that is, how diluted it is, pH, or acidity, and creatinine, which is a waste product.

Then the next phase of testing is adulterant testing for the known adulterants. Both of these tests are due at the cost of the submitter.

The specimen is subjected to screening tests for five drugs under DOT guidelines. If a screening is positive, the specimen goes through a second round of testing using GCMS, a different type of technology that is highly specific. If that test is confirmed, then that test is considered positive.

All lab results regulated by the DOT must be received in the office of a Medical Review Officer, who must be a licensed MD with additional certification. When a non-negative result is received, the lab result is matched to a copy of the chain of custody to eliminate clerical errors.

The donor is contacted by the MRO to investigate the possibility of a legitimate medical explanation. If there is no legitimate medical explanation, then the final result is considered positive.

The ultimate protection for the donor though is a split specimen, which, if the donor challenges, there is always a second specimen that is sealed and labled that can be retested at a different lab. The medical review process is primarily to protect the donor.

DATIA believes that Federal legislation is needed to curtail the use of substances and devices that subvert drug tests. The products pose a safety risk to the transportation industry, and they increase employer costs associated with worker's comp, health benefits, impair productivity, and they increase employers' costs associated with drug testing.

Thank you.

[The prepared statement of Jill F Captain follows:]

PREPARED STATEMENT OF JILL F CAPTAIN, DRUG AND ALCOHOL TESTING INDUSTRY ASSOCIATION

Addendum:

Overview of a typical urine drug screen collection regulated by the Department of Transportation (this scenario does not include every step but outlines the essential elements):

Securing the collection site

- The bathroom has no water supply available to the donor
- Excess equipment such as trash cans are removed from the room (prevents concealment of products place in the bathroom before the collection takes places)
- The water in the toilet has bluing agent added

Collection process:

- The donor is asked to remove extra outer garments such as jackets, coats or coveralls and heavy boots
- Photo identification is required and checked
- The donor is asked to empty pockets to check for bottles that might contain liquids or containers of substances that might be used to adulterate specimens
- The donor then washes his/her hands
- The collector opens a sealed collection container and hands it to the donor
- The donor is instructed to urinate in the container
- The donor is allowed to enter the bathroom and shut the door, if the donor flushes the toilet, the collection process will start over
- When the donor exits the bathroom, the collection container has a temperature strip and the temperature of the specimen must be within 90 to 100 degrees Fahrenheit (this is to detect the addition of water or other liquid)
- The collector observes the specimen for color and odor (the human check for adulterants)
- The collector then pours the urine into 2 separate containers. Each container is sealed with a label and the donor initials each label. Two containers are used to hold the original specimen. One container is designated bottle A and used for testing. The second container is designated bottle B and reserved if a donor wishes to challenge a result, this challenge is called "split testing".

Paperwork (aka chain of custody):

- The chain of custody form is a multipart carbonless form. Each page is barcoded and the sealing labels of the urine containers (these labels are part of the top page) have the same barcode
- The donor's name and identification number is printed. The donor also signs this form. Additionally, the date of birth and contact telephone numbers are printed.
- The form that goes to the laboratory has only the id number and no other donor indentifying information.
- Additional info on the chain of custody includes the collector's name and signature, the date and time of the collection, the company name and contact information and the method of transportation of the specimen to the lab.
- When the paperwork is complete, the specimens and one copy of the form are sealed in a tamper evident bag for shipping.
- The donor is given a copy of the chain of custody.

Laboratory processing (this process can be more properly explained by a representative of a SAMHSA-certified lab):

- When the specimen arrives at the lab, the paperwork and specimen bottles are checked to ensure they match.
- The specimen undergoes validity testing (specific gravity, pH and creatinine) this is to ensure that the specimen is consistent with human urine.
- Adulterant testing is done if requested (not currently required under DOT regulations and costs approximately 10% more.
- If these tests are cleared, then the specimen is subjected to a screening test for 5 drugs: cocaine, opiates, PCP, marijuana, amphetamines.
- If the screening test is positive, the sample undergoes a confirmation test using a different technology that is highly specific. If that test is confirmed, the test is considered positive at the lab level.

Medical Review:

- All test results regulated by DOT must be received in the office of a Medical Review Officer (MRO, who must be a licensed MD with additional certification)
- When a non-negative result is received, the lab result is matched to a copy of the chain of custody to eliminate clerical errors.
- The donor is contacted by the MRO to investigate the possibility of a legitimate medical explanations. For instance, if a donor can a result positive for opiates if he/she took Tylenol with codeine. The donor is required to submit a note from the treating physician documenting the safe and appropriate use of the medication. Our office verifies that the physician has an active license to practice. If all criteria are met, the ultimate result of the test is NEGATIVE. This will be the only result the employer will see.
- If there is no legitimate medical explanation, then the final result is POSITIVE. Under DOT guidelines, donors are offered the process of split testing. With split testing, the second container label bottle B (which is still sealed and labeled) is shipped to a DIFFERENT SAMHSA-certified lab for retesting.

Sources of error: urine drug screen collection is a lengthy, meticulous process. Errors can occur during the collection process by neglecting to prevent obvious attempts at adulteration or substitution (emptying of pockets or a bathroom that hasn't been secured). Human clerical error can occur during the reporting process but there are checks and balances that prevent or ameliorate the effects, such as split testing.

False positive tests: the ultimate security to prevent or identify false positive tests is the process of split testing. If the first lab had a flaw in their testing system and the specimen is retested by a second, independent lab this acts as a check. My experience has been that even people who vehemently deny use, will request split testing. A lab representative can speak to the false positive issue better than I.

Invalid tests: are cancelled but require further investigation. There are some prescription medications that can interfere with the screening test to produce an invalid test. If there is not an adequate medical explanation, the donor is directed to give another specimen under direct observation.

Dilute tests: There are very specific guidelines but basically there are 3 categories of dilute. 1) Mildly dilute which is commonly seen—can be ignored or may require a second unobserved collection. 2) Very dilute—which is rarely seen, requires second observed collection. 3) Extremely dilute—is not considered consistent with human urine and is considered substituted.

Legitimate medical explanation: if a donor has a documented prescription from a licensed physician that ensures safe and appropriate use of medication, there is no requirement for a follow-up drug test. As a physician on the prescribing side and having had to produce such documentation, I feel comfortable as the investigating MRO that this poses a minimal safety risk. Additionally, it is rare for a person to have a legitimate prescription.

Minimal standards for a non-DOT regulated employer. We recommend to all employers that they adhere to the standards set by DOT.

The DOT standards go as far as can be reasonably accepted by a population that is largely innocent.

Comprehensive supervision or observed collection: The DOT does not require observed collections in the absence of evidence that suggests adulteration or substitution. I find it difficult to imagine that the DOT would require observed collections as a standard given that most people are innocent. I think the extra invasion of privacy would be unacceptable.

Recollection of dilute and invalid specimens: My experience has been that when donors are sent back for a recollection after a dilute specimen, there is a higher positive rate. My experience with invalid specimens is that there has been no legitimate medical explanation and , of course, there should be a recollection.

Accuracy of hair and saliva testing: the accuracy of all modes of testing are equally accurate. Hair and saliva testing is theoretically not subject to adulteration or substitution since it is an observed collection.

Window of detection: the period of time a specimen will show a positive result after use of a drug.

- Hair specimens will generally not be positive until about a week after use but will show use for months prior to the collection depending upon the length of the hair.
- Urine specimens will generally be positive roughly 6 hours after use up to about 3 days.
- Saliva specimens can be positive immediately after use for marijuana soon after use for other drugs but can only be detected for about 24 hours after use.

Federal legislation is needed to curtail the use of substances and devices that subvert drug tests. These products pose a safety risk in the transportation industry; they increase employer costs associated with workers compensation, health benefits, impaired productivity; and, they increase employers costs associated with drug testing and the increased need to improve the technology to detect the products.

Mr. WHITFIELD. Thank you very much.

Mr. Sims, you are recognized for 5 minutes.

TESTIMONY OF JEFF SIMS

Mr. SIMS. Thank you, Mr. Chairman and committee members, for the opportunity to speak today on behalf of the Substance Abuse Program Administrator's Association. SAPAA is a nonprofit trade association who represents all the alcohol/drug-testing service agents, including third-party administrators, in-house administra-

tors, medical review officers, laboratories, substance-abuse professionals, manufacturers of testing devices and collectionsites. Our membership includes representation from all 50 States and Canada in all of the above professions. On behalf of SAPAA members, who represent well over 200,000 employers and more than 3.5 million DOT regulated drug tests, I would like to take the opportunity to provide comments on adulterant and substitution issues arising from products sold that claim to prevent detection of certain substances by direct testing programs or allow for the substitution of the specimens.

In addition, I am co-owner of a'TEST Consultants, Inc., in North Little Rock, Arkansas. My company administers drug-and-alcohol-testing programs for employers, and we do this throughout the United States.

I am here to tell you today that the drug-testing professionals of SAPAA are highly concerned about the games employees play on a daily basis in the collection centers around America to beat a drug test. They are resourceful, creative and have little fear that their misconduct will truly have consequences. SAPAA believes that the integrity of regulated drug testing is at stake if Congress does not take strong action to beat these drug cheaters at their game.

Attached to my remarks is a letter from the former acting director of the U.S. Department of Transportation's Office of Drug and Alcohol Policy and Compliance in which he expresses similar concerns of that office.

What is the human cost of an adulterated or substituted specimen? It is the bus driver with the load of school kids who crashes into a bridge because he is high on cocaine, when only 3 days earlier he tested negative by substituting a specimen for his own.

It is a drug-testing collector who is assaulted after informing a donor that his sample could not be accepted because it was outside the normal temperature range. When told that another specimen would need to be provided, the donor became irate, causing the package containing a yellow liquid to fall from his pants leg. The donor grabbed the collector and through her into the wall, injuring her elbow, but still capable of reaching an installed panic button. As the donor fled from the office, he took his cold specimen and also the plastic bag that had fallen out of his pants leg.

On May 4, 2005, this donor was found guilty of a class A third degree battery charge, given 1 year of probation, fined $500 plus court costs, found guilty of Arkansas' new anti-adulterant law, which is a class B misdemeanor charge, and was fined an additional $350 plus court costs.

It is a nuclear plant operator in the southeast discovering that a contractor employee adulterated his sample with a commercially available product during a pre-access fitness-for-duty test. His first initial screening test was positive for marijuana, THC, but, oddly, after it was sent to an HHS certified laboratory, it was confirmed by gas chromatography mass spectrometry as negative.

With an obvious discrepancy, the operator requested an additional adulterant test be performed. This additional test showed the presence of pyridinium chlorochromate, a known adulterant used for masking THC in the urine. The employee was interviewed.

He admitted to being a regular marijuana user and using this adulterant product to beat previously required tests.

There are more stories from collectors, medical review officers, TPAs and employers around the country where donors attempt and on occasion succeed to beat a drug test.

It is the hands-on experience of SAPAA members around the country who deal with this plague every day that has caused our association to take such a strong stance against these cheaters. State-by-State patchwork legislation is not a solution. Only when Congress decides to take some strong action to truly punish federally regulated employees and applicants who choose to attempt to cheat will drug-testing adulteration and substitution come to a screeching halt.

Such action by Congress will effectively cause a drop in demand for the kind of cheater's aids that litter the internet, head shops and certain nutrition stores. SAPAA recommends that Congress take a serious look at amending the Department of Transportation laws and include a lifetime CDL disqualification and significant increased penalties if a donor presents an adulterated or substituted specimen in a DOT regulated test.

SAPAA also believes it would be appropriate for a data base to be maintained by the DOT of employees and applicants who have been determined by the DOT to have presented an adulterated or substituted specimen for regulated testing. SAPAA believes a slight modification to the Federal custody and control formula used in the testing process should be made to warn the donor of the consequences of such misconduct.

SAPAA stands willing in any manner it finds appropriate. We have included in our written submission suggested legislation from SAPAA's general counsel to accomplish what we have recommended with regard to the commercial drivers. You will note the suggested highlighted additions to 49 USC 521 and 49 USC 31310. Similar amendments can be made to include employees covered by the other Federal agencies.

SAPAA stands ready to assist this committee with that effort and is willing to marshal the support of our membership to call their Congressmen and Senators and request the speedy approval of such legislation. We believe such a measure will definitely have broad support.

As I said at the beginning of my remarks, the members of SAPAA belief the integrity of federally regulated testing is at stake, and with that, the safety of our Nation's rail lines, skies, roadways, pipelines and navigable waterways.

In conclusion, on behalf of all those professionals in the alcohol and drug-testing industry and employers everywhere, SAPAA thanks this committee for spotlighting this serious problem and its commitment to beat the cheats.

[The prepared statement of Jeff Sims follows:]

PREPARED STATEMENT OF JEFF SIMS, THE SUBSTANCE ABUSE PROGRAM ADMINISTRATORS PROGRAM

Dear Honorable Ed Whitfield: I would like to thank the Chair and committee members for the opportunity to speak today on behalf of Substance Abuse Program Administrators Association (SAPAA).

The Substance Abuse Program Administrators Association (SAPAA) is a non-profit trade association whose members represent all of the alcohol and drug testing service agents including third party administrators (TPAs), in-house administrators, medical review officers (MROs), Substance Abuse Professionals (SAPs), manufacturers of testing devices, and collection sites/collectors. Our membership includes representation from all 50 states and Canada in all the above professions. Therefore, on behalf of SAPAA members (who represent well over 200,000 employers and more than 3.5 million DOT regulated drug tests) and the drug testing industry as a whole will take this opportunity to provide comments on adulterant and substitution issues arising from products sold that claim to prevent detection of certain substances by drug testing programs, or allow for the substitution of a specimen.

In addition, I am co-owner of a'TEST consultants, inc. in North Little Rock, Arkansas. My company administers alcohol and drug-testing programs, provides medical review officer services, performs onsite specimen collections in the workplace, performs collections at three office locations, and collections at contracted facilities throughout the United States.

I am here to tell you today that the drug testing professionals of SAPAA are highly concerned about the games employees play on a daily basis in the collection centers around America to beat a drug test. They are resourceful, creative and have little fear that their misconduct will truly have a consequence. SAPAA believes that the integrity of regulated drug testing is at stake if Congress does not take strong action to beat these drug cheaters at their game. Attached to my remarks is a letter from the former acting director of the U.S. Department of Transportation's Office of Drug and Alcohol Policy and Compliance (ONDCP), in which he expresses similar concerns of that office.

What is the human cost of an adulterated or substituted drug specimen?

It is the bus driver with a load of school kids who crashes into a bridge because he is high on cocaine, when only three days earlier he tested negative by substituting a specimen for his own.

It is a drug-testing collector who is assaulted after informing a donor that his sample could not be accepted because it was outside the normal temperature range. When told that another specimen would need to be provided; the donor became irate causing a package containing a yellow liquid to fall from his pants leg. The donor grabbed the collector and threw her into the wall, injuring her elbow but capable of reaching an installed panic button. As the donor fled from the office, he took his cold specimen and also the plastic bag that had fallen out of his pants leg. On May 4, 2005, this donor was found guilty of a Class A 3rd Degree Battery Charge, given one year of probation, fined $500 plus court costs, found guilty of Arkansas' anti-adulterant law which is a Class B Misdemeanor Charge, and was fined an additional $350 plus court costs.

It is a nuclear plant operator in the southeast discovering that a contractor employee adulterated his sample with a commercially available product during a pre access fitness for duty test. His first initially screening test was positive for Marijuana (THC), but oddly after it was sent to a HHS certified laboratory; it was confirmed by gas chromatography mass spectrometry as negative. With an obvious discrepancy, the operator requested an additional adulterant test be performed. This additional test showed the presence of pyridinium chlorochromate, a know adulterant used for masking THC in the urine. The employee was interviewed, he admitted to being a regular marijuana user and using this adulterant product to beat previously required test.

There are more stories from collectors, Medical Review Officers, TPAs and employers around the country where donors attempt, and on occasion succeed, to beat a drug test.

It is the on-hands experience of SAPAA members around the country who deal with this plague every day that has caused our Association to take such a strong stand against these cheaters. State by state patchwork legislation is not a solution. Only when Congress decides to take some strong action to truly punish federally regulated employees and applicants who choose to attempt to cheat will drug testing adulteration and substitution come to a screeching halt. Such action by Congress will effectively cause a drop in demand for the kind of cheater's aids that litter the Internet, head shops, and certain nutrition stores. SAPAA recommends that Congress take a serious look at amending the Department of Transportation laws and include a lifetime CDL disqualification and significant increased penalties if a donor presents an adulterated or substituted specimen in a DOT regulated test. SAPAA also believes it would be appropriate for a database to be maintained by the DOT of employees and applicants who have been determined by the DOT to have presented an adulterated or substituted specimen for regulated testing. SAPAA believes

a slight modification to the federal custody and control forms should be made to warn the donor of the consequences of such misconduct.

SAPAA stands willing to assist this Committee in any manner its finds appropriate. We have included in our written submission suggested legislation from SAPAA's General Counsel to accomplish what we have recommended with regard to Commercial Drivers. You will note the suggested highlighted additions to 49 U.S.C. 521 and 49 U.S.C. 31310. Similar amendments could be made to include employees covered by the other DOT Agencies. SAPAA stands ready to assist this committee with that effort and willing to marshal the support of our membership to call their Congressmen and Senators and request speedy approval of such legislation. We believe such a measure will have broad support.

As I stated at the beginning of my remarks, the members of SAPAA believe that the integrity of federally regulated testing is at stake, and with that the safety of our nation's rail lines, skies, roadways, pipelines and navigable waterways. We request serious consideration of our proposal.

In conclusion, on behalf of all of those professionals in the alcohol and drug testing industry and employers everywhere, SAPAA thanks this Committee for spotlighting this serious problem and its commitment to beat the cheats.

Mr. WHITFIELD. Thank you, Mr. Sims.

Dr. Sample, you are recognized for 5 minutes.

TESTIMONY OF R.H. BARRY SAMPLE

Mr. SAMPLE. Mr. Chairman, members of the committee, thank you for the opportunity to speak with you today about a problem that impacts the quality and accuracy of all employers' drug-testing programs and potentially the health and safety of employees in the workplace.

I am Barry Sample, the Director of Science and Technology for the Employers Solutions Division of Quest Diagnostics. We are the Nation's leading provider of diagnostic testing, information and services. My division, which performs more than 8 million drug tests annually, is dedicated to providing innovative solutions to meet an employer's screening needs.

Relevant to today's discussions, our laboratory tests of urine are for drugs of abuse and adulterant testing, using patented testing procedures. We also perform laboratory-based hair and oral fluid tests for drugs of abuse. Tests using these specimens are growing and are also subject to attempts to beat the drug-testing process.

Today, I am testifying on behalf of Quest Diagnostics on the subject of trends in workplace drug testing and the impact and costs associated with the use of products designed to defeat the accuracy of urine drug tests.

We have been tracking and reporting the trends in workplace drug testing performed by our network of six SAMHSA certified laboratories with the Quest Diagnostics drug-testing index since 1988. During this time, the overall positivity rate has gone from a high of about 13.5 percent in 1988 to 4.5 percent today. Does this mean that drug use by workers is decreasing? Perhaps that is part of the story. Our data, as well as the government drug use data, indicates that applicants and employees of companies with a drug-testing program are much less likely to test positive for or use drugs, by as much as 50 percent.

For example, in our data, workers subject to federally mandated preemployment and random testing have a positivity rate that is almost half that of private sector workers. The latter are typically subject only to preemployment tests.

Another part of the story are the products that are designed to help a donor beat a drug test, that is, cheat. These products include substances that a donor consumes in order to dilute or cleanse their urine specimen, products that are added to, that is, adulterate a specimen, and, even more insidious, products, devices, that cannot be easily detected short of an observed collection. This last group enables a donor to substitute clean, negative urine for their own.

In order to determine if a specimen is real, adulterated or substituted, laboratories perform a variety of tests to determine specimen validity. Unfortunately, only more, slightly more, than 50 percent of the tests we perform undergo all of these comprehensive tests, presumably due to the added costs involved.

In private sector testing of specimen validity, dilute specimens account for about 4 percent of all specimens. While not all of these dilute specimens are the result of donors trying to cheat, a significant portion are. In a study of over 2 million specimens, we found that drug positive specimens are more than two times more likely to have an indicator of dilution.

Another study of over half a million specimens conducted in 1988 looked at specimens where we detected either marijuana or cocaine metabolites, both above as well below the administrative cutoff on the initial or screening test. We found nearly an equal number of specimens in both groups.

Furthermore, in this study, we found that approximately an equal number of specimens that contained marijuana or cocaine metabolites, regardless of the cutoff, had an elevated incidence of this indicator of dilution. This means that some of those above the cutoff were unsuccessful attempts at dilution while some of those below the cutoff are likely successful attempts at dilution.

As laboratories enhanced their tests for specimen validity, the anti-drug-testing industry responded with a continual evolution and sophistication of the products and devices used to defeat the drug-testing process. It is a continual cat-and-mouse game, and, unfortunately, this industry is developing systems that may be undetectable by laboratories.

Over the last 6 years, the incidence of the largest type of adulterated specimens has dropped 90 percent. An invalid specimen is one with an adulterant that cannot be identified or one with abnormal indicators of dilution. Over the last 3.5 years, the incidence of an invalid specimen has increased more than 40 percent, and in the first 4 months of this year, the number of invalid specimens has jumped an additional 60 percent over 2004.

There are two main effects of these invalid specimens. An invalid result usually requires an immediate observed recollection of another urine specimen. The associated cost of such second specimens due to invalid results reported by our laboratories would directly cost employers an additional $1 million annually, not including the lost opportunity costs related to the delay in putting someone to work.

The more insidious cost is the impact of buying time for a donor to clear their system of drugs. In this case, the donor would be able to produce a negative result on the recollection and be hired, and since most private sector employers do not test current employees,

this represents a drug user that has been put to work and who is thereby putting him or herself as well as their coworkers at risk.

Since the use of the devices employed to provide a clean urine specimen is not detectable by a laboratory test of specimen validity, individuals using these products are able to totally circumvent the testing product. As a scientist who has pursued drug-test cheaters, I can tell you how frustrating it is to encounter technology being used to subvert the drug-testing process.

I want to thank you once again for the opportunity to speak about this important topic. I would be happy to entertain any questions you may have regarding either my oral or written testimony.

[The prepared statement of R.H. Barry Sample follows:]

Testimony of

R.H. Barry Sample, Ph.D.
Director of Science and Technology
Employer Solutions
Quest Diagnostics Incorporated
before the
Oversight and Investigations Subcommittee of the
Committee on Energy and Commerce
U.S. House of Representatives
on
Products that Claim to Prevent Detection of Certain Substances by Drug Testing Programs

May 17, 2005

Executive Summary

Quest Diagnostics' Employer Solutions division performs more than 8 million drug tests annually in its network of six SAMHSA-certified labs. Trends in workplace testing are reported semi-annually in the Quest Diagnostics Drug Testing Index (DTI). The written report that follows examines the trends as reported in the DTI and describes in more detail the impact and costs of products designed to defeat the accuracy of urine drugs tests. Key findings and observations include:

- We have observed a gradual decline followed by a leveling off in the positivity rate of workplace drug tests – from a high of 13.6%, in 1988, to 4.5%, today
- Our data suggests that simply having a comprehensive drug testing program has a deterrent effect on drug use and the more frequently an individual is eligible for a drug test, the lower the positivity rate.
- Based on our data and data from the National Survey of Drug Use and Health, suggests that the prevalence of drug use in the past month among the employed U.S. population is approximately 50% greater when there is no employer sponsored drug testing program.
- In 2004, approximately 52% of the workplace drug tests performed by Quest Diagnostics included optional comprehensive specimen validity testing. The remaining 48% of the tests are at risk because the employers did not request comprehensive specimen validity testing that including oxidizing adulterants.
- Drug positive specimens are more than two (2) times more likely to have a low creatinine (potentially indicative of a *dilute* specimen).
- In a recent study, we found that approximately an equal number of specimens that contained marijuana or cocaine metabolites (regardless of the cutoff) had low creatinine values. This means that some of those above the cutoff were unsuccessful attempts at dilution and some of those below the cutoff are suggestive of successful attempts at dilution.
- The additional direct cost our laboratories incur to perform additional analysis based on specimen validity test results indicating potential adulteration or dilution is estimated to exceed $500,000 annually.
- The additional direct cost to employers for collection and other non-laboratory components of a second specimen due to "invalid" specimens is estimated to be over $1,000,000 annually!
- Just by providing an invalid specimen, the donor will be buying enough time to clear the drugs from his or her system and thus naturally produce a negative drug test on the second collection.

Options to combat "anti-drug testing" products include:

- Legislation to prevent the distribution and use of these products and devices
- Performing specimen validity tests at the collection site

- Performing additional analysis in the laboratory, without regard to administrative cutoffs, if a "suspicious" specimen is detected.
- Requiring a recollection for all dilute as well as invalid specimens.

Background

Quest Diagnostics is the leading provider of diagnostic testing, information and services that patients and doctors need to make better healthcare decisions. The company offers the broadest access to diagnostic testing services through its national network of laboratories and patient service centers, and provides interpretive consultation through its extensive medical and scientific staff. Quest Diagnostics is a pioneer in developing innovative new diagnostic tests and advanced information technology solutions that help improve patient care.

The Quest Diagnostics Employer Solutions division is dedicated to providing innovative solutions to meet a company's employee screening needs. As the leading provider of drug testing services in the nation, our unparalleled experience can help reduce a company's exposure to risk with the following comprehensive screening services and employee health management solutions.

Laboratory-based Drug Testing Options
Specimens are tested at one of our six national Substance and Mental Health Services Administration (SAMHSA)-certified laboratories. In addition, each laboratory maintains the licenses or certifications to meet applicable Federal, State, and local laws and regulations.

Alternative Specimen Testing
In addition to urine testing, we offer hair and oral-fluid tests for drugs of abuse at two of our laboratories

Adulterant Testing
With the recent development of specimen adulteration products, specimen adulteration threatens even the most stringent drug testing programs. Specimen donors may either ingest these foreign substances, sometimes promoted as cleansing agents, or they may add them to urine specimens with the goal of preventing drug use detection. With our TestSure™ adulterant testing process, we are able to detect a wide variety adulterants that may be added to a urine specimen in an attempt to beat the drug test.

Healthcare Professional Panels
Addressing potential drug abuse by healthcare professionals, we offer a healthcare professional panel to detect a wide variety of narcotics and sedatives that might be abused by professionals or other workers in the healthcare industry.

Steroid and Athletic Drug Testing
We perform steroid and athletic drug testing specifically designed to detect performance-enhancing agents including anabolic steroids. We also provided the anti-doping analyses for the Centennial Olympic Games held in Atlanta in 1996.

On-site Drug Testing Options
We offer the option of on-site specimen collection and testing, and a portfolio Quest Diagnostics branded point of collection test devices, to deliver immediate results in support of time-critical decision-making efforts.

Collection Services
We have a national network of more than 1000 Quest Diagnostics-owned Patient Service Centers that can perform collections for the detection of the drugs of abuse complemented by an additional network of more than 600 third-party collections sites.

Employee Wellness Programs
We also offer Employee Wellness Programs designed to lower healthcare costs through health risk assessments and clinical testing.

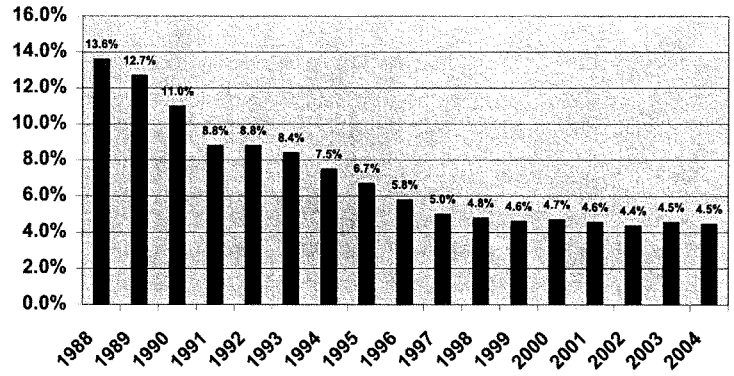
OSHA
We offer testing for employee exposure to potentially hazardous substances in the workplace.

Overall Drug Testing Trends

Each year, Quest Diagnostics Employer Solutions Division performs over 8 million drug tests. The Drug Testing Index (DTI), which we publish semi-annually as a public service to government and industry, summarizes the results of workplace drug tests performed by Quest Diagnostics. We have published the DTI since 1988. The DTI examines positivity rates among three major testing populations: Federally-mandated safety-sensitive workers (FMSS); the general workforce (GW); and the combined U.S. workforce. Workers in the FMSS category include airplane pilots, bus and truck drivers, railroad workers, and workers in nuclear power plants, for whom routine drug testing is mandated by the U.S. Department of Transportation (DOT) and the Nuclear Regulatory Commission (NRC). Since the DTI focuses on prevalence rates in *workplace* drug testing, it excludes tests performed for medical reasons, including rehabilitation and monitoring programs; criminal justice settings; and tests submitted for confirmation of drug tests conducted at the point of collection. The most recent release of the DTI includes and summarizes the results of over 7.2 million workplace drug tests performed in 2004.

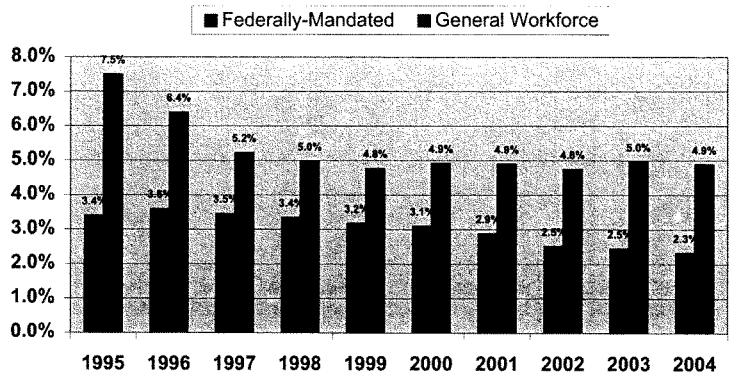
Since the inception of the DTI in 1988, we have observed a gradual decline followed by a leveling off in the positivity rate in these workplace drug tests – from a high of 13.6%, in 1988, to 4.5%, today (See **Figure 1**)

Figure 1: Annual Positivity Rates for Combined U.S. Workforce



There has been little change in the overall positivity over the last 5-6 years. However, we do observe differences in the positivity rates between the General Workforce (GW) and the Federally-mandated Safety Sensitive (FMSS) testing (See **Figure 2**)

Figure 2: Annual Positivity Rates by Testing Category



This difference in positivity rates between the two groups may be due to the greater testing rates in the FMSS group. The two major types of testing reasons – pre-employment and random – between 2001 and 2004 are summarized in the **Table 1**, below.

Table 1: Percent of Specimens Tested by Testing Reason, 2001-2004

	Federally-Mandated Safety Sensitive (N=4.7 million)	General Workforce (N=23 million)
Pre-Employment	45%	79%
Random	43%	9%
Other	12%	12%

This data, in combination with the positivity rates, suggests that simply having a comprehensive drug testing program has a deterrent effect on drug use and the more frequently an individual is eligible for a drug test, the lower the positivity rate. This hypothesis is also supported by data from the annual National Survey on Drug Use and Health (NSDUH) conducted by the department of Health and Human Services. The table below compares positivity rates from the DTI and population estimates of reported drug use in the previous month from the NSDUH in 2002 and 2003.

Table 2: Comparison of Positivity Rates and Reported Drug Use Between the Quest Diagnostics Drug Testing Index and the National Survey on Drug Use and Health, 2002-2003

Data Set	Group[3]	Any Illict[4]		Marijuana	
		2002	2003	2002	2003
NSDUH[1]	Any Program	7.4%	7.0%	5.3%	5.3%
NSDUH	No Program	10.3%	10.4%	8.3%	8.5%
DTI[2]	FMSS	2.5%	2.5%	1.4%	1.3%
DTI	GW	4.8%	5.0%	2.9%	3.0%

[1] U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies. NATIONAL SURVEY ON DRUG USE AND HEALTH, 2002-2003 [Computer file]. ICPSR version. Research Triangle Park, NC: Research Triangle Institute [producer]. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor].

[2] Quest Diagnostics Drug Testing Index

[3] For the NSDUH, "Any Program" is defined as a "Yes" answer to the question: "Does your workplace ever test its employees for drug use"

[4] For the NSDUH, "Any Illicit" drug use is defined as use of marijuana, hallucinogens, heroin, cocaine, inhalants or psychotherapeutics in the past month.
For the DTI, in the Federally-mandated safety sensitive (FMSS) group, the rate shown is full-year overall positivity for amphetamines, cocaine metabolite, marijuana

metabolite, opiates, or phencyclidine, adulterants, or substitution. In the general workforce (GW) group, it is full-year overall positivity for barbiturates, benzodiazepines, methadone, methaqualone, propoxyphene, or the analytes included in the FMSS group

On the basis of the NSDUH data, the prevalence of drug use in the past month among employed respondents appears to be approximately 50% greater when there is no employer sponsored drug testing program. Comparing the DTI (General Workforce) and NSDUH prevalence rates, one might conclude that the DTI underestimates drug use among employed workers by 50% or more. Part of this difference in "positivity" rates may be explained by timing differences – most drugs measured by the DTI are cleared by the body, depending on usage patterns, in a matter of days and thus a urine sample would not be positive; whereas, the NSDUH asks about drug use in the previous 30 days. Another factor that might explain the difference in positivity rates is the requirement for administrative cutoffs in workplace drug testing – most drug testing programs are designed to ***deter*** drug use rather than ***detect*** all possible drug users. Thus, the presence of a drug metabolite in the urine below a cut-off value is not reported as a positive drug test. Finally, another factor to consider are donors that attempt to "beat the drug test" by using a variety of products designed to subvert the testing process.

Specimen Validity Testing and Adulteration

Products designed to assist donors in beating a drug test can be broken down into three broad categories – ***"cleansing" agents***, ***adulterants*** added to a specimen, and ***devices***. The "cleansing" agents include "teas", "detoxifiers", "shampoos", and "mouthwashes", in addition to water. Shampoos and mouthwashes are designed specifically to try to subvert hair and oral-fluid testing, respectively. The teas and detoxifiers were developed originally for urine drug tests and many are now marketed for all types of drug tests. While the product themselves are not likely to actually "clean" or "wash away toxins", the user is usually instructed to consume anywhere from 32 to 64 oz of fluid as a part of the "cleansing" process. Since workplace drug tests usually have administrative cutoffs,or limits below which a drug test is considered negative, this ***"internal dilution"*** may lower the concentration of drug or metabolite in the urine below the reporting threshold. Occasionally, donors may also attempt either ***"external dilution"*** or *substitution* of the urine with water or other liquids, in the privacy of the restroom.

Adulteration of urine specimens has been attempted by donors, probably as long as there have been urine drug tests. In the early days of drug testing, this would typically involve the use of household products easily available to a specimen donor, e.g., bleach, vinegar, drain cleaner, lye, soap, etc. One of the first "commercial" products for adulteration of a urine specimen was Urinaid (glutaraldehyde). When laboratories first began performing basic tests of specimen validity, we saw limited evidence of adulteration. By the late 1990's, there was an explosion of these products along with constant evolution (Urine Luck, Whizzies, Instant Clean ADD-IT-ive). Most of these products are in a group known as ***"oxidizing adulterants"***. These oxidizing compounds can interfere with the detection and/or confirmation of marijuana metabolite in a

urine specimen. Since marijuana has consistently represented 50-60% of all positives reported in the DTI, oxidizing adulterants can be a serious issue.

In addition to the "cleansing agents" that are consumed by a donor and adulterants that are added to a urine specimen, there now are devices sold that enable a donor to provide a totally clean, negative urine – that is not their own – in the privacy of the bathroom or other private collection area. Currently, the verification of specimen validity at collection sites relies on inhibiting access to water, soap, or other products that might be used to adulterate a specimen; asking the donor to display the contents of their pockets; prohibiting the taking of purses, briefcases or similar personal items into the bathroom; and the measurement of specimen temperature. By using devices which may be concealed under the donor's clothing, the donor is able to provide a "certified negative", "clean" urine that will pass the temperature check. Many of these devices are sold with "heat activators" or "thermocouples" to either maintain the temperature or heat the sample to the desired range of 90°-100°F. Other devices, such as the "Zip N Flip" detoxifying bag, require the donor to urinate into a bag, mix the urine to remove the "toxins" and then pour the urine into the collection container. The best mechanism for thwarting these devices is a directly observed collection – but, for many reasons, this is not a practical or attractive solution.

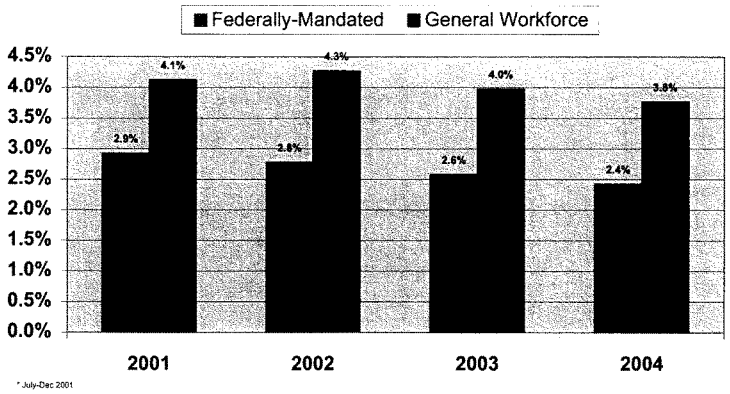
After the specimen arrives at the laboratory for testing, laboratories assess *"specimen validity"* by performing a group of tests known collectively as specimen validity tests (SVT). The Department of Health and Human Services, in the Mandatory Guidelines for Federal Workplace Drug Testing Programs (69 FR 19644), has recently modified the requirements for SVT to now require tests for creatinine and specific gravity, when indicated (as indicators of dilution and substitution); for pH (an indicator of acidity/alkalinity); and for oxidizing adulterants. The new rules also modified certain of the cutoffs and testing methodology requirements for SVT. Quest Diagnostics has routinely tested for creatinine, specific gravity, when indicated, and pH on all specimens for many years. In addition, since 1998 with our TestSure™ process, we have offered specimen validity tests including testing for oxidizing adulterants and alternative screening technology, when indicated. Unfortunately, other than the recent change in standards for testing Federal employees, comprehensive SVT is not required even for the Federally-mandated testing performed either under DOT rules (49 CFR Part 40) or NRC rules. Some of the reluctance to require SVT on the part of both these Federal agencies and the private-sector is the added cost of performing specimen validity tests. On average, these tests cost employers $1.00-$2.00 more than a drug screen with only basic SVT. ***In 2004, approximately 52% of both the private-sector and Federally-mandated workplace drug tests performed by Quest Diagnostics included comprehensive SVT testing.***

Dilution & Substitution

The parameters measured to determine if a specimen is ***dilute*** or ***substituted*** are creatinine and specific gravity. Creatinine is a normal metabolic product of muscle metabolism, is normally present in everyone's urine, and has long been used clinically as an indicator of urinary dilution. Specific gravity is a measure of dissolved particles in urine and is also an indicator of urinary

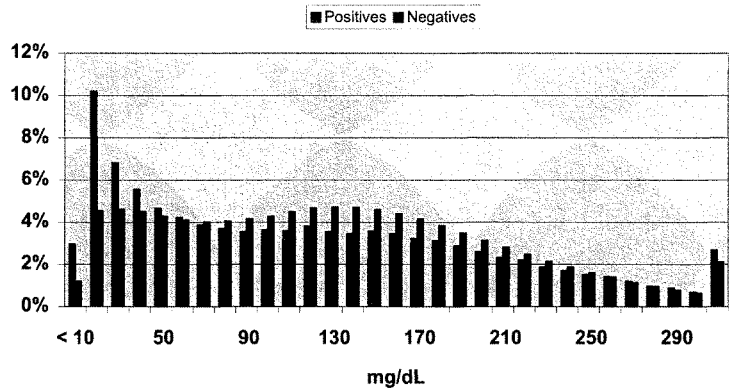
dilution. A dilute specimen is one that has a creatinine less than 20 mg/dL and a specific gravity less than 1.003 ***and*** does ***not*** fulfill the criteria for a substituted specimen. Quest Diagnostics has been specifically tracking the incidence of all dilute specimens since July 2001 and the trends are shown in the **Figure 3** below:

Figure 3: Annual Dilute Rates by Testing Category, 7/2001-2004



Of note, however, is the potential impact of dilution and fluid intake on drug test results. Between 1999 and 2001, we performed three separate data collections where the distribution of creatinine concentrations in positive and negative specimens was determined. Shown below (**Figure 4**) is a chart comparing the distribution of creatinine concentrations in nearly 2,000,0000 negative specimens and 80,000 urine specimens from general workforce employees and applicants:

Figure 4: Distribution of Creatinine Concentrations in Negative and Positive Specimens



There appear to be two different distributions of creatinine values – one for positives and one for negatives – with positive specimens being skewed towards lower creatinine concentrations. In fact, based on this data, it would appear that a drug positive specimen is more than two (2) times more likely to have a creatinine <20 mg/dL (one of the two factors in the definition of a *dilute* specimen) and there is a significant difference in the proportion of positive specimens with a creatinine <20 mg/dL. **These individuals may be viewed as those that tried to dilute, but failed.**

In another smaller study (N~500,000) conducted in 1998, we examined those specimens that exhibited a response, both above and below cutoff, on the initial (screening) test for either cocaine metabolite or marijuana metabolite. These two analytes were selected since they both have very high (>97%) confirmation rates and those specimens not confirming almost always contain drug at a concentration less than the confirmation cutoff. A comparison of the detection rates and incidence of a creatinine less than 20 mg/dL is shown in the **Table 3** below:

Table 3: Detection Rates on the Initial Test for Marijuana and Cocaine Metabolites and Incidence of Low Creatinine Values in Each Group

		Drug Detection Rate	Creatinine <20 mg/dL
Overall			6.0%
Marijuana Metabolite	Below Cutoff	2.6%	14.7%
	Above Cutoff	3.5%	11.7%
Cocaine Metabolite	Below Cutoff	1.0%	8.1%
	Above Cutoff	0.9%	10.2%

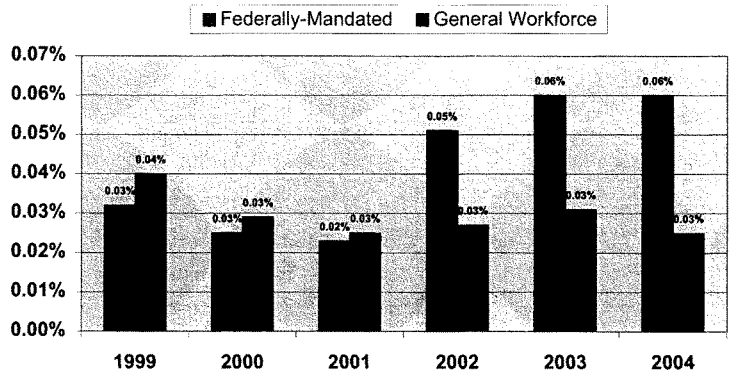
The data for the above cutoff specimens is consistent with that presented above and with the general workforce DTI results. However, the notable point is that in specimens suspected of containing marijuana or cocaine metabolites, ***there were approximately an equal number of specimens that contain drug at a concentration less than the cutoff*** as there were above the cutoff. In the case of marijuana metabolite, there is an even higher incidence of low creatinine specimens among those below the cutoff. Thus, some percentage of specimens containing marijuana metabolites below the cutoff and with a low creatinine may be viewed as having been ***successfully diluted.***

A Substituted specimen is defined (69 FR 19644) as: "A urine specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine." The criteria used by laboratories for reporting a substituted specimen are:

Creatinine < 2 mg/dL & SG <1.0010 *or*
Creatinine < 2 mg/dL & SG $\geq$1.0200

Prior to the effective date of the revised HHS rules and publication of the laboratory guidance documents in November 2004, the creatinine cutoff for a substituted specimen was 5 mg/dL as specified in HHS Program Document #35 (9/28/1998). The trends in substituted specimens are shown in the chart (**Figure 4**) below:

Figure 4: Annual Substituted Rates by Testing Category, 1999-2004



Dilute and substituted specimens also have an impact on laboratory costs, MRO costs and employer costs. Every specimen with a low creatinine (<20 mg/dL) requires a reflexive specific gravity with an estimated annual Quest Diagnostics laboratory cost of over $400,000. In addition, the recent regulatory changes (11/2004) now require the use of a 4-place refractometer to measure specific gravity on all specimens with a specific gravity <1.0020 or are determined to have been substituted. This regulatory change requires ***all*** federally certified drug testing laboratories to purchase new instrumentation for these specimen validity analyses. For the network of Quest Diagnostics laboratories, this represented a capital expenditure of approximately ***$100,000***.

A negative-dilute specimen may require additional review and in some private-sector employer programs, a negative-dilute result is not considered a valid result, which could require an additional drug screen with the incumbent collection and laboratory costs. Furthermore, for DOT-mandated testing, a specimen that is "ultra-" or "hyper-" dilute (i.e. with a creatinine between 2 and 5 mg/dL and specific gravity of > 1.0010 and <1.0030), triggers an immediate observed collection. The average cost for an observed collection is $100-$150 not including the additional cost for laboratory analysis or MRO review of the additional specimen.

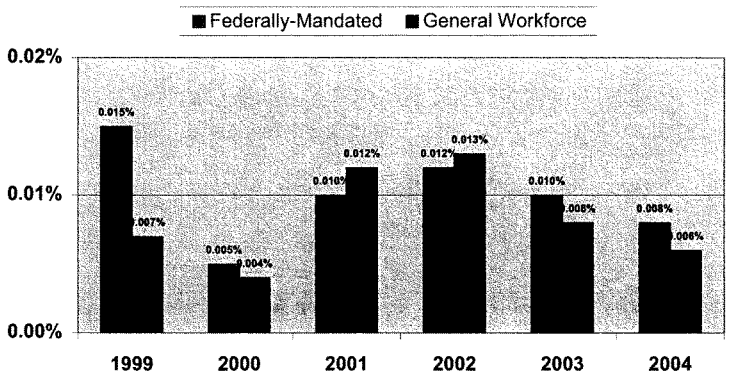
Some specimens may also be reported as ***Invalid*** based on the creatinine and specific gravity results. These specimens have abnormally low creatinine or specific gravity values and do not meet the criteria for a substituted specimen. All of these invalid specimens, as well as the substituted specimens, require additional (confirmatory) analysis on a second portion of the original urine specimen. This confirmatory testing is projected to cost approximately ***$100,000***, in 2005 – reflecting a nearly ***three (3) fold increase*** in the number of specimens requiring

additional specimen validity analyses since the new HHS criteria were implemented in November 2004.

Adulterated and Invalid

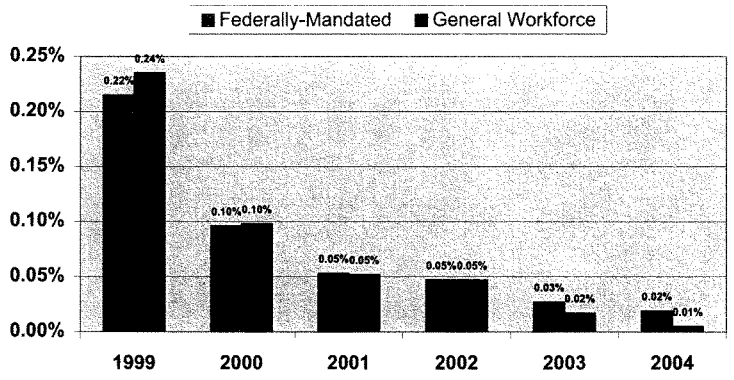
The two most commonly detected types of adulteration detected by Quest Diagnostics are caused by altered specimen pH (acidity) or oxidizing adulterants. While pH adulteration has occurred for many years, its prevalence rate has remained low and relatively constant (see **Figure 5** below).

Figure 5: Annual Acid/Base (pH) Adulteration Rates by Testing Category, 1999-2004



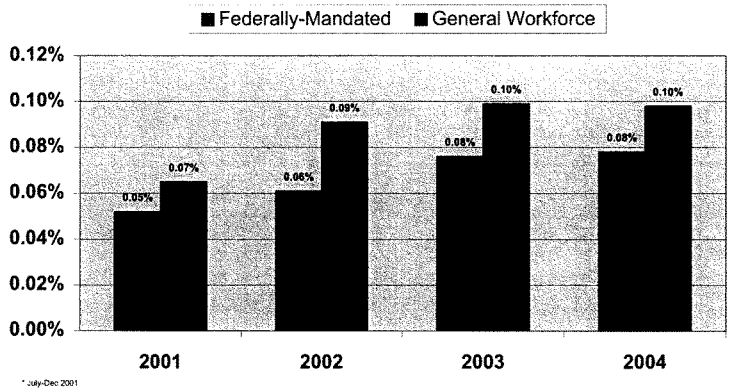
In contrast, the rate of occurrence of oxidizing adulterants has shown marked change over time as the adulterant industry and donor awareness of laboratory testing capabilities have evolved. In 1998, the use of nitrites, Urine-Luck™, and other products exploded in the marketplace, and the "positivity" rate for these adulterants was very high (>0.5%). However, as testing for oxidizing adulterants evolved in response to the evolution of the adulterant industry, the "positivity" rate for adulteration declined as shown in the chart(**Figure 6**) below:

Figure 6: Annual Oxidizing Adulterant Rates by Testing Category, 1999-2004



This chart does not tell the whole story behind this decline. While some of the decline is due to laboratories' ability to detect adulterants, some of the decline is also due to the changing nature of the adulterant products. In addition to changing the type of oxidizing adulterant in an attempt to evade laboratories' efforts at identification, some providers of these products developed "cocktail" products. This approach combines several different adulterants, none of which would exceed the laboratory reporting threshold, resulting in, at worst, an invalid result. Overall, if one looks at the incidence of all invalid specimens – to include an invalid result due to abnormal oxidant activity (where the adulterant is not identified or is below the reporting threshold), abnormal pH, abnormal creatinine or specific gravity, abnormal odor, etc., – the incidence of invalid specimens has been increasing over time (see **Figure 7** below):

Figure 7: Annual Invalid Rates by Testing Category, 7/2001-2004

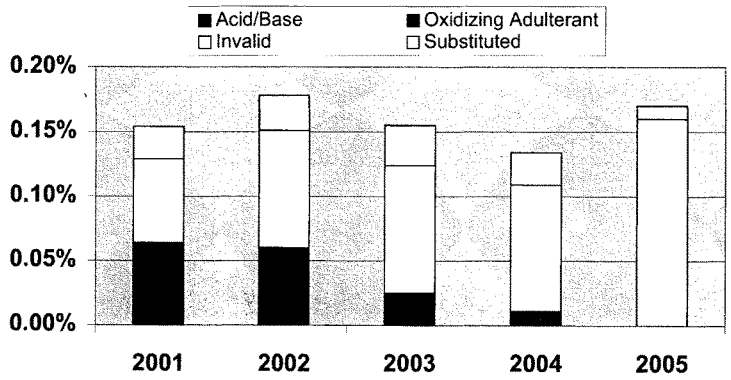


Like dilute and substituted specimens, adulterated specimens also have an impact on laboratory, MRO and employer costs. Every specimen with an abnormal pH on the initial test requires that the laboratory perform a reflex test on that aliquot of urine using different technology with a greater dynamic range. In addition, specimens shown to have an abnormal pH and/or abnormal oxidant activity on the initial test require that the laboratory perform a confirmation test on a separate aliquot of urine. All of this additional testing costs our laboratories approximately $50,000, annually. Every specimen reported as either adulterated or invalid incurs additional costs for MRO services; and, in the case of an invalid specimen, usually requires an additional observed specimen collection and laboratory analysis and MRO review.

Overall Trends in Specimen Validity Testing

The chart below show the combined incidence of general workforce specimens that were reported as adulterated, substituted or invalid between mid-2001 (when we started uniformly tracking all of these parameters in conjunction with the laboratory statistical reporting requirements of 49 CFR Part 40) and April 2005:

Figure 8: Annual Adulterated/Substituted/Invalid Rates in the General Workforce, 7/2001-4/2005



We believe that one of the reasons for the recent large increase in incidence of invalid specimens is the recent regulatory change in the criteria and required technology for reporting substituted, invalid, and adulterated results (especially due to the presence of oxidizing adulterants). The other reason is the increasing sophistication of "anti-drug testing" products that make it more difficult for the laboratory to identify a specific adulterant. If one assumes that only 50% of the invalid specimens reported by our laboratories do not have an "alternative medical explanation" and require a second collection under observed conditions, ***the additional direct cost to employers for collection, testing, and review of a second specimen would be over $1,000,000 annually!*** Furthermore, just by providing an invalid specimen, the ***donor will be buying enough time*** to clear the drugs from his or her system and thus naturally produce a negative drug test on the second collection. Moreover, since the majority of private-sector testing programs do not include random testing, these individuals will be able to resume their drug-using habits after the test, putting themselves and their co-workers at risk

Mr. WHITFIELD. Thank you very much.

Dr. Dasgupta, you are recognized for 5 minutes.

TESTIMONY OF AMITAVA DASGUPTA

Mr. DASGUPTA. Honorable chairman and honorable members of the panel, thank you for the opportunity to testify before you. We do drug testing for a six-hospital system in Harman, Texas, and we also do emergency room drug testing.

In 1986, September 15, President Reagan issued Executive Order Number 12564 directing Federal agencies to enact a drug-free work environment. In the military, where the urine collection process is supervised, chances of adulterated specimens are remote. But in preemployment testing, which we do, where direct supervision of specimen collection is not practiced, a person can beat a drug test.

Interestingly, in a State like Texas, where buying those adulterated products are against the law, we still see 1 or 2 percent of specimens adulterated, and we test the specimen using this dipstick which is commercially available. It is called Intect 7. It has a color code, and if there is any adulterant presence, the color changes and the colors are in the bottom.

How is this happening? Well, maybe they are buying it from their friends.

Now, simple household chemicals, such as table salt, vinegar, lemon juice, can beat a drug test, because those things can change the pH, or the specific gravity of urine, making the amino acid screening invalid. But those adulterants can be easily detected by specimen integrated testing, which is specific gravity, creatinene, pH and temperature.

The most serious problem we face is a quick-fix synthetic urine, which is a bottle of pre-mixed urine with all of the characteristics of natural urine. This product can be heated in a microwave or a heating pad supplied by the manufacturer, and this is the surest way to beat a drug test.

Commercial products to beat drug tests can be classified under two broad categories. The first category is taking specific fluids or tablets, alum with plenty of water, to flush out drugs and metabolites. Many of these products can produce dilute urine and the concentration of drugs or metabolite can be reduced.

When you do the drug testing, every drug has a sensitivity limitation, so drug testing that is negative doesn't mean that person never used a drug or no drug was present in the specimen. It can simply indicate that concentrations are too low to detect.

There are several products available that can be purchased for less than $40, such as Absolute Detoxx XXL Drink, Carbo Drink and Ready Clean Drug Detox Drink. It is also possible to take a diuretic, such as hydrochlorothiazide, which can produce dilute urine, and this is another way of cheating a drug test.

The laboratory regularly checks pH, temperature, specific gravity and creatinine, but the adulterants, such as Urine Luck, UrinAid, Klear and Whizzies cannot be detected by those tests, so, therefore, we do testing with the Intect 7 product, and there are three other products commercially available to test the presence of the adulterants.

This is a good way of doing it. But, again, it is possible there are some other adulterants present, for example, diluted urine, which can still beat a drug test. And the biggest headache we have is the substitution urine or synthetic urine, which cannot be detected without direct supervision.

Glutaraldehyde is another product sold as Urine Luck. It is very effective in beating amphetamine, methadone, opiate and cocaine tests.

Hair and saliva specimens are alternatives to urine specimens for drug testing. Several products available for sale through the Internet that claim by washing hair with the shampoo can aid a person to beat a drug test.

Saliva samples are also used for drug testing. A mouthwash is available commercially claiming that by rinsing the mouth twice with this product can help the person beat a saliva drug test. However, the effectiveness of such products are questionable. Some of the hair samples we tested in our laboratory is not effective in removing the drugs from hair, especially because we test the hair with hydrochloric acid to get the drug.

In conclusion, adulteration imposes a new challenge in the testing for abuse of drugs. Routine specimen integrity testing is not adequate to detect the presence of more recently introduced alduterants, such as Urine Luck, Klear and Stealth, which may effectively mask a drug test, especially marijuana and cocaine metabolite. Intake of herbal cleansing agents and diuretics may also aid a person to beat a drug test by diluting urine with reduced concentrations of drug.

It is better to have a more general acceptance for testing hair and saliva where substitution is not possible, but, in conclusion, the biggest headache from the side of the laboratory is the synthetic urine or substitute urine, which cannot be detected, unless the urine collection process is supervised.

I thank you, Mr. Chairman and members of the committee, and I recommend that there should be Federal regulation to ban those products so we can have a safe work environment.

Thank you.

[The prepared statement of Amitava Dasgupta follows:]

PREPARED STATEMENT OF AMITAVA DASGUPTA, PROFESSOR OF PATHOLOGY AND LABORATORY MEDICINE, UNIVERSITY OF TEXAS HEALTH SCIENCES CENTER AT HOUSTON

On September 15, 1986, President Regan issued Executive Order No 12564 directing federal agencies to achieve a drug free work environment. Then the Department of Health and Human Services developed guidelines for drugs of abuse testing. In Military where the urine collection process is supervised, chances of an adulterated specimen are remote but in pre-employment testing where direct supervision of specimen collection is not practiced, a person may attempt to beat a drug test by adulterating the specimen.

Reports of usage of household chemicals such as bleach, table salt, laundry detergent, toilet bowl cleaner, vinegar, lemon juice and Visine eye drop for adulterating urine specimens were published in medical literature as early as 1988. Most of these adulterants except Visine eye drop can be detected by routine specimen integrity tests. More recently a variety of products are commercially available which can be ordered either through the Internet sites (http://www.bdtzone.com, http://pass-drug-test.com etc) or toll free numbers. The Quick Fix Synthetic Urine is a bottle of premixed urine with all the characteristic of natural urine. The product can be heated in a microwave oven for up to 10 seconds in order to achieve a temperature between 90 to 1000F.

Commercially available products to beat drug tests can be classified under two broad categories. The first category is taking specific fluids or tablets along with plenty of water to flush out drugs and metabolites. Many of these products can produce dilute urine and the concentrations of drugs or metabolites can be significantly reduced. Common products are Absolute Detox XXL drink, Absolute Carbo Drinks, Ready Clean Drug Detox Drink, Fast Flush Capsules and Ready Clean Gel Capsules. The second category of products available is in vitro urinary adulterants, which should be added to urine after collection in order to pass a drug test. Stealth, Klear, Clean ADD-IT-ive, Urin-Aid and Urine Luck are urinary adulterants available through the Internet.

A negative result for the presence of abused drugs in a urine specimen does not mean that no drug was present. It is also possible that the amount of drug was below the cut-off values used in the drug testing protocol. Diluting urine is a simple way to beat otherwise positive drug tests if the original concentrations of drugs in the urine are moderate. Use of flushing and detoxification is frequently advertised as an effective mean to pass drug tests. Published reports indicate that Naturally Clean Herbal tea, Golden Seal root and hydrochlorothiazide, a diuretic can cause false negative results due to diluted urine.

Laboratories routinely checks pH, temperature, specific gravity and creatinine of urine to detect validity of specimens. Although adulteration with common household compounds can be detected by this mechanism, the presence of newer urine adulterants like Urine Luck, UrinAid, Klear and Whizzies can not be detected by urine specimen integrity test. Wu et al reported that the active ingredient of "Urine Luck" is 200 mmol/L of pyridinium chlorochromate (PCC). This product may help beat drug tests for marijuana and opiate. Other product "Klear" and "Whizzies" contain potassium nitite and are effective in masking moderate concentrations of marijuana metabolites from detection by immunoassays or Gas chromatography/ mass spectrometry. Stealth consists of two vials, one containing a powder (peroxidase) and another vial containing a liquid (hydrogen peroxide). Both products should be added to the urine specimen. Stealth is capable of producing false negative results using immunoassay methods when marijuana metabolite, LSD and opiate (morphine) were present in the urine at 125-150% of cutoff values.

Glutaraldehyde has also been used as an adulterant to mask urine drug tests (15). This product is available under the trade name of "UrinAid". Glutaraldehyde at a concentration of 0.75% volume can lead to false negative screening results for marijuana test using immunoassays. At higher concentrations (1-2%) amphetamine, methadone, benzodiazepine, opiate and cocaine metabolite tests are also affected.

The presence of nitite, pyridinium chlorochromate and Stealth can be detected in adulterated urine specimen by various spot tests. Recently on-site adulterant detection devices are commercially available. Peace and Tarani evaluated performance of three on-site devices, Intect 7, MASK Ultrascreen and AdultaCheck 4 and concluded that Intect 7 was most sensitive and correctly identified all adulterants. AdultaCheck 4 did not detect Stealth, Urine Luck or Instant Clean ADD-it-ive.

Hair and saliva specimens are alternatives to urine specimens for drug testing. Several products are available for sale through the Internet that claim by washing hair with these shampoos can aid a person to pass a drug test. Saliva samples are also used for drug testing. A mouthwash is available commercially claiming that by rinsing the mouth twice with this product can help a person to beat saliva based drug testing which is often a popular method of testing by insurance companies. However, effectiveness of such products in beating drug tests has not been clearly established by scientific research.

In conclusion, adulterants impose a new challenge in the testing for abused drugs. Routine specimen integrity testing is not adequate to detect the presence of more recently introduced adulterants such as Urine Luck, Klear, Stealth which may effectively masking modest amounts of abused drugs from detection. Intake of herbal cleansing agents and diuretic may also aid a person to beat drug tests by producing diluted urine with reduced concentrations of drugs.

Mr. WHITFIELD. Thank you.

Ms. Kenney, you are recognized for 5 minutes.

TESTIMONY OF JOSEPHINE ELIZABETH KENNEY

Ms. KENNEY. Good afternoon, Mr. Chairman, and members. Thank you for the opportunity to speak before the committee.

The anti-drug-testing products available through the Internet and the detoxification products sold in retail stores I believe are

undermining the efforts of the drug-and-alcohol-testing service agent industry to assist employers in the effective administration of both regulated and non-regulated drug-free workplaces.

In the early days of drug testing for me as a service provider, there were two types of results: negative and positive. That was the 1990's through the mid-1990's. Over time, adulterated, diluted, substituted, invalid and canceled tests became more prevalent. In fact, commencing in the nineties, the industry was essentially forced to change its nomenclature to reflect this new landscape. Positives and negatives became positives, negatives and non-negatives to reflect this change in our very landscape.

The anti-drug-testing product industry is largely responsible for this change. It has become a significant obstacle to the efforts of the drug-and-alcohol-testing industry because it has added a level of complexity that resulted in and has presented additional distracting and unnecessary challenges for employers, third-party administrators, supporting employers, program administration, collectors, test technicians, laboratories, medical review officers and substance abuse professionals.

Historically, there were only a few unusual specimens in the early days of drug testing, when I had my little company in 1990 and on. Adulterations did occur. They were the exception, and although they were a challenge procedurally and administratively, they were not a huge problem programmatically.

The true challenge for me as a service provider, businesswoman and attorney came with the advent of the adulterant nitrite, which results were believed to be the outcome of the availability of the product through the Internet. The nitrite product and products resulted in challenges to the integrity of the testing process that took much time and effort to overcome and actually threatened the very viability and integrity of my business operation.

Since the advent of nitrite adulteration, the drug-and-alcohol-testing industry has been under siege by an explosion of adulteration products marketed through the Internet, detoxification products that encourage over hydration and likely account for the increase in dilute specimens and appliances marketed for the specific purpose of assisting a cheating donor to carry into the collectionsite a substituted or clean specimen.

To this date, 14 States have passed drug-test falsification legislation to address this threat to our effective workplace programs, and those States are Arkansas, Illinois, Kentucky, Louisiana, Maryland, Nebraska, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas and Virginia. The scope of the prohibitions covered by these laws includes attempts to defraud a drug test, manufacturing products intended to defraud a drug test, marketing product intended to defraud a drug test, transporting products intended to defraud a drug test, and under the Illinois statute, manufacturing or providing synthetic human substances that defraud a drug test.

These prohibitions are even generally considered criminal misdemeanors of various degrees. There are a couple of States that have them as class D felonies. They provide a range of fines from $500 to $5,000 and some provide for imprisonment. A couple of States have more serious penalties for a second offense, bringing

the crime up to a felony rather than a misdemeanor and increasing the monetary penalty.

In my opinion, the significant downside to these State legislative initiatives, although they certainly are to be commended, is, one, not enough States have passed legislation that addresses this national problem; and, two, the States do not include language that would enhance their effectiveness and enforceability.

Specifically, a minority of 14 States cannot effectively overcome an issue that is national in scope, and the laws do not have reporting requirements or protection for collectors, test technicians, laboratories, medical review officers and employers or even service agents that discover and report that the law has been violated.

In conclusion, 14 State laws that have inconsistent language and do not address critical reporting and enforcement issues do not adequately address a national objective as important as a drug-free workplace. Only a strong Federal law that addresses reporting and enforceability can do so by curtailing and, over time, overcoming the effects of the anti-drug-testing industry that undercut and subvert the efforts of the drug-and-alcohol-testing industry to assist employers, both regulated and non-regulated, to maintain a drug-free workplace.

Simply put, an industry that negatively impacts on the maintenance of a drug-free workplace must be derailed by effective Federal legislation.

Thank you.

[The prepared statement of Josephine Elizabeth Kenney follows:]

PREPARED STATEMENT OF JOSEPHINE ELIZABETH KENNEY, SENIOR VICE PRESIDENT OF COMPLIANCE, EMPLOYMENT SCREENING SERVICES DIVISION, FIRST ADVANTAGE CORPORATION

INTRODUCTION

The anti-drug testing products available through the Internet and the detoxification products sold in retail stores are undermining the efforts of the Drug and Alcohol Testing Industry Service Agents to assist Employers in the effective administration of both Regulated and Non-Regulated Drug Free Workplace Programs.

DISCUSSION/HISTORY

In the early days of drug testing for me as a service provider there were two types of results: negative and positive (1990 mid 90's). Over time, adulterated, diluted, substituted, invalid and cancelled tests became more prevalent. In fact, commencing in the late 90's, the Industry was essentially forced to change its test result nomenclature over time to reflect the new landscape. Positives and negatives began being referred to as negatives and non-negatives to reflect the number of test results possible.

The Anti-Drug Testing Product Industry is largely responsible for this change. It has become a significant obstacle to the efforts of the Drug and Alcohol Testing Industry because it has added a level of complexity that results and has presented additional, distracting and unnecessary challenges for Employers, Third Party Administrators supporting Employers' program administration, Collectors/Test Technicians, Laboratories, Medical Review Officers, and Substance Abuse Professionals.

Historically, there were only a few unusual specimens in the early days of drug testing. Adulterations did indeed occur. These were the exception, and though a challenge, they were not a huge problem programmatically. The true challenge for me as a Service Provider, Business woman, and attorney came with the advent of the adulterant nitrite, which results were believed to be the outcome of the availability of the product through the Internet. The nitrite product(s) resulted in challenges to the integrity of the testing process that took much time and effort to overcome and actually threatened the very viability and integrity of my business operation. Since the advent of nitrite adulteration, the Drug and Alcohol Testing Indus-

try has been under siege by an explosion of adulteration products marketed through the Internet, detoxification products that encourage over hydration and likely account for the increase in dilute specimens, and appliances marketed for the specific purpose of assisting a cheating donor to carry in to the collection sites a substituted "clean" urinespecimen.

To date, fourteen states have passed drug test falsification legislation to address this threat to effective Drug Free Workplace Programs.

These states include: Arkansas, Illinois, Kentucky, Louisiana, Maryland, Nebraska, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Virginia.

The scope of the prohibitions covered by these laws include attempts to defraud a drug test, manufacturing products intended to defraud a test, marketing products intended to defraud a test, transporting products intended to defraud a test and under the Illinois Statute, manufacturing or providing synthetic/human substances that defraud a drug test. These prohibitions are generally considered criminal misdemeanors of various degrees. They provide a range of fines from $500 to $5,000 and some provide for imprisonment. A couple of states have a more serious penalty structure for a second offense. These statutes designate the crime as a felony rather than a misdemeanor, increase the monetary penalty ($5,000 to $10,000) and increase the possibility of imprisonment (3 to 5 years).

The significant downside to these state legislative initiatives are that not enough States have passed legislation that addresses this national problem and 2) the laws do not include language that would enhance their effectiveness and enforceablility. Specifically, a minority of fourteen states cannot effectively overcome an issue that is national in scope, and the laws do not include reporting requirements or protection for Collectors/Test Technicians, Laboratories, Medical Review Officers, and Employers that discover and report that the law has been violated.

CONCLUSION

Fourteen state laws that have inconsistent language and do not address critical reporting and enforcement issues, do not adequately address a national objective as important as a Drug Free Workplace. Only a strong federal law that addresses reporting and enforceability can do so by curtailing and over time overcoming the efforts of the Anti-Drug Testing Industry that undercut and subvert the efforts of the Drug and Alcohol Testing Industry to assist Employers both Regulated and Non-Regulated to maintain a Drug Free Workplace. Simply put, an Industry that negatively impacts on the maintenance of a Drug Free Workplace must be derailed by effective federal legislation.

Mr. WHITFIELD. Thank you. I want to thank the entire panel for your presentations. We appreciate that very much.

Mr. Moore, you mentioned in your testimony I believe that you were proud of the fact that on certain Web sites now it appears that the manufacturer or the distributors of these products say that they cannot ship into Kentucky. Do most of these Web sites or the packaging of these products say they do not ship into particular States?

I would ask anyone that question.

Mr. MOORE. Representative Whitfield, my experience is a minority of the sites list 14 States that have legislation. In Kentucky, we made the sale and distribution a felony, while the use is a misdemeanor. So I think that that felony designation also probably has some role to play.

Mr. WHITFIELD. So anyone that ships one of these devices or agents into Kentucky would be liable for prosecution for a felony?

Mr. MOORE. Class D felony, yes, sir.

Mr. WHITFIELD. Four or five of you specifically said we need Federal legislation. Is there anyone on this first panel that would disagree that we need Federal legislation?

What about the Federal drug paraphernalia statute? Are any of you familiar with that at all?

That was a bad question.

Mr. CRAMER. Although certainly I am not an authority on it, and we have had some internal debates in our office about whether or not the drug paraphernalia statute would apply to these devices, there is clear language in that statute that goes to products that conceal illegal drugs. But whether the intent of the statute covers this type of concealment, there is some question. So, arguably, it does apply to these products, but the fact that there have been no Federal prosecutions that we found on this indicates to us perhaps that the law enforcers see this differently.

Mr. WHITFIELD. Okay. Then I think the consensus is that we probably need some Federal action.

Dr. Sample and Dr. Captain and Mr. Sims and others that are involved in the testing, if you are not using a dilution processor, a cleansing processor, adulterated process in some way or a device, would there be certain drugs that your tests would not detect?

Mr. SAMPLE. I am sorry, could you repeat that question? You are asking if——

Mr. WHITFIELD. Let's just say they are not using anything to conceal the use of an illegal drug; would there be some drugs, because of compounding or whatever, that you would not be able to detect in your testing process?

Mr. SAMPLE. If you are referring to substances that are added to a urine specimen as opposed to substitution?

Mr. WHITFIELD. No, I am talking about I am on drugs, I am taking a lot of drugs, and I am coming to you for a test. Is there a possibility that your test would not detect particular drugs?

Mr. SAMPLE. Yes, there is certainly that possibility. If you recall the previous testimony there are administrative cutoffs that are applied and a negative drug test does not necessarily mean no drug is present. It could also mean that there are other drugs present that are not included in the panel. So negative does not necessarily mean drug free.

Mr. WHITFIELD. I guess what I am getting at, the technology is such that you feel quite comfortable that you can detect the levels that would present a problem for an individual?

Mr. SAMPLE. Yes, we are very comfortable from a laboratory perspective that if a drug is present at or above the administrative cutoffs, that it can be properly detected and identified and confirmed above those administrative thresholds.

Mr. WHITFIELD. And the three ways that you detect this is the use of hair, saliva and urine; is that correct?

Mr. SAMPLE. Those are the three main specimen types that would be used in workplace drug testing.

Mr. WHITFIELD. What about blood tests?

Mr. SAMPLE. Blood tests are a possibility, although they have a much shorter window of detection than the other specimen types, and it is a much more invasive procedure since it involves sticking a needle in somebody's arm to collect the blood specimen.

Mr. DASGUPTA. If I could make one comment, there are certain drugs like gamma hydroxybutyrate acid, or GHB, we had several cases in our hospital, when a young woman was raped and the specimen was not adulterated, but it is not part of the panel. But, fortunately, the emergency room physician was very conscientious, and we sent it to the ARP laboratory in Salt Lake under the chain

of custody, and they were able to detect that gamma hydroxybutyrate acid.

There is a possibility that in the future the different diagnostic companies that manufacture those kits will sell the amino acid screen for GHB, and a test is already on the market for amino acids which can screen for it. So those are the problems.

Mr. WHITFIELD. Well, I certainly agree with the panel, when you consider the criminal aspects of our legal system relating to the criminal part of our society, and then you consider the workforce, railroad employees, airlines, barge lines, school bus drivers, all of that, you find it difficult to think of any reason why we would allow these products to be in interstate commerce. So I want to thank the panel very much for your testimony today.

I will yield back the balance of my time and, with that, recognize Mr. Stupak for his period of questioning.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. Sims, when I gave my opening, we talked a little bit about drugs coming in this country, and we have been trying to cut down on Internet sales. Have you seen, in your position, increases in prescription drug abuse, even the schedule 1, the marijuana and the cocaine, drug testing?

Mr. SIMS. Mr. Stupak, thank you. It is my experience through my own corporation that I own that I have seen an increase of prescription drug abuse going up. I do see that. I can't correlate that back to Internet sales, for example, but I can see an increase in our own statistics internally within my own corporation that that is becoming a preferred drug.

Right now, through our Federal workplace testing programs, we have narrowed that down to five illegal substances that we normally test for. Well, drug users, of course, of course are smart. They identify and they know those five drugs that are being tested for, and then they spawn off and move to something else.

Mr. STUPAK. Mr. Stephenson, do you want to add anything to that? As to prescription drugs, are you finding the same thing, after the five, they are spinning off to other areas?

Mr. STEPHENSON. Yes, I think we can clearly say we have seen an increase in the presence of prescription drugs. What particular source they are from, we couldn't give you any guidance in that area.

The primary thing with prescription drugs is that you have to focus the drug test on something you intend to try to stop. When we built the program, it was intentionally aimed at the illicit substances and not an attempt to interfere with the practice of medicine. So we steered away from some of the drugs that are now becoming more of a problem, like the prescription drugs, the pain killers and so on.

We are clearly seeing them, and we are seeing them in the drug-test results that go to our medical review officers for review. We would be glad to give you any data we have from any of the surveys or any of the sources.

Mr. STUPAK. The slides we have here, we found from some of the areas coming into the country, that is just the tip of the iceberg then?

Mr. STEPHENSON. Most likely, sir.

Mr. STUPAK. Thanks. I am looking at one of these ads here. We have been on the Internet in preparation of this hearing, our staff has gone through, and I am concerned as to whether any of you have done anything to try to address this.

Here is an add for the original Whizzinator 5000. The reason why I bring this up is to highlight some of the things I said in the opening. Here you have MasterCard, Visa, Discover and—I can't read the other one—American Express. So that is one way you can do it.

Then, of course, if you don't have credit, it says they will take a check or money order. This is Pub Technology. I think you mentioned Puck Technology.

But here is the other part: Shipping, $7.50 priority mail; $12.50 FedEx second day; $27.50 FedEx priority overnight. Have any of you done any legislation, done anything to try to go after credit card companies or these carriers to try to crack down, and is that an approach you think we ought to look at federally?

Ms. REED. From Texas' perspective, I don't know that we have, in relation to the credit cards, the ability to go after them. We would have if we could have when we were investigating Puck Technology. But that was one of the bases for my recommendations, that we really need some Federal legislation.

Mr. STUPAK. Right. Well, you either got to dry up how they are putting the money source, if you will, call it a credit card, or the shipper, if they can't ship. Because I think any legislation we come up, a little bit like Mr. Stephenson says, they will just come up with a different way to get around this thing.

So I am trying to figure out how you do it. It seems like most of them come through, like those slides we showed earlier, through the mail, either through FedEx, UPS, whatever it might be.

I am just trying to figure out how do we stop the flow. It has to either be through the money source or the shipping source.

Ms. REED. I am a great believer that if you take the money away from them, it is going to discourage the flow. Consequently, if you place seizure upon it and you go after the corporations that sell it, you are going to decrease the incentive to do that. If you allow Federal agencies to go after the online providers, you are getting into the big area of concern.

Mr. STUPAK. Since 1998 and 1999, some of us have been trying to go after the internet sites, and unfortunately, we cannot even get the FDA to comment on our legislation. Mr. Walden has some excellent legislation he is working on this year. Maybe all of us can get together and put something together.

One of my concerns is that any new legislation we write to curb the sale of these drug-masking products, many sites will simply go offshore, leave the United States and go elsewhere. Again, it brings up another complication. We see it with prescription drugs all the time.

Do any of you have any concerns that these sites are already or soon will be operating from foreign locations? Have any of you checked that?

No? I take it by the silence and your nodding, no.

If you take a look, going back to this, again, even if you didn't use the credit card, you still have a check or money order, so there

is still a way to get around the credit card. Any suggestions, any further suggestions? You all have written some good legislation. We have 14 States right now, but we have 50 States plus our U.S. Territories and possessions. So there is more we have to do in this area, and we are struggling a little bit on how best do we approach this from a Federal point of view so we can really get at the source. Any comments?

Mr. Sims?

Mr. SIMS. You know, one of the correlating things that we keep coming back to is the shipping, the shipping carriers, and that would be my best approach, if that is something that we need to look at. I mean, especially when you are opening up your photo that you had a moment ago of the U.S. Postal Service. Unfortunately, the logo under it, but it had all the illegal substances shipped in from other countries going through the U.S. mail. So I think that is maybe something we—a different approach we could start looking at, too.

Mr. WHITFIELD. Mr. Moore, you mentioned Highway 64 there, and you said you stop there and see all the shippers, and we had DOT testify a little bit about it, Dr. Captain there. I find it ironic, I mean, FedEx must be one of these that tests, but they use FedEx to move it, to mask the drug testing.

Mr. MOORE. We have found UPS and FedEx to be very cooperative with us in being willing to look at tracking processes and those types of things as we have looked at methamphetamine and pseudoephedrine shipments, for example. But I also would echo the thought that in addition to looking at your criminal penalties, that you also look at civil forfeiture and civil penalties that allow you to be able to go after the money.

Mr. STUPAK. In my opening, we mentioned Google, that they had told us 2 years ago they had cracked down on these sites. I think most of you testified that those of you who have gone onsite, you have seen the explosions. We have tried to stay out of it federally, but I don't know what else we can do, other than actually go after these sites, try to shut it down, go after the shippers, go after the credit cards. I guess your last one is going after the monetary part, maybe RICO or something like that we are going to have to use.

We are just about out of time. I still have a couple of minutes. I am sure this panel wants to leave, but we have votes on the floor. I am going to yield back right now. Thank you all for coming. It was really good testimony. Stay in touch with us, because we are going to have to do something and do it soon.

Mr. WHITFIELD. Chairman Barton, we still have about 4 minutes before a vote, if you would like to ask some questions.

Chairman BARTON. Thank you, Mr. Chairman. You may want to reset the clock. I want to thank this panel for being here. It is not normal that we would have that many people on one panel.

As one of you said, I think the gentleman from Kentucky, people want to treat this as a skit on Saturday Night Live, and it is funny, some of the things that these products are called, but it is not funny that they are used to beat the system.

My first question, generically, is there any legitimate use for any of these products? We are going to have the proprietors on the next panel, the manufacturers, and I am sure they will tell us there are.

Those of you at this panel, is there any real reason to allow these products?

Mr. DASGUPTA. There is one product, Visine eye drops. Visine eye drops, if you add the whole bottle, can mask the drug-testing image, and that is the only legitimate product.

Chairman BARTON. You are saying Visine eyedrops have a legitimate use in your eyes, but not to mask the sample of the urine.

Mr. DASGUPTA. That is correct. You need the whole bottle to mask the drug test. It affects different amino acids differently, but, unfortunately, with the image technology, which is inside the amino acids, it can very effectively mask marijuana and coke metabolite. That is the only product. The rest, no.

Chairman BARTON. I think Mr. Stupak asked this question, or perhaps Mr. Whitfield did, but I just want to reiterate. Do you all support a Federal law that would set Federal standards? Is there anybody that thinks this should be a State issue? We do have 14 States that have passed laws. But this group, you all support Federal legislation?

Let the record show their heads are all nodding yes. That is nine yesses and no noes on that.

Would it be possible to make it illegal to post these products on a Web site, to make the act of posting illegal? Our district attorney from Texas?

Ms. REED. I see all sorts of jurisdictional issues for the Federal Government, as well as perhaps free speech issues.

Chairman BARTON. Right now, the products are not illegal. First, we have to make them illegal. Do you have a constitutional right to free speech to advertise an illegal product?

Ms. REED. I don't know that you do, no.

Chairman BARTON. I don't think you let somebody advertise cocaine.

Ms. REED. Right. But first, if you make them illegal, then you have accomplished what you need to. Then you could do the posting, and the transfer through the mails. The banking industry is probably going to tell you, we don't know what the check is for, so that is going to be difficult, but you could get to the users or the people using these systems over which you have the jurisdiction.

Chairman BARTON. Is this a growing industry? In the absence of Federal legislation, would this industry continue to grow? The fact of doing this hearing is going to publicize to people that didn't even know these products exist, that there is a way to beat the system.

Ms. REED. With the advent of the Internet, you have to have your head in the sand to not know that that is the biggest area of distribution and advertising and product marketing that you have got for people who want to, particularly when they want to do something that they would rather other people not know about. So you don't want to walk into your local K-Mart or something and buy a Whizzinator, because it is pretty obvious, but you might order it.

Mr. SAMPLE. This is indeed a growing problem and a disturbing problem. You have heard testimony about the evolution of these products. It used to be adulterated; now it is invalid. Some of those products that are added to a urine sample are now undetectable, and the worst is these devices. It is going to continue to evolve and

grow and change and get to the point where laboratories and drug-testing programs may not be able to detect the use of these products.

Ms. KENNEY. Yes, you know, I see this as a marketplace issue in part. If you had strong Federal legislation that got at this supply and-demand issue that we have here, and that legislation required reporting of the use of these products in workplace drug testing, and on the front end, you made them illegal and provided sanctions at the front end for the individuals and companies that distribute them.

Chairman BARTON. Who would you require to report it? The tester?

Ms. KENNEY. Anyone involved in drug testing, the employer, the service agent, the medical review officer.

Chairman BARTON. If they catch one of these, they report it.

Ms. KENNEY. If they become aware that adulterant was used, informed by the laboratory, I believe that a reporting structure that is required, mandatory, would really support this initiative.

Chairman BARTON. Would you make it illegal, to go back to our Commonwealth of Kentucky and our district attorney, would you make it illegal to use a device? If you are caught using one, would you double the penalty, if they are already convicted and on parole? Would that be a deterrent to using it?

Mr. MOORE. I certainly would. The issue that many States face is that, with growing confinement costs, the legislatures are anxious to keep the users at a misdemeanor level so that the population in the jails does not continue to explode. But the reality is that those same economic factors, just as we are here now, there is a hearing in my State where we are discussing the number of people that are in the penitentiary system, and yet we are relying on drug testing to tell us that we are policing the behavior of those individuals when we have them in community-based settings.

So, yes, Representative, it is a growing problem, and it is going to continue to be a growing problem, because when we double the number of people we have out on conditional release, those people that are on conditional release are going to be finding a way to beat the system so they can use their narcotics and stay out.

Chairman BARTON. I am told we have a vote on the floor that we need to adjourn to go do, so I am going to have to yield back. But I am going to have some written questions about hair testing and saliva testing and what we need to do to try to help in that area, too. Again, we will try to legislate on this this year. Thank you all.

Mr. WHITFIELD. Thank you, Mr. Chairman.

I want to thank the panel. What we are going to do, we have two votes on the floor. We are going to recess until about 10 minutes until 12, so that will give everyone an opportunity to relax and contemplate this. We will be back at 10 minutes to 12. We will recess until then.

[Brief recess.]

Mr. WHITFIELD. If we could reconvene the first panel, I would appreciate it. Before I recognize Dr. Burgess for his 10 minutes of questions, I think that Mr. Cramer wanted to respond to Chairman Barton's questions, so I will recognize Mr. Cramer.

Mr. CRAMER. Regardless of whether the products that we're talking about here today have legitimate purposes and uses, the fact is that our work showed that these products are being marketed for illegitimate uses. These Web sites, there are scores of them out there, and they are clearly targeting their products to people who use drugs illegally and want to pass a drug test. And it is that intended use of these products that legislation can address. It's like the drug paraphernalia statute. If you have a hypodermic needle and the nurse is using to give it a patient medication, that is perfectly appropriate and legal.

However, if it's being used by a drug addict to inject heroin, that is a possession which is illegal and the same kind of analysis could be applied to these kinds of products.

Mr. WHITFIELD. Well, thank you, Mr. Cramer, for clarifying that. And at this point, I would recognize Dr. Burgess for 10 minutes.

Mr. BURGESS. Thank you, Mr. Chairman. Mr. Cramer, just to go along that same line, what is the possible potential use of the product that we were told is called the Whizzinator? Doesn't seem like it has any other use other than to avoid detection on a drug test.

Mr. CRAMER. It would seem to me that you're right on that.

Mr. BURGESS. And I apologize to the panel for missing some of the testimony. We typically have three or four things scheduled at one time. But Dr. Captain, thank you for being here this morning. The committee would like your help and perspective on statements made by Mr. Robert Baraona, the attorney for Mr. Matt Stephens of spectrum laboratories. Mr. Baraona made these statements on behalf of Mr. Stephens in his capacity as a representative for spectrum laboratories on April 25 in an e-mail with confirmation by letter.

Mr. Baraona discusses personal and private matters that are being invaded by technological advances. He states "previously innocuous or normal acts can now be used by employers, insurance companies or other investigators in order to gain a wealth of information about a person's day-to-day activities." Are any of the things that you are testing for in an employment drug test innocuous or normal acts?

Ms. CAPTAIN. The employee drug tests are designed to detect the use of illegal substances or the inappropriate use of legal substances. And in my opinion, that is neither normal nor innocuous.

Mr. BURGESS. Mr. Baraona further infers that because your analysis to detect drug metabolites and not the drug itself, the urine drug test is, therefore, by definition, inaccurate.

Ms. CAPTAIN. There's never been a study that someone would have drug metabolite in their body fluid of any type without having ingested the drug.

Mr. BURGESS. So just because a urine test looks for metabolites, it doesn't make it an unreliable study?

Ms. CAPTAIN. Correct. The way human physiology works, almost nothing that you ingest directly will leave your body in the same form.

Mr. BURGESS. Well, Mr. Baraona was correct when he stated the urine test can detect substances that were ingested in the past. However, he stated the drug metabolites can be found in the urine

weeks or months later, is that correct, for the common drugs tested? Is what the look-back ability of the urine test?

Ms. CAPTAIN. That is most particularly true for marijuana. If someone is a heavy regular or chronic binge smoker, the metabolite of marijuana can be taken up by the fat cells and then released back into the bloodstream and produce detectable levels in the urine for a long period of time, weeks or possibly months. Most of the other drugs are very water soluble so they are go not going to persist in the system for very long. In terms of being able to determine from a urine drug test whether somebody had a recent use of marijuana or whether they were just a really heavy smoker and quit 30 days ago, you can't determine that from a urine test.

Mr. BURGESS. Would second-hand smoke ever play a role in that if someone were in a household where marijuana was smoked? Would the metabolite be detectable in that otherwise innocent person's urine?

Ms. CAPTAIN. There are two answers to that question. Yes. If someone is subjected to side-streamed smoke, you can, through the use of very good tests, detect the presence of marijuana metabolite. However, the DOT set the screening cutoff level and most employers follow that same administrative cutoff level at a high enough rate that side streamed-smoke should never make you positive for marijuana.

Mr. BURGESS. And as a complete aside, because of the high lipid solubility of the active ingredient in marijuana smoke, there is, perhaps, object lesson in there for people who believe that casual use of marijuana renders them fully capable to perform their functions the following day or days after ingesting that compound, and perhaps we ought to make that information more readily available to our grade school and high school populations, because they are certainly exposed to the contrary argument that you get high once in awhile, it's nobody's business but your own. Mr. Baraona is concerned about human errors and specimen handling protocol and chain-of-custody problems. Is that addressed in both the Federal and general workplace drug testing?

Ms. CAPTAIN. Absolutely. When a donor arrives for a collection, there is a very standard chain-of-custody form and the form is used by all tests regulated by the Department of Transportation. Most employers also use what we call a look alike form and it is nearly identical to the DOT form. It is a multi-paged carbonless form. Every page is bar coded. And the labels that are used to seal and ship the specimens are bar coded. And during the collection process we say, here, look at your paperwork and the numbers on the bar code match up with the shipping labels. Photo identification is required. And the photo identification must be government issued or it can be employer issued if it's for that particular company.

Copies of the chain of custody are distributed to the lab, the employer, the donor, the collector and the medical review officer. The specimen is shipped. It's prepared and packaged in front of the donor, and it's sealed with a tamper-evident label, and it's shipped in this tamper-evident package. When the package is received at the lab, the package is examined by the laboratory to make sure there have been no attempts to tamper with the paperwork and the specimens are double checked to match up. It goes through the

screening process. When the results then come to a medical review office like mine, the first thing we do when we get a result on a lab form is we take our chain of custody and we make sure that the ID numbers of the donor match up. It is usually their Social Security number, but can be any type of ID. And also the specimen number matches up.

So we check the lab result to make sure that the specimen number matches up with the chain of custody form. And we actually have two people that check that before we interview the donor. Then during the donor interview, if the donor has objections or questions or wants to rebut the claim, then we also have a third check before any result goes out to the employer. So along the way, there are many, many steps that protect the integrity of the chain of custody.

Mr. BURGESS. And render the possibility of a false positive that much lower. Well, again, the lawyer expressed concern about not knowing what the actual starting substance of the metabolites were. Is this a problem?

Ms. CAPTAIN. The metabolites we test for have a known starting point. And that's all I can say. We know if you have this metabolite, you ingested this. We don't know of any other substances that look like it, sound like it. For instance, we frequently get the claim they went to the dentist and had Ladacaine given to them, and that's why their drug test is positive for cocaine. It doesn't work that way in human physiology and biochemistry.

Mr. BURGESS. Mr. Baraona states that detoxification products offer protection to individuals concerned with the shortcomings of urinalysis and similar tests and another quote, they afford a level of privacy. What protection do detoxification products offer individuals?

Ms. CAPTAIN. Are you asking do the products work or are they protecting a legitimate right to privacy?

Mr. BURGESS. Presumably protecting a legitimate right to privacy or legitimate right to cleanse oneself of toxins?

Ms. CAPTAIN. Again going back to the fact that employment testing is really trying to detect the use of illegal substances or inappropriate use of legal substances, I don't think they have any place in that.

Mr. BURGESS. And I would agree with you having spent some time on a medical staff myself, I know we have had physicians who have had problems and have gone through rehabilitation and have to submit specimens. And the mere thought that someone could be trying to avoid that process, no pun intended, is absolutely frightening that you could be across the table from another physician in the middle of the night doing an emergency operation and helping someone who, in fact, was impaired and that impairment was not just slipping through the cracks, but actively being manipulated so that that person could continue to practice. It almost seems like premeditated assault or murder.

So thank you very much for your adding to our knowledge this morning, Mr. Chairman. Mr. Dasgupta, let me ask you a question because you brought up the issue of Rohypnol and GABA and the possibility that these things might be missed. Is that something that we need to look at?

Mr. DASGUPTA. Yes. I think we have several tests at our hospital where if the emergency room physician was not very conscientious, we will have missed a criminal activity because a woman was raped, gamma hydroxybutyrate can be very easily prepared from gamma hydroxybutyrolactone, which is not an illegal compound. And it can be passed in a drink and it has no test. It puts the victim to deep sleep. And if she is raped, she will not have any memory of the situation. There is no sign of struggle or any other circumstantial evidence. GHB is a designer drug and illegal drug. And it will be nice to change the rules or something that it cannot be sold. Rohypnol is that benzodiazepine is a hypnotic medication to help people go to sleep. It is legal in Europe and illegal in U.S. because of the report of using it as a date rape drug. Unfortunately it is available in the underground market. And again, those drugs can be purchased from Europe and can be brought illegally to this country, because we have several cases of Rohypnol abuse.

Mr. BURGESS. Are you aware of anyone buying Rohypnol over the Internet and having it shipped to this country?

Mr. DASGUPTA. I have not tried it by myself, but I know it is available and they can ship it to you from Mexico. And one thing which is interesting when I was doing my research on catching those adulterants, Texas did not pass a law so I can buy this product from the spectrum laboratory. But when the State of Texas passed the law, I can no longer buy the product. So I am if there is legislation, it is definitely going to help.

Mr. BURGESS. Thank you, Mr. Chairman.

Mr. WHITFIELD. At this time, I recognize the vice chairman of this committee for 5 minutes—to 10 minutes of questions.

Mr. WALDEN. Thank you very much, Mr. Chairman I appreciate you holding this hearing on this very important issue. Having been on this subcommittee for a couple of years and listening to what goes on in America, I shouldn't be surprised by some of the what I would call nefarious activities and this ranks right up there. We have had hearings on ephedra and have had witnesses testify before the committee, who, it would seem to me, had both convictions for fraud as well as nothing more than a high school diploma, which isn't necessarily bad unless you are the one creating the formula that goes into this stuff and is then marketed to kids who take it in overdose amounts and die. And we had testimony to that effect. And I know that one of the witnesses we subpoenaed, Michael Fichera, owner of Health Choice in New York, was quoted yesterday as saying, why shouldn't he be allowed to detoxify your body if you make a mistake.

As a parent of a teenager and others, I just can't imagine how you sleep at night thinking you may empower somebody to deal with their "mistake" and end up driving a dump truck or some other heavy piece of equipment, maybe a school bus, or be in the operating room and wreak absolute havoc on individuals, and if not certain death.

The products that this subcommittee is investigating have no legitimate purpose from my perspective, other than to deceive and defraud. I think you all made that pretty clear as well. In my home State of Oregon, it's illegal to possess, sell or transport products designed to produce these false drug tests. But I agree, a State-by-

State approach isn't going to get it done, because it just moves to another State. In fact, in Oregon, you can face up to a year in prison. I have been working on legislation with my colleague from Florida, Mr. Davis, called the Safe on-line Drug Act, H.R. 1808. This is trying to get at the problem with Internet sales of various things, various pharmaceuticals, certainly, and just today has been endorsed by both the chain pharmacy drug stores as well as the National Boards of Pharmacy.

What we are trying to do is get at the issue of the money, if you get to the credit card companies and preclude the sale if these legitimate sites, then you can begin to attack this at least in a better manner than we are today. I don't have any questions. I think you have been eloquent in your testimony and certainly enlightened this committee and our staffs about the problem you are trying to address everyday. And hopefully we will see legislation emerge that will treat this as a national problem that it indeed is.

I am just amazed at the amount of money as an employer that is spent by my colleagues who have businesses to make sure everything is on the up and up, and then you have got these jokers making a fortune trying to defraud and deceive.

Mr. WHITFIELD. Mr. Walden, thank you very much. And I want to thank the panel for being with us this morning. We genuinely appreciate your testimony and you have helped us make some decisions about some Federal legislation we may be pursuing. I would also ask Mr. Cramer and Ms. Reed that one of our panel members, Ms. Blackburn, was unable to come back, but she does have three or four questions that she wants to submit to you all in writing. And we will make sure you get these and would appreciate you responding to those in writing. And we will keep the record open for 30 days for that purpose. So with that, we will dismiss this panel and once again thank you for being with us this morning.

Now we will call the second panel, which consists of one person and that is Mr. Josiah Wayne Smith. Mr. Smith is at the Eastern Correctional Institution in Maryland, and he has agreed to join us by teleconference this morning. And so what I'm going to do is, first of all, Mr. Smith, can you hear me okay.

TESTIMONY OF JOSIAH WAYNE SMITH, EASTERN CORRECTIONAL INSTITUTION-ANNEX

Mr. SMITH. Yes, sir.

Mr. WHITFIELD. I want to thank you so much for agreeing to testify before the committee this morning. We genuinely appreciate your cooperation. And I will tell you that this is a committee, it is the Oversight Investigations Subcommittee of Energy and Commerce, and this is an investigative hearing. And when we do this, we have the practice of taking testimony under oath. And do you have any objection to testifying under oath this morning?

Mr. SMITH. No, Your Honor.

Mr. WHITFIELD. The Chair advised you that under the rules of the House and the rules of the committee, you are also entitled to be advised by legal counsel if you so wish. Do you desire to be advised by legal counsel today?

Mr. SMITH. No, sir.

Mr. WHITFIELD. Mr. Smith, if you would please rise and raise your right hand, I will swear you in.

[Witness sworn.]

Mr. WHITFIELD. Mr. Smith, thank you so much, you are now under oath. And it is my understanding that you do reside in the Eastern Correctional Institution Annex in Maryland, and you are here today by video conference. It is my understanding you do not have a prepared opening statement but that you have agreed to answer some questions for us, is that correct?

Mr. SMITH. Yes.

Mr. WHITFIELD. Mr. Smith, you started using illegal drugs at age 13 or 14, is that correct?

Mr. SMITH. Yes.

Mr. WHITFIELD. And how did you pay for those drugs at that young age?

Mr. SMITH. I was engaged as a farmhand and a newspaper boy. That is when I was in school at 13, 14 years old.

Mr. WHITFIELD. And you were using LSD, PCP and marijuana I believe, is that correct?

Mr. SMITH. Yes.

Mr. WHITFIELD. You went on later and used other drugs, more powerful drugs, is that correct?

Mr. SMITH. Yes.

Mr. WHITFIELD. Powder cocaine, rock cocaine and a little heroin, is that correct?

Mr. SMITH. Yes, sir.

Mr. WHITFIELD. How old are you now?

Mr. SMITH. 31.

Mr. WHITFIELD. In your 20's, how did you pay for these drugs that you were using?

Mr. SMITH. Mostly from illegal means. I hustled and whatever. Made some money, stole stuff, sold it. I realized—sometimes I worked two jobs.

Mr. WHITFIELD. I understand you worked at Sam's Club, you unloaded tractors and did farm work. Did you ever have to pass a drug test or take a urine test for any of these jobs?

Mr. SMITH. Yes, sir. I had to take a urine test at Wal-Mart to get employed at Wal-Mart. I had to take a drug test to be an employee at a mattress company.

Mr. WHITFIELD. If you were on drugs, how did you pass these tests?

Mr. SMITH. Through a means of—I bought a test clean product at the GNC. It's an herbal tea that you mix up in a gallon of water and drink 3 or 4 hours ahead of time. Then it flushes your system out.

Mr. WHITFIELD. So there were products like test clean and golden seal and things like that in herbal teas, is that correct?

Mr. SMITH. Yes, your Honor.

Mr. WHITFIELD. Did the person at the counter understand why you were buying this and give you instructions of how to effectively use the product?

Mr. SMITH. That's right. They also come with instructions.

Mr. WHITFIELD. So you simply read them?

Mr. SMITH. Yes.

Mr. WHITFIELD. Did the products work?

Mr. SMITH. Yes. As long as you followed the directions, they worked perfectly.

Mr. WHITFIELD. So you took the test and passed the test and continued working and you continued to use drugs, is that correct?

Mr. SMITH. Yes, sir.

Mr. WHITFIELD. Now did you have any difficulty finding these products?

Mr. SMITH. No. You can find these products in any of the health stores. You can find them in the Internet and also in the head shops.

Mr. WHITFIELD. Now did you know many people other than yourself who used these products?

Mr. SMITH. Yeah. Yeah, that's how I learned about it, from other people.

Mr. WHITFIELD. There are a lot of people out there using them, I take it?

Mr. SMITH. Yeah. I believe so.

Mr. WHITFIELD. Do you feel like your drug use contributed to your criminal record?

Mr. SMITH. Yes, sir.

Mr. WHITFIELD. And right now, why are you in the correctional institution in Maryland?

Mr. SMITH. I'm here for altering a drug test that was a part of my probational period.

Mr. WHITFIELD. So you were in prison and then you were on probation and then you went in for a drug test, and did you get caught cheating on the drug test?

Mr. SMITH. Well, I wasn't in a prison. I was on probation for 2-1/2 years. And during that time, yeah, I was getting tested for urinalysis, drugs and alcohol and due to altering one of the tests, it sent me to prison, yeah, as part of my violation.

Mr. WHITFIELD. So were you using a particular device to pass the drug test on that occasion?

Mr. SMITH. No. That particular time, I give somebody else's urine and because the thermal tape on it didn't read 98 degrees, he could tell it wasn't my urine.

Mr. WHITFIELD. So why didn't you just buy a product instead of using someone else's urine?

Mr. SMITH. I was at work at the time and because of the directions, like I explained the directions, you have to use the test clean 3 to 4 hours and I was at work. I didn't have time to take the product and then give the urinalysis.

Mr. WHITFIELD. Well, Mr. Smith, can you think of any reason why companies would be manufacturing these kinds of products and providing these kinds of substances other than to help people pass a drug test? Can you think of any other legitimate use for any of these products?

Mr. SMITH. I gave that some thought. I mean the only thing I can think of would be somebody that would have a liver disorder or kidney disorder where they would need something to help flush out the impurities, other than that, I could see no use for it.

Mr. WHITFIELD. Well, listen, I want to thank you for taking time to be with us this morning. Is there anyone else on the panel that would like to ask Mr. Smith a question? Mr. Stupak of Michigan,

who is the ranking minority member, would like to ask you some questions, Mr. Smith.

Mr. STUPAK. You said you took a drug test when you applied for employment at Wal-Mart Corporation?

Mr. SMITH. Yes, sir.

Mr. STUPAK. Did you receive that job at Wal-Mart?

Mr. SMITH. Yes, I did.

Mr. STUPAK. After you were an employee, did you do any follow-up drug testing?

Mr. SMITH. No. I wasn't there long enough.

Mr. STUPAK. For your probation officer, the other time, you would have to do the drug testing?

Mr. SMITH. Yes.

Mr. STUPAK. Any other employment opportunities where you took drug testing where it was required for part of the job?

Mr. SMITH. Yes, the mattress store.

Mr. STUPAK. Why would the mattress company require you to have a drug test?

Mr. SMITH. Insurance purposes. Everybody employed must pass a urinalysis before being employed and starting because of workmen's comp to keep their workplace drug and alcohol free.

Mr. STUPAK. Did you deliver goods like mattresses at this mattress place? Were you a driver?

Mr. SMITH. No. I ran a gun. I actually built them.

Mr. STUPAK. This was manufacturing, not delivery?

Mr. SMITH. Yes.

Mr. STUPAK. Besides the herbal tea, did you ever buy any other drug masking agents from GNC, the store?

Mr. SMITH. No.

Mr. STUPAK. Where did you buy other masking agents other than GNC? Did you get them from the Internet? How did you obtain them?

Mr. SMITH. The only way I obtained them was over the counter in the GNC stores. I know that they're available in other places such as the head shops and Internet. I didn't go that route, I went directly to the store.

Mr. STUPAK. So at GNC, the only thing you ever bought there to flush out your system was herbal tea?

Mr. SMITH. Yes, sir.

Mr. STUPAK. No other agents or anything to mask the drugs?

Mr. SMITH. No.

Mr. STUPAK. I have no further questions. Thank you for your answers.

Mr. WHITFIELD. Anyone else on the panel that would like to ask the witness a question? Mr. Smith, I want to thank you so much for joining us this afternoon. We are in the process of trying to make some decisions about Federal legislation to help address this issue and your testimony has helped us a great deal and thank you for cooperating with us very much.

Mr. SMITH. Yes, sir.

Mr. WHITFIELD. At this time, we will call the fourth panel—sorry, the third panel. Mr. Dennis Catalano, Mr. Michael Fichera and Mr. Matt Stephens, we'd ask you to come to the witness table. Mr. Catalano is an owner of Puck Technology. Michael Fichera is

the owner of Health Choice of New York, and Matt Stephens is the owner of Spectrum Laboratories. They are all with us today pursuant to a subpoena. On May 4, 2005, the committee invited these three individuals to voluntarily testify at this hearing, but they declined. On May 11, 2005, the subcommittee authorized subpoenas to be issued to compel their appearance which were subsequently issued by Chairman Barton and served. My understanding is that these witnesses will rely on their constitutional right not to testify at today's hearing. I believe that this privilege, which is the only basis upon which a witness may refuse to cooperate with an inquiry by the House, the people's House of Representatives, should be personally exercised before the members as we have done in the past.

That is why we have insisted on the appearances of Mr. Catalano, Mr. Fichera and Mr. Stephens today. Given the importance of their testimony to this subcommittee's fact finding processes, I would hope that these individuals might reconsider their decision to invoke their fifth amendment rights today and decide to cooperate with this critically important investigation. Mr. Catalano, Mr. Fichera and Mr. Stephens, you are aware that this subcommittee is holding an investigation hearing and in doing so, we have had the practice of taking testimony under oath.

TESTIMONY OF DENNIS CATALANO, PRESIDENT, PUCK TECHNOLOGY; MATT STEPHENS, PRESIDENT, SPECTRUM LABS; AND MICHAEL FICHERA, HEALTH CHOICE OF NEW YORK, INC.

Mr. WHITFIELD. Do any of you have any objection to testifying under oath this afternoon? The Chair also advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do any of you desire to be advised by counsel during your testimony today?

Mr. CATALANO. I do.

Mr. WHITFIELD. In that case, would each of you please identify your counsel for the record.

Mr. CATALANO. My counsel is Barry Boss.

Mr. FICHERA. Gary Orseck.

Mr. STEPHENS. Robert Baraona.

Mr. WHITFIELD. Then at this time, what I would ask the witnesses to do, I want you to stand with me and I want to swear you in for testimony.

[witnesses sworn.]

Mr. WHITFIELD. Thank you. You are now under oath and you may give a 5-minute oral statement for the record if you choose to. Mr. Catalano, do you have a statement?

Mr. CATALANO. I do not.

Mr. FICHERA. I do not.

Mr. STEPHENS. No statement.

Mr. WHITFIELD. Very well. The chairman will recognize himself for questioning of the witnesses. I will start with you Mr. Catalano. What is the intended use of your company's products and does your company market these products for the purpose of subverting lawful drug testing programs?

Mr. CATALANO. On the advice of my attorney, I respectfully decline to answer and invoke my fifth amendment right.

Mr. WHITFIELD. Let me be clear, Mr. Catalano. Are you refusing to answer the questions on the basis of the protections afforded to you under the fifth amendment of the U.S. Constitution?

Mr. CATALANO. I am.

Mr. WHITFIELD. Mr. Catalano, will you invoke your fifth amendment rights in response to all the questions we may ask you today?

Mr. CATALANO. I will.

Mr. WHITFIELD. Then you are excused from the witness table at this time, but I would like to advise you that you do remain subject to the processes of the committee and that if the committee's needs are such, we may recall you at a later time.

Chairman BARTON. Parliamentary inquiry, I understand the witness's right to plead the fifth amendment. I accept that and respect that. But we still are going to ask for records and documentation. And at some point in time, they have to comply with that, is that not correct?

Mr. WHITFIELD. That is correct, Mr. Chairman. We have submitted rather lengthy requests to them in writing and we do expect them to provide that documentation for the record. And it is my understanding that they have provided most of that.

Mr. BARTON. I don't want them to walk out of here thinking they can just come and exercise their constitutional right, which they have every right to do, and not have to—we will get the facts. Just understand that.

Mr. WHITFIELD. Well, I'm glad you pointed that out, Mr. Chairman, and we appreciate you making that point.

Mr. STUPAK. Mr. Chairman, point of order, also those long lines we will do follow-up questions for documentation that we would like to see. So you could expect further questions from this committee to these gentlemen.

Mr. WHITFIELD. Thank you, Mr. Chairman. I think all of you do understand that, of course and we have submitted questions in writing. We may be submitting more questions in writing. You are free to go.

Mr. Fichera, what is the intended use of your company's products and does your company market these products for the purpose of subverting lawful drug testing programs?

Mr. FICHERA. On the advice of council, I respectfully decline to answer based upon the protections afforded me under the Constitution.

Mr. WHITFIELD. Are you refusing to answer the questions on the basis of the protections afforded to you under the fifth amendment of the Constitution?

Mr. FICHERA. Yes, I am.

Mr. WHITFIELD. Will you invoke that fifth amendment right in all questions we may ask you today?

Mr. FICHERA. Yes, I will.

Mr. WHITFIELD. You are also excused from the witness table at this time, but I advise that you do remain subject to the process of the committee and that if the committee's needs are such, then we may recall you. So you are also free to go. My next question is for Mr. Stephens. What is the intended use of your company's prod-

ucts and does your company market these products for the purpose of subverting lawful drug testing programs?

Mr. STEPHENS. Under the advice of counsel, I respectfully decline to comment on that question.

Mr. WHITFIELD. So you are refusing to answer the question on the basis of the protections afforded to you under the fifth amendment of the Constitution?

Mr. STEPHENS. That is correct.

Mr. WHITFIELD. Do you intend to invoke the fifth amendment right in response to any questions we may ask you today?

Mr. STEPHENS. That is also correct.

Mr. WHITFIELD. You are excused from the witness table at this time, but I advise you that you remain subject to the process of the committee and that if the committee's needs are such, then we may recall you at some future time.

Mr. STEPHENS. Thank you.

Mr. WHITFIELD. That will conclude our hearing for today. We are disappointed that the owners of three of these manufacturing companies that produce these products have refused to answer questions and have invoked their fifth amendment protections. We do intend to vigorously pursue this issue. And I expect that you can see the full Energy and Commerce Committee moving forward with legislation on this in the very near future. Thank you for your time. And thank Mr. Stupak and Dr. Burgess and the other committee members for their assistance today in this important hearing. And with that, this hearing is adjourned.

[Whereupon, at 12:35 p.m., the subcommittee was adjourned.]