

9 April 2012

The Honorable Janet Napolitano
Department of Homeland Security
U.S. Customs and Border Protection
799 9th Street, N.W.
Washington, DC 20229-1179

RE: STATEMENT IN OPPOSITION TO DOCKET NO. USCBP-2011-0022, INTERNET PUBLICATION OF ADMINISTRATIVE SEIZURE AND FORFEITURE NOTICES

Dear Secretary Napolitano:

The following organizations representing newspapers interested in public notice hereby provide comments on the instant proposal: *Public Notice Resource Center (PNRC)*, a nonprofit organization that provides research and public education materials on the use of public notice in newspapers; the *Newspaper Association of America (NAA)*, representing nearly 2,000 newspapers and its multi-platform business in the United States and Canada; the *National Newspaper Association (NNA)*, a 2,300 member trade association for community newspapers; and the *American Court and Commercial Newspapers (ACCN)*, an organization of newspapers in the business of publishing court, legal and commercial newspapers.

These groups, individually and collectively, strongly oppose the amendment to *19 CFR Part 162*, titled *Internet Publication of Administrative Seizure and Forfeiture Notices* as proposed by the *Department of Homeland Security* (the “*Department*” or *DHS*) to require the *U.S. Customs and Border Protection (CBP)* to post seizure and forfeiture notices of property valued at more than \$5,000 on www.forfeiture.gov. In summary, our opposition is based on these views:

- Overall, any Internet notice is an inadequate substitute for a printed, fixed newspaper notice, although our organizations believe the Internet should be actively used by the *CBP* and newspapers to extend the reach of printed notices. The newspaper industry has already made substantial investments in making sure public notice is available through industry websites, so the public can find notices both in print and online without losing the many advantages of a fixed, hard-copy notice.
- Government Internet sites do not have a strong readership. Public notice in a newspaper, particularly when supplemented by a newspaper website, is more likely to be read than notices on a government Internet site. A comparison with the government’s site with just one newspaper that is commonly used for public notice, *USA Today*, illustrates the differences in the outreach to citizens. *USA Today* operates on a scale far above www.forfeiture.gov. (See Appendix A). Industry experience indicates that when notices are targeted to geographic areas most involved in the subject matter of the notice, the local newspaper—with its print and website readership—typically far outstrips government sites in reaching readers.

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- Access to the Internet remains limited. Many in poor, minority and senior communities cannot readily view Internet notifications.¹ Disability or illness also hinders viewing Internet notifications. Research shows that the infirm are substantially less likely to use the Internet.²
- Internet site-only notifications create due process problems for reviewing courts, historians, researchers and archivists. Web publications are difficult to archive and maintain in updated fashion without ongoing funding, whereas printed public notice is fixed in form and time and leaves no doubt as to its authenticity.
- The *Department* has no way to ensure the *CBP* will be appropriated adequate resources to maintain forfeiture notices in a digital fashion that permits them to supplement printed, fixed notices. Indeed, the President has already announced last year that many federal government websites will be eliminated for budget reasons.³
- The *Department's* rationale for the proposed regulation does not factor in the cost and resources the *CBP* will have to allocate to constantly update, verify, manage, and secure the notice information on www.forfeiture.gov. In fact, the *CBP* believes it will be “virtually cost-free.”⁴ Government websites—including the *Department of Justice's* (“*DOJ*”)—have been attacked and temporarily removed, exposing security and accessibility issues.⁵
- The *Department's* proposed regulation leaves substantial doubt about the manner and method of providing notice. The proposal leaves the public with potentially large gaps in public information.

I. GOVERNMENT INTERNET SITE NOTICES ARE INEFFECTIVE

A. Low Government Internet Site Readership Fails to Ensure Maximum Government Transparency and Accountability

¹ Even in communities with wide broadband coverage, such as Kansas City, Kansas where Google recently announced plans to bring the entire city online, income disparities bar many from using digital media. “At least one in five Kansas City households, maybe as many as one in four, live entirely offline, “Google project could widen gap in Kansas City between computer haves and have not,” *Kansas City Star*, 30 March 2012.

² “Americans living with disability and their technology profile,” Pew Research Center (Jan. 21, 2011), <http://www.pewinternet.org/Reports/2011/Disability.aspx>.

³ “Federal Government to delete half its websites,” *L.A. Times* (June 15, 2011).

⁴ “In 2010, CBP spent over \$1 million advertising more than 6,000 lines of property. Under this rule, CBP would advertise the vast majority of items using the *DOJ* website, which would be virtually cost-free. *CBP* would advertise only a small number of items both on the Internet and in a traditional newspaper or other publication. Because these items will be the highest profile items, *CBP*, will likely advertise these items in large circulations or national newspapers. Such advertising will make up a disproportionate amount of the costs. We estimate that it will cost \$300,000 to continue to advertise these items in print. Therefore, we estimate that advertising on the Internet instead of in print for most items will save the government approximately \$700,000 per year.” Internet Publication of Administrative Seizure and Forfeiture Notices from Department of Homeland Security, 19 CFR Part 162 (proposed Feb. 9, 2012).

⁵ “10 Sites Skewered by Anonymous Including FBI, DOJ, US Copyright Office,” *Time* (Jan. 20, 2012).

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The point of public notice is to place information in places where people not necessarily looking for it are likely to find it, which ensures maximum government transparency and the ability of the public to hold the government accountable. Under the *Department's* proposed regulations, the *CBP* would be required to utilize the *DOJ's* forfeiture website, located at www.forfeiture.gov, to post seizure and forfeiture notices for property appraised in excess of \$5,000 in value for 30 consecutive days instead of publishing these notices in newspapers. The proposed regulation fails to consider that the forfeiture website does not have a large following when compared to a daily or weekly newspaper. The *Department* fails to cite any studies or reports that indicate that www.forfeiture.gov has a following that would justify replacing newspapers as the means of distributing notice. The proposed rule does not indicate that the agency has carried out any studies of the relative traffic on its own website versus that of the newspapers that now typically post notices, nor done any comparison of the total readership of www.forfeiture.gov to the combined newspaper audiences.

The *Department* may not be aware of research by the *Pew Center for the Internet and American Life* (*Pew Research Center*), an independent, non-partisan public opinion research organization that studies attitudes toward politics, the press, and public policy issues. In 2010, the *Pew Research Center* released its findings that only 40% of adult users have researched online for raw data about government spending and actions.⁶ Although this same study found that visits to government Internet sites from the general public are slowly growing, this study did not examine any research specific to the Internet sites that may be visited for public notice searches. Even at a 40% audience level, it must be recognized that studies that measure government Internet site searches covers a generic search that includes thousands of government topics and government Internet sites, resulting in an audience viewership percentage that greatly overstates the potential for public notice audiences. It is also unclear whether unique visitor totals for government websites are able to filter out those users who visit the website for their government work—agency employees, contractors and other stakeholders. If they do not, readership by the citizenry is likely even lower.

CBP is not in the business of building readership for www.forfeiture.gov. Just as the *CBP* does not have expertise in designing and building high tech-surveillance equipment for border protection, so it outsources to contractors. The *CBP* does not have expertise in building audiences, so it outsources forfeiture notices to newspapers. It is in a newspaper's interest to have and continue to build a strong following of readers, both in print and on the Internet. They develop these readerships at great marketing costs. The *CBP*—particularly in today's tight fiscal environment—has little motivation to allocate scarce financial resources to advertise, promote, or expand the readership for www.forfeiture.gov; the burden of finding the government notice is on the citizen. It is unreasonable to expect a citizen to be on the hunt for information that may affect him as immediately and intimately as losing property rights. Newspapers are a better choice for public notice given their much broader reach.

Moreover, local newspapers are circulated consistently within a timeframe and delivered to a defined geographical area. Most people turn to their local newspapers for current

⁶“Government Online,” *Pew Research Center* (April 27, 2010), <http://pewinternet.org/Reports/2010/Government-Online.aspx>.

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developments in their community and then they find the notices. The website www.forfeiture.gov cannot easily equal the same traffic because its updates are infrequent, and the general public has to proactively visit www.forfeiture.gov, a burden not likely to be accepted by citizens.

Finally, one of the major purposes of posting forfeiture notices in newspapers is to generate public awareness of items to be auctioned in the future. Public awareness is important to generating interested bidders. It is in the *CBP's* interest, as well as the interest of the original property owner to expose the property to a large audience in order to obtain the highest value for the seized property during the bidding process. It is also in the *CBP's* interest to auction the property as quickly as possible, so the *CBP* does not have to retain storage or maintain the property, which itself saves money. *CBP* did not calculate financial *savings* associated with forfeiture notices being published in local newspapers. Newspapers publish notices in print and generally also on their websites; therefore, more people are likely to receive the notice.

B. Key Stakeholders May Be Disenfranchised

In addition to reaching potential bidders, public notice serves those whose property may have been wrongfully seized, or friends, relatives, creditors and business partners of persons who may hold rightful title in property seized from a suspect. Further, it is safe to suggest that property stakeholders can be jailed or imprisoned, patients in hospitals, or otherwise infirm or unable to gain access to the Internet. If the information is printed in a newspaper in the area where the property is seized, there is a better chance an interested property stakeholder will find it or learn about the forfeiture proceeding from a member of the community. Not only is it reasonable to assume that friends and family may read local newspapers, it is foreseeable that other parties may notice a particular property stakeholder's name and assist with the recovery of property.

C. Minorities, Senior Citizens, the Underprivileged, Disabled and Ill Will Be Disenfranchised

Survey after survey has shown that particular classes will be disenfranchised if notices are solely placed on Internet sites because certain classes are less likely to have access to the Internet. A recent survey by *George Washington University School of Media and Public Affairs* found that people over 60 years of age face a substantial digital divide with people that are younger.⁷ The *Pew Research Center* found that only 26% of the people they surveyed that were 65 years or older used the Internet.⁸ Also, *MediaPost*, a leading news and research resource for media, marketing and advertising professionals, released a survey showing only 4/10 of minorities regularly used the Internet.⁹ The evidence is overwhelming that if the *CBP* is granted

⁷ "Citizen Use of Digital Media to Connect with Government Yields a Mixed Picture," *George Washington University School of Media and Public Affairs* (October 27, 2010), <http://smpa.gwu.edu/news/articles/229>.

⁸ "Older Adults and Social Media," *Pew Research Center* (April 27, 2010), <http://www.pewinternet.org/Reports/2010/Older-Adults-and-Social-Media.aspx>.

⁹ "Minorities Agree on Importance of Web; Only 4/10 Regularly Use," *MediaPost* (Jan. 10, 2010), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=120354&passFuseAction=PublicationsSearch.showSearchResults&art_searched=minority&page_number=0.

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the authority to post forfeiture notifications only on www.forfeiture.gov, minorities and senior citizens will disproportionately suffer.

Further, property stakeholders' economic classifications are very diverse—ranging from wealthy to poor. The *Kansas City Star* last month published an article, “*Google project could widen gap in Kansas City between computer haves and have nots,*” about someone's computer being seized after falling behind on rent during a jobless spell.¹⁰ Thereafter, this person had problems locating a community computer to access the Internet. With many still recovering from the great recession in the United States, the story in the *Kansas City Star* is a reflection of the hundreds of thousands of people that have fallen on economic hardship. Public notice must be kept in newspapers so people from all economic classifications can access it.

Under the *Department's* proposed regulations, a property stakeholder could receive forfeiture notices only by a government Internet site posting. The rule would require property stakeholders to have basic technical skills and access to a costly computer. If a property stakeholder is without even one of those requirements, the property stakeholder will not receive notification of his or her property being forfeited—a harsh penalty, especially since the notification will provide very specific and highly important information.

A survey conducted by the *Pew Research Center* found that Americans who live with a disability or illness struggle to gain access to the Internet.¹¹ One might easily posit that the disabled or ill struggle with the technical skill or aptitude to sort out Internet information, to make their computers work properly or to maintain Internet connections. Putting additional barriers in their paths by requiring disabled or ill property stakeholders to do what they cannot in order to find the information they need to prevent loss of property rights is counter intuitive. In other words, if the property stakeholders are the very people who will not have access to information concerning their property being forfeited, the purpose of public notice is utterly defeated.

D. The Rural Will Be Disenfranchised

Even if a property stakeholder has access to a computer, the next hurdle is having access to the Internet. In February 2011, the *Department of Commerce's National Telecommunications and Information Administration*, released the “Digital Nation Expanding Internet Usage” report that shows many rural areas use dial-up connections because broadband is unavailable.¹² Broadband provides faster access to the Internet, downloading documents, and Internet sites and is preferred over dial-up Internet access. People who use dial-up often find that connecting to the Internet can be time consuming; and once connected, downloading Internet sites or documents is painstakingly slow and the Internet connection can often end abruptly if someone

¹⁰ *Google project could widen gap in Kansas City between computer haves and have nots,* *Kansas City Star*, 30 March 2012.

¹¹ “Americans living with disability and their technology profile,” Pew Research Center (Jan. 21, 2011), <http://www.pewinternet.org/Reports/2011/Disability.aspx>.

¹² “Digital Nation Expanding Internet Usage,” Department of Commerce's National Telecommunications and Information Administration (February 2011), http://www.ntia.doc.gov/reports/2011/NTIA_Internet_Use_Report_February_2011.pdf.

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calls in on the telephone line. Another study, issued by the *United States Department of Agriculture* titled, “Farm Computer Usage and Ownership,” reported that 41% of U.S. farms are without Internet access.¹³ Whether the rural area has dial-up or no access, both are large barriers to receiving Internet notices.

E. Public Resources Cannot Provide the Disenfranchised With Internet Access

Some mistakenly assume property stakeholders can always gain Internet access to notifications through local libraries and community centers. This rationale ignores the reality that libraries and community centers have limited—some extremely limited—hours of operation and those locations operate at the pleasure of the local or state governments—not the federal government.

With poor economic conditions causing local and state governments to collect less tax revenue, many libraries are forced to reduce their hours of operation or permanently cease operation altogether. Also, libraries and community centers have limited budgets and can only purchase and maintain a limited number of computers. Long lines and limited hours of operation will not provide a property stakeholder with an adequate opportunity to access notices.

II. GOVERNMENT INTERNET SITE POSTING OF NOTICES IS NOT VALID PUBLIC NOTICE

Our organizations find that in the long tradition of public notice there are four elements that mark a valid notice. The notice must be published from an independent party, the publication must be archivable, the publication must be accessible, and the publication must be verifiable. If any one of these elements is absent, the public loses.

A. Public Notice Must Be Published By An Independent Third Party

A public notice must be published in a forum independent of the government, typically in a local newspaper. An independent and neutral third party has an economic and civic interest in ensuring that the notice law is followed. The *Department’s* proposed rule removes the independence of a third party because the *CBP* will have to publish forfeiture notifications on www.forfeiture.gov, a government Internet site. Allowing the *CBP* to self-publish will lead to the general public—more specifically, property stakeholders—losing an extra layer of confidence in the notice that having an independent publisher provides.

B. Public Notice Must Be Archivable

A public notice must be archived in a secure and publicly available format. The *Department’s* proposed rule simply requires, “...to post seizure and forfeiture notices for property appraised in excess of \$5,000 in value **for 30 consecutive days.**” After the expiration of the 30 consecutive days, in theory, the *Department* turns to the *National Archives and Records Administration (NARA)* to archive information.

¹³ “Farm Computer Usage and Ownership,” United States Department of Agriculture (August 2009), [URL?].

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Numerous newspaper reports, however, have indicated that the *NARA*'s electronic records archives program is behind schedule and will cost substantially more than originally budgeted.¹⁴ Additionally, there is great concern that the *NARA* may abandon some of its archive responsibilities because of the pressure to reduce spending at the federal government level. "The cost of building a digital system to gather, preserve and give the public access to the records of the federal government has ballooned as high as \$1.4 billion, and the project could go as much as 41 percent over budget"¹⁵ If the *NARA* comes under pressure to reduce its archiving obligations, in order to reduce costs, public notice may not be high on the *NARA*'s priority list for preservation; therefore, some public notice could be lost forever.

Further, if the *DHS* temporarily archives the notices until releasing them to the *NARA*, there is a chance the notices will be lost. "Agencies have struggled to meet statutory requirements for maintaining their records, failing about 95 percent of the time, according to a *NARA* estimate based on agency self-assessment."¹⁶ A public notice published in a newspaper, however, is easily archivable, and can be archived now, in several different places, without wait. Newspapers are typically archived both by their publishers and by libraries, where they can be easily retrieved for years after the date of publication.

C. Public Notice Must Be Accessible

A public notice must be capable of being accessed by all segments of society. As discussed above, it is not just a question of physical access but also economic means. Property stakeholders that are without notice of forfeiture auctions will lose complete financial interest in their property.

Further, within the past six months, federal government websites have been under attack by hackers, such as Anonymous.¹⁷ These attacks have temporarily removed websites from the Internet, exposing access problems for users who want to visit the website at time of attack. If the *DOJ*'s main website was attacked earlier, www.forfeiture.gov may become a target because www.forfeiture.gov is also a *DOJ* managed website.

D. Public Notice Must Be Verifiable

The public and the source of the notice are able to verify that the notice was published and not altered once published. In a newspaper notice, an affidavit is provided by the publisher, which can be used in an evidentiary proceeding to demonstrate that a true copy was published as well as the exact wording that was used. It is difficult and costly to provide authentication of

¹⁴ McDonough, Frank, "NARA's digital archive falters as others soar," *Federal Computer Week* (Feb. 22, 2011), <http://fcw.com/articles/2011/02/28/comment-frank-mcdonough-digital-archives.aspx>.

¹⁵ Rein, Lisa, "Cost to build digital archive could hit \$1.4 billion," *Washington Post* (Feb. 6, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/06/AR2011020603944.html>.

¹⁶ Marks, Joseph, "Archives crowdsources advice on federal e-records management," *NextGov* (March 27, 2012), http://www.nextgov.com/nextgov/ng_20120327_7308.php?oref=topnews.

¹⁷ "Hackers Claim Responsibility for Temporarily Felling CBS.com After Attacking DoJ Site," *National Journal* (Jan. 23, 2012).

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Internet site publications because Internet sites can be and often are edited after initial publication and it becomes virtually impossible to prove that any stakeholder witnessed any particular element of an Internet site at any given time. For the federal government, the *Government Printing Office* has developed a public key system to certify documents, but the system is expensive, and even it raises doubts about authenticity from time to time. Even when the federal government—more specifically, the *CBP*—is the sole party both verifying that the notification was drafted correctly, published correctly, not edited once published, and posted on www.forfeiture.gov—the system has not yet matured to one that provides complete confidence. And having the government verify its own work deprives the public of the independent review of a publisher.

Validation keys may be used to guarantee authenticity, but consistent application of them creates an expense that offsets any nominal savings that an agency may assume it can claim from not printing public notice. Many federal websites that purport to carry public notice do not employ validation technology, and the technology that is used often fails to identify a trail of authorship.

III. THE DEPARTMENT'S JUSTIFICATION FOR THE PROPOSED INTERNET PUBLICATION IS FLAWED

The justification for the *Department's* proposal is to provide the *CBP* with a more cost effective option to publish forfeiture notifications. The *Department* specifically cites that in 2010, the *CBP* “spent over 1 million advertising more than 6,000 lines of property.”¹⁸ Further, the *Department* believes that using www.forfeiture.gov to advertise would be “virtually cost-free.” Nothing, however, is ever cost-free. The *Department* fails to disclose whether it has considered the full cost of operating, maintaining, and archiving forfeiture notifications when using a government Internet site and there is no indication the *Department* has fully evaluated the substantial marketing expense to attract an audience. Moreover, the *Department* has not calculated the financial *savings* associated with forfeiture notices being published in local newspapers.

Some state governments have also wrongly believed that publishing notices on the Internet saves taxpayers money, but in reality, posting notices on state government Internet sites costs taxpayers more and places an additional legal burden on governments. In Utah, the legislature briefly believed that a state-owned website would provide adequate public notice for the state's four largest cities by passing legislation in 2008 to eliminate newspaper notice. But in 2010, the legislature reversed course and repealed its 2008 law before a state website was in operation. Also, within the past year, Arizona, Florida, and Tennessee considered posting public notice on state government websites instead of using independent newspapers; however, after careful consideration, none acted. Public notice remains in newspapers.

The *undersigned organizations* recognize the time and effort the *Department* has dedicated in drafting proposed regulations to address the growing issue of people using the Internet for

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information as opposed to newspapers. We believe that more information is always better information, and we do not oppose encouraging the *CBP* to provide public information in a variety of venues, in addition to newspapers. But the official record notice should remain in newspapers for the reasons stated above.

In conclusion, newspaper notifications are the best form of public notice. They provide notifications that are independent, archivable, accessible, and verifiable. This form of notification is important because newspaper notices are not lost with technological changes, and their content is fixed in form and time so due process is satisfied. Information on government Internet sites is desirable and a valuable supplement to the public record. But the time has not yet arrived when any Internet site—public or private—can supplant printed newspaper public notice. Moreover, newspapers are in the best position to draw readership for both print and digital distribution.

The *PNRC*, *NNA*, *NAA*, and *ACCN* appreciate the *Department's* consideration of their views with regards to proposed notice provision. For the foregoing reasons stated hereinabove, the *PNRC*, *NNA*, *NAA*, and *ACCN* respectfully request that the *Department* revise the proposed regulation.

If you have any questions, please call (703) 237-9806 or email me at info@pnrc.net.

Sincerely,

Mark W.C. Stodder
President
Public Notice Resource Center

Chris Mobley
President
American Court and Commercial Newspapers

Reed Anfinson
President
National Newspaper Association

Sophia Cope
Director, Government Affairs/Legislative Counsel
Newspaper Association of America

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APPENDIX A

The following data were captured in a search through the website Compete.com on March 28, 2012.

