Supplemental Memorandum in Support of the CRE Aug. 9, 2004 Suggestion for Amendment of the "Trustworthiness" Proviso of Rule 803(8)(C) of the Federal Rules of Evidence

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As indicated in our December 27, 2004 interim letter response to the Reporter's memorandum to the Advisory Committee (copy of CRE letter attached, and incorporated herein), we believe the Reporter's memorandum makes a number of points, and raises a number o f issues, that would certainly benefit from further discussion and clarification, and we attempt to provide such further discussion and clarification in this supplemental memorandum. While we disagree with a number of key aspects of the Reporter's memorandum, as discussed below and in our December 27 letter, we view it as a constructive contribution, and we look forward to the Committee's consideration of the issues raised.

Importance of the Issues

Of course, Congress does not enact legislation to deal with non-existent problems. The highlights of the legislative history of the new information quality standards are set out in our initial memorandum of August 9, 2004. Since enactment of the legislation, both OMB and Congress have continued to express concern on the issue of reliability of government-disseminated information. The OMB report to Congress for FY 2002 on *Managing Information Collection and Dissemination* continued to comment on this issue after OMB had promulgated final information quality guidance:

> **The Problem of Poor Quality Information**
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> Even before Congress passed the Information Quality Act [citation omitted], there was substantial evidence that the quality of the information advanced for use by government decision-makers needed to be improved. In the scholarly literature on what is called "science-policy," there are entire books of case studies demonstrating technical problems with the information collected, used and published by Federal regulatory agencies.[1]

The conference report on OMB appropriations for Fiscal Year 2004 also continued to express Congressional concerns regarding the quality of government information:

> *Implementation of the Federal Data Quality Act.* – The conferees are concerned that agencies are not complying fully with the requirements of the Federal Data Quality Act (FDQA). . . . The Administrator of the Office of Information and Regulatory Affairs (OIRA) is directed to submit a report to the House and Senate Committees on Appropriations by June 1, 2004, on whether agencies have been properly responsive to public requests for correction of information pursuant to the FDQA, and suggest changes that should be made to the FDQA or OMB guidelines to improve the accuracy and transparency of agency science.[2]

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[1] At 24. http://www.whitehouse.gov/omb/inforeg/paperwork_policy_report_final.pdf

[2] H.R. Rep. No. 401, conference report, 108th Cong., 1st Sess., Nov. 25, 2003, at 1016.

Prior to passage of the information quality legislation in 2000, the Advisory Committee received information from the bar asserting that there were serious problems with the trustworthiness provision of Rule 803(8)(C). We have previously referenced (pp. 28-29) the comments/suggestions which attorney John Grunert sent to the Committee in 1996. Mr. Grunert advised the Committee that in his experience Rule 803(8)(C) presented "a serious and growing problem, permitting a great deal of facially persuasive but very poor quality evidence to go un-cross-examined to juries." The "presumption that government officials will issue only accurate, objective documents" is "an obvious fiction", he asserted, since government agencies and officials "are notoriously apt to issue reports which reflect their political agendas, those of the administration in which they labor, or perceived wishes of their constituents. . . ." The trustworthiness proviso in the rule, he argued, was currently inadequate to the task of screening out unreliable reports, in large part because the report authors are usually unavailable for cross-examination or undisclosed, and litigants were unable to ascertain whether the authors had proper qualifications, where and how the data were obtained, the analytical methods used, and what political or other concerns might have influenced the wording or conclusions of the report. As we have noted, the Committee's minutes and archives do not show that this suggestion was ever thoroughly evaluated.

Those who are familiar with the workings of federal agencies, and who have seen examples of agency information products that were either later shown to be clearly inaccurate or highly suspect, would not, as does the Reporter, regard the presumption in 803(8)(C) as clearly warranted and as a presumption that should be regarded as a "strong" presumption that should place a "heavy" burden on an opponent of admissibility to overcome. Neither the Rule nor the Note state that the presumption is strong and imposes a heavy burden to overcome. The Rule and Note establish simply a *prima facie* presumption, and a trial court should have the discretion, and obligation, to rule inadmissible all or a portion of a government report which has been shown to be significantly suspect at to reliabilityt.[3] The opponent of admissibility should not bear the burden, as the Reporter suggests, of establishing that the report is an "extreme" case of a report "so plainly defective that it makes no sense to give it to the jury" because a reasonable juror could not be expected to rely on it. (At 16, 15.) Yet, that does appear to be the view of a number of federal courts, whose broad statements on this subject continue to be propagated through the opinions of other federal courts.

Congress perceived that there was a problem with the reliability of federal reports disseminated to the public, and it therefore mandated the establishment of minimum quality standards that would ensure reliability. The Center's review of the Rule's proviso, the Note, and the case law interpreting the proviso establishes that there is considerable fog, confusion, and

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[3] This does not mean, as suggested by the Reporter (at 14), that a report should be excluded whenever an opponent raises any claim of lack of qualifications, incompleteness, or faulty methodology. What it means is that the trial court should have substantial discretion to exclude a report when the opponent is able to show particular flaws that cast significant doubt on the reliability of conclusions. If the report is excluded, the offering party still has the option of obtaining the testimony of an expert witness, including a government employee responsible for the report, who will then be subject to cross-examination.

inconsistency in application of the proviso, and that classification of elements of reliability such as accuracy, completeness, objectivity, and transparency of data and methodology as matters of weight for the jury to consider, rather than matters bearing on admissibility, is a serious and recurring problem which raises an issue of inconsistency with federal law under 28 U.S.C. § 2071(a) and Evidence Rule 402.

Is There Really a Significant Problem with the 803(8) Trustworthiness Proviso?

One of the main contentions of the Reporter's critique of the Center's suggestion is that the courts (*i.e.,* those whose opinions are analyzed by the Center for inconsistency with the information quality standards) have been correctly applying the trustworthiness proviso because "conclusions are for the jury", and that exclusion of a report on the basis that its conclusions are inaccurate is "a classic usurpation of the jury's role"-- to call a conclusion "inaccurate" is simply another way of saying that it is "not credible", and issues of credibility are for the jury. (At 14, 15.)

Perhaps the best way to respond is by first calling attention to the U.S. Supreme Court's opinion in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). That decision specifically addressed the admissibility under Rule 803(8)(C) of "evaluative" government reports, as opposed to *Daubert*, which addressed Rule 702 expert testimony where the expert is available for cross-examination, and which is relied on by the Reporter for his conclusion that conclusion that the accuracy of conclusions is an issue for the jury. In *Beech Aircraft*, the Court held that government reports containing evaluative conclusions derived from factual findings come within the hearsay exception of 803(8)(C). In so holding, the Court emphasized the protection afforded by the trustworthiness proviso as a "safeguard against the admission of unreliable evidence." The Court then went on to state that the proviso applies to "all elements of the report", and –

> Thus, a trial judge has the discretion, indeed the obligation, to exclude an entire report or portions thereof – whether narrow "factual" statements or broader "conclusions"-- that she determines to be untrustworthy.

488 U.S. at 167. That Supreme Court statement is certainly in conflict with a view that conclusions are for the jury. Also, contrast that statement by the Supreme Court with statements in a number of lower court opinions cited and quoted by the Center that "[w]hether a conclusion is correct and whether the bases for that conclusion are complete and accurate are issues of credibility [for the jury]", or statements to that effect. (*E.g*., *Moss, Avondale, Vanderpoel, Complaint of Nautilus Motor Tanker Corp., King Fisher Marine Serv., Inc.*) The Reporter's critique does not recognize that statement in *Beech Aircraft*; instead, it focuses on a subsequent statement by the Court in that opinion that "of course it goes without saying that the admission of a report containing 'conclusions' is subject to the ultimate safeguard–the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." 488 U.S. at 168. (The Committee Note to Rule 803(8) likewise does not consider this statement in *Beech Aircraft*, nor does it make any mention of the decision, simply because the Note is so out of date.)

The Reporter, however, insists that neither he nor the courts are confused about the difference

between credibility (or "accuracy") of conclusions as an issue of weight for the jury, and reliability as an issue of admissibility for the trial court. We assert that the case law indicates that confusion and inconsistency does indeed exist on this issue, and that clarification is needed.

Apparently the Reporter is referring to the evaluation of the credibility or accuracy of conclusions in the sense of subjective "belief", rather than a determination based on objective indicia. There is a world of difference, however, between a trial court judge declaring that (s)he simply does not believe a conclusion because (s)he personally does not believe it is credible -- which would indeed be a usurpation of the jury's role -- as contrasted with a judge determining that (s)he has determined a conclusion is not reliable based on identifiable objective factors relevant to such a determination. A conclusion might be considered inaccurate based on many different kinds of objective factors. For example, a conclusion that a certain substance is causing disease might be inaccurate because an exposure measuring device was incorrectly calibrated, or because key mathematical calculations are demonstrably incorrect, or because the substance was incorrectly identified. An accident investigator might be shown to have measured the wrong set of skid marks or to have failed to take into account that the road was damp at the time of the accident. A flawed analytical methodology or model will also generate inaccurate, unreliable conclusions. A biased investigator is likely to generate biased conclusions. A report which is significantly incomplete because it does not take into account key data or a key study is likely to be inaccurate. One cannot distinguish between inaccuracy in the inputs and inaccuracy in the conclusion. If the inputs are materially flawed or incomplete, the conclusion will likely be materially flawed. Even if the inputs are flawless, if they are analyzed through a methodology that is flawed, or by an assessor who is biased, they are likely to yield inaccurate conclusions.

Some of the confusion indicated by the case law derives, we believe, from the current wording of the Rule and impressions conveyed by the current Committee Note.

The term "trustworthiness" in the Rule appears confusing in that it clearly seems, on its face, to encompass a decision based on an assessment of either credibility or reliability. This interpretation is reinforced by the Note's specification of "possible motivation problems" as a relevant factor in assessing trustworthiness. Webster's gives the primary definition of "trust" as "assured reliance on some person or thing : a confident dependence on the character, ability, strength, or truth of someone or something", and gives as a primary synonym the term "BELIEF", as well as "reliance".[4] "Belief", in turn, is defined primarily as "a state of mind in which trust, confidence, or reliance is placed in some person or thing". *Id*. The primary definition of "credibility" is "capable of being credited or believed : worthy of belief . . . entitled to confidence . . ." with "trustworthy" given as a primary synonym. The definition of "reliable" also gives "trustworthy" as a synonym. *Id*. It appears, therefore, that "trustworthiness" is a slippery term, especially when bias or credibility are issues.

The term "circumstances" in the Rule's proviso also appears to limit a probe into

[4] *Webster's Third New International Dictionary, Unabridged*. Merriam-Webster, 2002.

trustworthiness, since it indicates that the court is to examine only the facts surrounding the preparation of the report, rather than the contents of the report itself -- the prefix "circum" meaning "around" (*id.*). Webster's primary definition of "circumstance" is "a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or logically likely to be present . . . ." *Id.* The term "indicia" on the other hand, which the Center has proposed substituting for "circumstances", is far broader and would clearly allow for consideration of aspects of the report itself. The primary definition of "indicia" is "a distinctive mark that indicates or that is felt to indicate the nature or quality or existence or reality of something." *Id.*

These problems with the plain meaning of the terminology currently used in the Rule itself were discussed in our original supporting memorandum, but are not commented on in the Reporter's memorandum.

The current Committee Note to 803(8) appears to reinforce the notion that factors which the trial court can consider in determining trustworthiness are limited to "circumstances" outside the contents of the report -- that is, factors pertaining to the way in which the report was prepared rather than its actual contents. The examples of appropriate factors provided in the note are timeliness in preparation, the special skill or experience of the preparer, whether a hearing was held and how it was conducted, and "possible motivation problems". All of these are factors outside the content of the report itself. There is no mention of indicia such as accuracy, objectivity (bias), completeness, or transparency of data and analytical methods. Although the Note makes clear that other factors might be considered, in reality it appears that most courts confine themselves to the factors given as examples in the Note. A number of cases cited and quoted in the Center's original memorandum indicate that the trial court can consider only factors pertaining to the way it which the report was prepared (e.g., *Vanderpoel*, at 37, *Avondale*, at 40, *King Fisher Marine*, at 41, and *Union Pacific* and *Moss*, at 44).

The Reporter's memorandum concludes that the case law analyzed in the Center's original memorandum does not indicate confusion or a problem with interpreting the Rule. The Reporter discusses five (*Blake*, *Gentile*, *Nautilus*, *Moss*, *Kirby*) of the 21 "problem" cases discussed in the Center's memorandum, but indicates that the critique of those few cases should suffice to dispose of the issues raised by the Center.[5] In the Reporter's view, all of the cases discussed by the Center as apparently inconsistent with the information quality standards by excluding consideration of factors such as accuracy, completeness, bias, or transparency, "can be explained" as having given adequate consideration to such factors, but having found them to be insufficient for meeting the "heavy" burden required to overcome the "strong" presumption of trustworthiness which attaches

[5] Why the Reporter selected those particular cases is not stated. He does state that *Moss* was selected because of the emphasis we put on it. However, we view *Moss* as particularly important not only because of the opinion in that case, but because of the extent to which it has been relied on in other cases.

to evaluative public reports. We respectfully disagree with this interpretation of the case law and the Rule. While the Reporter's own explanation of the cases might prove to be supportable if one were to carefully review the record in each case, the actual opinions in those cases do not fit with the Reporter's explanation; instead the opinions make broad and unqualified pronouncements regarding the inappropriateness of considering factors such as accuracy, completeness, bias, and transparency because they are not circumstances bearing on the way in which the report was prepared. And those pronouncements are being propagated through additional cases which are not discussed by the Reporter.[6] We believe this is clear from our original memorandum. Nevertheless, we will provide some additional comments on those five cases in hopes of further illuminating the problems they illustrate.

We discussed *Blake* as an example of a case in which it appeared the court did not allow consideration of the fundamental scientific inaccuracy of a report in ruling on admissibility. The district court ruled inadmissible statement of cause of death in a death certificate, and the circuit court reversed. A review of the district court opinion shows that its exclusionary decision was objectively fact-based. The district court ruled on the basis of whether the conclusion in the certificate was "reliable", and cited *Beech Aircraft*. It also made the ruling after hearing many days of testimony and hearing extensive argument on the admissibility issue from counsel and determining that there was a "consensus among experts" that the stated cause of death was not accurate. However, the circuit court opinion, which reversed the exclusionary decision, and the Reporter's memorandum, both indicate that the district court relied on "belief", when in fact that was not so and the district court never even used that term.

In *Gentile*, the trial court did state that it had determined that the report was on the whole trustworthy; however, in reaching that conclusion, it based its determination (at least in some part – how much cannot be determined) on its opinion regarding the credibility of the witnesses, which led it to reject the opponent's assertions of bias and incompleteness. The circuit court then upheld the determination of inadmissibility on the basis that credibility is a matter for the jury. One of the odd things about this case is that it appears the circuit court would have ben correct in reversing on the basis that the reliability determination of the district court was based on witness credibility determinations, but was not correct, we assert, in disallowing consideration of bias and incompleteness as factors pertaining to reliability.

In *Nautilus*, while the court did "consider" the skill and completeness factors and states that they were "not sufficiently convincing", it appears to have found them unconvincing based on its next statement that the court should only look at the way in which the report was prepared, not whether it agrees with its conclusions. The court does not state what the Reporter states was its finding, namely, that the alleged defects did not "substantially outweigh" the trustworthiness factors that it found to exist. This case is also a good example of a court apparently confining its admissibility determination to just the four factors in the Note.

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[6] If those opinion are to be "explained", it would be beneficial for the Note to explain them.

In *Moss*, the circuit court ruled that the magistrate's determination of inadmissibility was based on "extraneous factors" that amounted to an error of law. Those erroneous ("extraneous") factors included accuracy, completeness, and bias (or being "misleading"). The court characterized those factors as factors pertaining to "credibility" which must be left to the jury – except in cases so extreme that no reasonable juror could credit the report. As discussed above, we would assert that the Rule was never intended to establish such a strong presumption, nor does the opinion state that the report should be admitted on the basis of such as a strong presumption; rather, it states simply that such factors are matters of credibility, and therefore could not be considered as a matter of law, except perhaps in an extreme case.

Union Pacific is cited principally for its reliance on *Moss*.

Assuming There Is a Problem, What is the Best Way to Handle It?

The Reporter makes some points regarding the Center's specific suggested changes in wording of the trustworthiness proviso which might have some validity in terms of style and consistency with how other rules are worded. We are not wedded to the exact wording that might be used to clarify that evaluative reports can be excluded based on factors that include those set out in the federal information quality standards (*e.g.*, accuracy, completeness, objectivity, transparency), and we note that it appears that those concerns could largely be addressed through explanation in a revised Note rather than through a change in wording of the Rule.

It should also be noted that the Center recommended three wording changes to the proviso, whereas the Reporter's memorandum addresses only one of the three. The first recommendation was to change "circumstances" to "indicia", in order to clarify that the factors which can be considered are not limited to those which are outside the content of the report and which pertain only to the manner in which it was prepared. The second was to change "trustworthiness" to "reliability", in order to clarify that the factor of "possible motivation problems" currently set out in the Note is not solely a matter of improper motive or bad faith, but rather one of any type of bias, whether personal, political, institutional, or otherwise, and to clarify that all aspects of the report can be considered making a ruling on admissibility. The third, the only one which the Reporter has commented on, is the one which would specifically refer to "noncompliance with duly promulgated quality standards disseminated by federal agencies", in order to clarify that the specific factors set out in the federal information quality standards can be considered as factors bearing on reliability for the purpose of determining admissibility.

It is possible that the objective of the third suggested wording change could be accomplished through new explanation in a revised, updated Note. We recognize that it is generally Committee policy not to revise a Note unless it is connection with a revision to the language of a rule.[7] In the present case, the first and second suggested changes to the rule (or either) would provide a basis for revising the Note in conformance with this policy. It is obvious that the current Note is in need of

[7] While we do not contest that policy, we do suggest that perhaps there should be exceptions.

updating and revision, not only with regard to clarification of the indicia of reliability which can and should be considered, but because, as discussed above, it does not contain any mention and discussion of the Supreme Court's decision in *Beech Aircraft*, and because it tends to convey the impression that the factors that can be considered in ruling on admissibility are only those pertaining to the way in which the report was prepared, and not its contents.

Is There a Need for Expeditious Committee Action, or Can It Wait Several Years?

As we noted in our December 27, 2004 letter, the Center's suggestion is premised in large part on a need to clarify that the case law interpreting the proviso as excluding from consideration factors such as accuracy and completeness are not consistent with federal law (the information quality legislation and the implementing rules/standards), and that this need distinguishes the Center's suggestion from those which the Committee has previously decided to defer indefinitely pending development of case law interpreting the meaning of "testimonial"as used in the Supreme Court's decision in *Crawford*. We believe that issues of consistency with federal law demand more expeditious resolution than those proposed 803(8) amendments which have been deferred due to *Crawford*.

As we have discussed previously, *Crawford* did not address the issue of reliability in any respect; it specifically declined to do so. Furthermore, the current rule expressly limits reports subject to 803(8)(C) to those which are offered against the government, not against an accused. Introduction of a report against an accused is the situation covered by *Crawford*. While there are apparently cases which circumvent the express wording of that limitation, the Center's suggestion would simply not change the *status quo*. Additionally, there is much to be said for beginning the process of obtaining comment on the issues raised by the Center's suggested changes given the length of time likely to be involved in resolving the issues (as was the case with the *Daubert* changes to Rule 702).

Attachment (Dec. 27, 2004, letter to the Committee from CRE)