United States Government Accountability Office

GAO

Testimony

Before the Special Committee on Aging, U.S. Senate

For Release on Delivery
Expected at 10:00 a.m. EDT
Thursday, September 7, 2006

GUARDIANSHIPS

Little Progress in Ensuring Protection for Incapacitated Elderly People

Statement of Barbara D. Bovbjerg, Director
Education, Workforce, and Income Security

GAO-06-1086T

September 7, 2006

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Highlights

Highlights of GAO-06-1086T, a testimony before the Special Committee on Aging, U.S. Senate

GUARDIANSHIPS

Little Progress in Ensuring Protection for Incapacitated Elderly People

Why GAO Did This Study

The Senate Special Committee on Aging asked GAO to follow up on its 2004 report, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655. This report covered what state courts do to ensure that guardians fulfill their responsibilities, what exemplary guardianship programs look like, and how state courts and federal agencies work together to protect incapacitated elderly people. For this testimony, GAO agreed to (1) provide an overview and update of the findings of this prior work; (2) discuss the status of a series of recommendations GAO made in that report; and (3) discuss the prospects for progress in efforts to strengthen protections for incapacitated elderly people through guardianships.

To complete this work, GAO interviewed lawyers and agency officials who have been actively involved in guardianship and representative payee programs, and spoke with officials at some of the courts identified as exemplary in the report.

What GAO Recommends

GAO is making no new recommendations in this testimony.

What GAO Found

GAO's 2004 report had three principal findings. First, all states have laws requiring courts to oversee guardianships, but court implementation of these laws varies. Second, those courts recognized as exemplary in the area of guardianships focused on training and monitoring. Third, there is little coordination between state courts and federal agencies or among federal agencies regarding guardianships. At present, these findings remain largely the same, but there are some new developments to report. Since GAO's report was issued, some states have strengthened their guardianship programs. For example, Alaska established requirements for licensing of private guardianships and New Jersey and Texas established requirements for the registration of professional guardians. However, there continues to be little coordination between state courts and federal agencies or among federal agencies in the protection of incapacitated people.

GAO's report made recommendations to federal agencies, but to date little progress has been made. GAO recommended that SSA convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although VA, HHS, and OPM indicated their willingness to participate in such a study group, SSA disagreed with this recommendation, and its position has not changed. Second, GAO recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. HHS did support a study that surveyed the status of states' guardianship data collection practices. HHS also supported a National Center on Elder Abuse survey of adult protective services agencies to collect information including the extent to which guardians are the alleged perpetrators or the sources of reports about elder abuse. Third, GAO recommended a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments. A National Conference of Commissioners on Uniform State Laws, held in July of this year, issued a discussion draft for a uniform state law addressing these issues.

Following issuance of GAO's 2004 report, a joint conference of professional guardianship organizations agreed on a set of action steps to implement previously-released recommendations from a group of experts on adult guardianship, known as the Wingspan recommendations. Among other things, these action steps call for licensing, certifying, or registering professional guardians.

www.gao.gov/cgi-bin/getrpt?GAO-06-1086T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Barbara Bovbjerg at (202) 512-7215 or bovbjergb@gao.gov.

Mr. Chairman and Members of the Committee:

I'm pleased to be here today to discuss guardianships for the elderly. As people age, some become incapable of caring for themselves and must rely on a guardian—a person or entity appointed by the court to make decisions for them.[1] Despite existing safeguards, there continue to be instances where some guardians have taken advantage of the elderly people they were supposed to protect. Such cases of abuse and neglect have prompted questions about the oversight of guardianship programs.

In 2003, the Senate Special Committee on Aging asked GAO to study guardianships for the elderly, and the results of our work appeared in a 2004 report.[2] This work covered what state courts do to ensure that guardians fulfill their responsibilities, what exemplary guardianship programs look like, and how state courts and federal agencies work together to protect incapacitated elderly people. I am here today to (1) provide an overview and update of the findings of this work; (2) discuss the status of a series of recommendations GAO made in that report; and (3) discuss the prospects for progress in efforts to strengthen protections for incapacitated elderly people through guardianships.

To do this work, we reviewed changes in guardianship statutes nationwide since our 2004 report, interviewed lawyers and agency officials who have been actively involved in guardianship and representative payee programs, and spoke with officials at some of the courts identified as exemplary in our previous report. Our work for the 2004 report involved similar interviews, as well as surveys of courts in the three states with the largest elderly populations: California, New York and Florida. For the report we visited courts in eight states and we interviewed federal officials responsible for representative payee programs. We conducted our review in accordance with generally accepted government auditing standards.

In summary, our 2004 report noted that some state laws and some courts provide more protection for incapacitated elderly people than others. State laws have varied requirements for monitoring guardianships and

[1] For convenience, we use the term "guardian," though some states use other terms. California, for example, uses the term "conservator" when the incapacitated person is an adult.

[2] GAO, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (Washington, D.C.: July 13, 2004).

court practices in the states we visited also varied widely. Coordination among federal agencies and courts was quite limited and on a case-by-case basis. Since our report was issued, some states have strengthened their guardianship programs and some efforts have been made to lay the groundwork for better collaboration. However, according to guardianship professionals, states and federal agencies have made only limited progress in improving guardianships. Some states, including Texas, New Jersey, and Wisconsin, adopted guardianship reform legislation that should help strengthen protections for people under guardianships in those states. Federal agencies administering benefit programs appoint representative payees to manage the benefits of incapacitated individuals. Our study found there is a lack of systematic coordination among the federal agencies and between federal agencies and the courts. In some cases, this may weaken protections for vulnerable incapacitated people.

Our report made recommendations to federal agencies, but to date little progress has been made. We recommended that the Social Security Administration (SSA) convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although the Department of Veterans Affairs (VA), Department of Health and Human Services (HHS), and the Office of Personnel Management (OPM) indicated their willingness to participate in such a study group, SSA disagreed with this recommendation. We checked with SSA recently, and its position has not changed. Second, we recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. HHS did support a study that surveyed the status of states' guardianship data collection practices. HHS also supported an effort to include in a survey of adult protective service agencies information about the extent to which guardians are the sources of reports about elder abuse or the alleged perpetrator. We also recommended a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments. A National Conference of Commissioners on Uniform State Laws, held in July of this year, issued a discussion draft for a uniform state law addressing these issues.

Following issuance of our report, a joint conference of professional guardianship organizations agreed on a set of action steps to implement

previous recommendations made at the Second National Guardianship conference, known as the Wingspan recommendations.[3] Although only modest progress has been made overall, there are a few bright spots. For example, the Wingspan recommendations call for the licensure, certification, or registration of professional guardians. Several states now have such programs and in the last couple of years Texas and New Jersey have been added to the list of states that have such requirements for some guardians.

Background

The number of people age 65 and older will nearly double in the U.S. by the year 2030 to 71 million. Over time, some elderly adults become physically or mentally incapable of making or communicating important decisions, such as those required to handle finances or secure their possessions. While some incapacitated adults may have family members who can informally assume responsibility for their decision-making, many elderly incapacitated people do not. In situations such as these, additional measures may be necessary to ensure that incapacitated people are protected from abuse and neglect.

Several arrangements can be made to protect the elderly or others who may become incapacitated. A person may prepare a living will, write advance health care directives, appoint someone to assume durable power of attorney, or establish a trust. However, such arrangements may not provide sufficient protection. For example, some federal agencies do not recognize durable powers of attorney for managing federal benefits. SSA will assign a representative payee for an incapacitated person if it concludes that the interest of the incapacitated beneficiary would be served, whether or not the person has granted someone else power of attorney. In addition, many states have surrogacy healthcare decision-making laws, but these alternatives do not cover all cases. Additional measures may be needed to designate legal authority for someone to make decisions on the incapacitated person's behalf. To provide further protection for both elderly and non-elderly incapacitated adults, state and local courts appoint guardians to oversee their personal welfare, their financial well-being, or both. The appointment of a guardian typically means that the person loses basic rights, such as the right to vote, sign

[3] The second national guardianship conference, known as the "Wingspan Conference" was held at the Stetson University College of Law in Florida on November 30 to December 1, 2001.

contracts, buy or sell real estate, marry or divorce, or make decisions about medical procedures. If an incapacitated person becomes capable again, by recovering from a stroke, for example, he or she cannot dismiss the guardian but, rather, must go back to court and petition to have the guardianship terminated.

The federal government does not regulate or provide any direct support for guardianships, but courts may decide that the appointment of a guardian is not necessary if a federal agency has already assigned a representative payee—a person or organization designated to handle federal benefits payments on behalf of an incapacitated person. Representative payees are entirely independent of court supervision unless they also serve their beneficiary as a court-appointed guardian. Guardians are supervised by state and local courts and may be removed for failing to fulfill their responsibilities. Representative payees are supervised by federal agencies, although each federal agency with representative payees has different forms and procedures for monitoring them. Each state provides its own process for initiating and evaluating petitions for guardianship appointment. Generally, state laws require filing a petition with the court and providing notice to the alleged incapacitated person and other people with a connection to that person.

In many cases, both courts and federal agencies have responsibilities for protecting incapacitated elderly people. For federal agencies, a state court determination that someone is incapacitated or reports from physicians often provide evidence of a beneficiary's incapacity, but agency procedures also allow statements from lay people to serve as a sufficient basis for determining that a beneficiary needs someone to handle benefit payments on their behalf—a representative payee. SSA, OPM, and VA ask whether the alleged incapacitated person has been appointed a guardian and often appoint that person or organization as the representative payee. In some cases, however, the agencies choose to select someone other than the court-appointed guardian.

In many cases, guardians are appointed with a full range of responsibilities for making decisions about the incapacitated person's health and well-being as well as their finances, but several states' laws require the court to limit the powers granted to the guardian, if possible. The court may appoint a "guardian of the estate" to make decisions regarding the incapacitated person's finances or a "guardian of the person" to make nonfinancial decisions. An incapacitated person with little income other than benefits from SSA for example, might not need a "guardian of the estate" if he or she already has a representative payee designated by SSA

to act on their behalf in managing benefit payments. Sometimes the guardian is paid for their services from the assets or income of the incapacitated person, or from public sources if the incapacitated person is unable to pay. In some cases, the representative payee is paid from the incapacitated person's benefit payments.

Guardians and representative payees do not always act in the best interest of the people they are appointed to protect. Some have conflicts of interest that pose risks to incapacitated people. While many people appointed as guardians or representative payees serve compassionately, often without any compensation, some will act in their own interest rather than in the interest of the incapacitated person. Oversight of both guardians and representative payees is intended to prevent abuse by the people designated to protect the incapacitated people. While the incidence of elder abuse involving persons assigned a guardian or representative payee is unknown, certain cases have received widespread attention.

Collaboration to Protect Incapacitated Elderly People Continues to Be Limited

Our 2004 report noted that some state laws and some courts provide more protection for incapacitated elderly people than others. State laws have varied requirements for monitoring guardianships and court practices in the states we visited also varied widely. Coordination among federal agencies and courts was quite limited and on a case-by-case basis. Since our report was issued, some states have strengthened their guardianship programs and some efforts have been made to lay the groundwork for better collaboration. However, there continues to be little coordination between state courts and federal agencies in the area of guardianships.

While State Court Procedures Vary in Their Oversight of Guardianships, Some States Have Recently Strengthened Their Guardianship Programs

In our 2004 review we determined that all 50 states and the District of Columbia have laws requiring courts to oversee guardianships. At a minimum, most states' laws require guardians to submit a periodic report to the court, usually at least once annually, regarding the well-being of the incapacitated person. Many states' statutes also authorize measures that courts can use to enforce guardianship responsibilities. However, court procedures for implementing guardianship laws appear to vary considerably. For example, most courts in each of the three states responding to our survey require guardians to submit time and expense records to support petitions for compensation, but each state also has courts that do not require these reports. We also found that some states are reluctant to recognize guardianships originating in other states. Few have adopted procedures for accepting transfer of guardianship from another state or recognizing some or all of the powers of a guardian

appointed in another state. This complicates life for an incapacitated elderly person who needs to move from one state to another or when a guardian needs to transact business on his or her behalf in another state.

In addition, guardianship data are scarce. Most courts we surveyed did not track the number of active guardianships, let alone maintain data on abuse by guardians. Although this basic information is needed for effective oversight, no more than one-third of the responding courts tracked the number of active guardianships, and only a few could provide the number that were for elderly people specifically.

Since issuance of our report, several states have passed new legislation amending their guardianship laws. During 2004, for example, 14 states amended their laws related to guardianships, and in 2005 at least 15 states did so, according to the American Bar Association's annual compilations. Alaska, for example, established requirements for the licensing of private professional guardians and, in January of this year, New Jersey began requiring the registration of professional guardians. Acting on legislation in 2004, the California court system established an education requirement for guardians and a 15-hour-per-year continuing education requirement for private professional guardians.[4] In 2004 Hawaii adopted legislation requiring that guardians provide the court annual accountings. Wisconsin also adopted a major revision of its guardianship code this year; it establishes a new requirement that the guardian regularly visit the incapacitated person to assess their condition and the treatment they are receiving. The new law also leaves in effect powers of attorney previously granted by the incapacitated person unless it finds good cause to revoke them, and establishes procedures for recognition of guardianships originating in other states.

Several states' guardianship law amendments established or strengthened public guardian programs, including those in Texas, Georgia, Idaho, Iowa, Virginia, Nevada, and New Jersey. In Georgia and New Jersey, for example, public guardians must now be registered. Public guardians are public officials or publicly funded organizations that serve as guardians for incapacitated people who do not have family members or friends to be

[4] Those who have served as guardians in California for 10 or more people during the 2000 to 2005 period are exempt from the education requirement for appointment, but are subject to the annual continuing education requirement.

their guardian and cannot afford to pay for the services of a private guardian.

"Exemplary" Courts Focus on Training and Monitoring

In our 2004 report several courts were identified as having "exemplary" programs. As we conducted our review, we sought particular courts that those in the guardianship community considered to have exemplary practices. Each of the four courts so identified distinguished themselves by going well beyond minimum state requirements for guardianship training and oversight. For example, the court we visited in Florida provides comprehensive reference materials for guardians to supplement training. With regard to active oversight, the court in New Hampshire recruits volunteers, primarily retired senior citizens, to visit incapacitated people, their guardians, and care providers at least annually, and submit a report of their findings to court officials. Exemplary courts in Florida and California also have permanent staff to investigate allegations of fraud, abuse, or exploitation. The policies and practices associated with these courts may serve as models for those seeking to assure that guardianship programs serve the elderly well.

We recently contacted officials in each of these courts and received responses from two of them. We learned that officials in these two courts have worked to help strengthen statewide guardianship programs. For example, court officials in Fort Worth, Texas, have helped encourage adoption of Texas' recent reform legislation. However, we could not determine whether other courts had adopted these courts' practices.

State Courts and Federal Representative Payee Programs Serve Many of the Same Incapacitated Elderly People, but Continue to Collaborate Little in Oversight Efforts

There is also a role for the federal government in the protection of incapacitated people. Federal agencies administering benefit programs appoint representative payees for individuals who become incapable of handling their own benefits. The federal government does not regulate or provide any direct support for guardianships, but state courts may decide that the appointment of a guardian is not necessary if a representative payee has already been assigned. In our study, we found that although courts and federal agencies are responsible for protecting many of the same incapacitated elderly people, they generally work together only on a case-by-case basis. With few exceptions, courts and federal agencies don't systematically notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a representative payee is abusing the person. This lack of coordination may leave incapacitated people without the protection of

responsible guardians and representative payees or, worse, with an identified abuser in charge of their benefit payments.

Since issuance of our report, we have not found any indication that coordination among the federal agencies or between federal agencies and the state courts has changed. SSA did, however, contract with the National Academies for a study of its representative payee program. The study committee issued a letter report including preliminary observations in 2005, and a final report is scheduled for release in May 2007.[5] The committee plans to use a nationally representative survey of representative payees and the beneficiaries they serve in order to (1) assess the extent to which the representative payees are performing their duties in accordance with standards, (2) learn whether representative payment policies are practical and appropriate; (3) identify types of representative payees that have the highest risk of misuse of benefits; and (4) suggest ways to reduce the risk of misuse of benefits and ways to better protect beneficiaries.

Limited Progress Has Been Made on Recommendations from 2004

Only limited progress has been made on our recommendations. In one recommendation we suggested that SSA convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although VA, HHS, and OPM indicated their willingness to participate in such a study group, SSA disagreed with this recommendation. SSA stated that its responsibility focuses on protecting SSA benefits, cited concern about the difficulty of interagency data sharing and Privacy Act restrictions, and indicated that leadership of the study group would not be within its purview. We checked with SSA recently and learned that its position has not changed. Coordination among federal agencies and between federal agencies and state courts remains essentially unchanged, according to agency and court officials we spoke with. SSA continues to provide limited information to the VA in cases where issues arise such as evidence of incapability or misuse of benefits. However, to ensure that no overpayment of VA benefits occurs, SSA will provide appropriate VA officials requested information as to the amount of Social Security benefit savings reported by the representative payee.

[5] Committee on Social Security Representative Payees, National Research Council, "Assessment of the Representative Payee Program of the Social Security Administration: Letter Report," The National Academies, August 4, 2005.

In 2004, we also recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. Specifically, we recommended that HHS support the development of cost-effective approaches for compiling consistent national data concerning guardianships. HHS made a step in this direction by supporting a study by the American Bar Association Commission on Law and Aging of the guardianship data practices in each state, which could prove helpful in efforts to move toward more consistent and comprehensive data on guardianships.[6] The study found that although several states collect at least some basic data on guardianships, most still do not. Only about a third of states receive trial court reports on the number of guardianship filings. A total of 33 states responded to a question about whether they were interested in compiling data. Of these, 21 expressed interest and 12 indicated that they are not interested, as the barriers are too high. Thus, it is still not possible to determine how many people in the U.S. of any age are assigned guardians each year, let alone the number of elderly people who are currently under such protection.

Third, we recommended that HHS support the study of options for compiling data from federal and state agencies concerning the incidence of elder abuse in cases in which the victim had granted someone the durable power of attorney or had been assigned a fiduciary, such as a guardian or representative payee, as well as cases in which the victim did not have a fiduciary. HHS has taken a step in this direction by supporting the inclusion of questions about guardians in the National Center on Elder Abuse's annual survey of state adult protective services agencies.[7] Specifically, the survey asked each state about cases in which a guardian was the source of a report of abuse or was the alleged perpetrator in state fiscal year 2003. Only 11 states provided information about the source of reports of abuse. Similarly, 11 states indicated the relationship between the victims and the alleged perpetrators. Guardians were not often cited in

[6] Erica F. Wood, "State-Level Adult Guardianship Data: An Exploratory Survey," American Bar Association Commission on Law and Aging for the National Center on Elder Abuse, August 2006.

[7] Pamela Teaster et al., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older* (Boulder, Colo.: February 2006).

either case. Indeed, a recent study found that existing data cannot provide a clear picture of the incidence and prevalence of elder abuse.[8]

Finally, we also recommended that HHS facilitate a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments to facilitate efficient and cost-effective solutions for interstate jurisdictional issues. The National Conference of Commissioners on Uniform State Laws (NCCUSL) met in July 2006 and issued a discussion draft for a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This draft contains provisions that would allow guardianships to be formally recognized by another state or transferred to another state. The draft is being refined, and a NCCUSL committee plans to discuss it at another meeting this November. Passage of this draft by the NCCUSL does not, however, guarantee that states will follow its provisions because they must decide on their own whether to amend their own laws.

Some Developments Regarding Guardianships Appear Promising

While little progress has been made on several of our specific recommendations, other steps taken since the release of our report are more promising. In November of 2004, a joint conference of the National Academy of Elder Law Attorneys, the National Guardianship Association and the National College of Probate Judges convened a special session to develop an action plan on guardianships.[9] This implementation session developed a series of 45 action steps that could be taken at the national, state, and local levels in order to accomplish a select subset of the recommendations made at the 2001 Second National Guardianship Conference--the "Wingspan Conference." These action steps fall into five main categories: the development of interdisciplinary guardianship committees at the national, state, and local levels; the development of uniform jurisdiction procedures, uniform data collection systems, and innovative funding mechanisms for guardianships; the enhancement of training and certification for guardians and the encouragement of judicial

[8] Erica F. Wood, *The Availability and Utility of Interdisciplinary Data on Elder Abuse: A White Paper for the National Center on Elder Abuse*, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (Washington, D.C.: May 2006).

[9] In addition to participants from the three organizations, representatives from the American Bar Association Commission on Law and Aging, the American Bar Association Section on Real Property, Probate and Trust Law, and the American College of Trust and Estate Counsel all participated in this conference.

specialization in guardianship matters; the encouragement of the most appropriate and least restrictive types of guardianships; and the establishment of effective monitoring of guardianships. The identification of these action steps and the work that has begun on them reflects a high level of commitment by the professionals working in the field.

In some cases work has begun on these action steps. Both the House and the Senate versions of bills calling for an Elder Justice Act[10] would establish an Advisory Board on Elder Abuse, Neglect, and Exploitation charged with making several recommendations including some concerning the development of state interdisciplinary guardianship committees. As noted earlier, the Commission on Uniform State Law has issued a discussion draft of a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Wisconsin's adoption of a reformed guardianship law this year emphasizes the use of the least restrictive type of guardianship that is appropriate. Regarding the monitoring of guardianships, recently Texas and New Jersey joined several states that now have programs in place to license, certify, or register professional guardians. In 2005, Colorado began requiring prospective guardians (with some exceptions such as parents who are seeking to be guardians for their children) to undergo criminal background checks.

Concluding Observations

In conclusion, as the number of elderly Americans grows dramatically, the need for guardianship arrangements seems likely to rise in response, and ensuring that such arrangements are safe and effective will become increasingly important. Progress on fulfilling some of our recommendations has been slow where it has occurred, and for some, no steps have been taken at all. The lack of leadership from a federal agency, and states' differing approaches to guardianship matters, make it difficult to realize quick improvements. Nonetheless, many people actively involved in guardianship issues continue to look for ways to make improvements. Emulating exemplary programs such as the four we examined would surely help, but we believe more can also be done to better coordinate across states, federal agencies, and courts. In our 2004 report we concluded that the prospect of increasing numbers of incapacitated elderly people in the years ahead signals the need to reassess the way in which state and local courts and federal agencies work

[10] *Elder Justice Act*, HR 4993, 109th Cong., 2d sess. (2006) and S 2010, 109th Cong., 1st sess. (2005).

together in efforts to protect incapacitated elderly people. Your Committee has played an important role in bringing these problems to light and continuing to seek improvements. In the absence of more federal leadership, however, progress is likely to continue to be slow, particularly in the coordination among federal agencies and between federal agencies and state courts.

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Mr. Chairman and Members of the Committee, this concludes my prepared statement. I'd be happy to answer any questions you may have.

Appendix I: GAO Contact and Staff Acknowledgments

GAO Contact

Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues at (202) 512-7215.

Acknowledgments

Alicia Puente Cackley, Assistant Director; Benjamin P. Pfeiffer; Scott R. Heacock; Mary E. Robison; and Daniel A. Schwimer also contributed to this report.

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