

Complaint

IN THE MATTER OF

AMERICAN STUDENT LIST, LLC

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4072; File No. 0223005

Complaint, January 28, 2003--Decision, January 28, 2003

This consent order addresses representations by Respondent American Student List, LLC – a commercial list broker that supplies names for youth marketing campaigns, and uses the information collected from a survey distributed to high school teachers and guidance counselors, with the request that they have their students complete the survey to create lists of college-bound students that it sells to commercial entities for use in marketing – about how detailed, personal information collected from high school students through a survey would be used. The order, among other things, prohibits the respondent – in connection with the collection of personally identifiable information from an individual – from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. The order also prohibits the respondent – in connection with the collection of personally identifiable information from students for any “noneducational-related marketing purpose” – from using or disclosing such information unless it discloses (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed. In addition, the order prohibits the respondent from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the order.

Participants

For the Commission: *Laura Mazzarella, Gregory A. Ashe, Jessica L. Rich, and Joel Winston.*

For the Respondents: *William D’Amico, and Kenneth A. Caruso, Chadbourne & Parke LLP.*

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COMPLAINT

The Federal Trade Commission, having reason to believe that The National Research Center for College and University Admissions, Inc. and American Student List, LLC, corporations, and Don M. Munce, individually and as an officer of The National Research Center for College and University Admissions, Inc. (“Respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The National Research Center for College and University Admissions, Inc. (“NRCCUA”) is a Missouri corporation with its principal office or place of business at 900 SW Oldham Parkway, Lees Summit, Missouri 64081.
2. Respondent Don M. Munce is an officer and director of NRCCUA. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of NRCCUA, including the acts or practices alleged in this Complaint. His principal office or place of business is the same as that of NRCCUA.
3. Respondent American Student List, LLC (“ASL”) is a New York limited liability company with its principal office or place of business at 330 Old Country Road, Mineola, New York 11501.
4. The acts and practices of Respondents alleged in this Complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
5. Since at least 1988, Respondents have collected personal information from high school students through a survey (the “Survey”). Respondents market and distribute the Survey to high school teachers and guidance counselors with the request that they have their students complete the Survey. Students may also complete the Survey online at NRCCUA’s Web site, www.nrccua.org. Last year, Respondents collected personal

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information from more than 2 million high school students who completed the Survey.

6. The Survey collects from high school students personal information, including, but not limited to, name, address, gender, grade point average, date of birth, academic and occupational interests, athletic and extracurricular interests, racial or ethnic background, and religious affiliation (the “Survey Data”).
7. Respondents create, market, and distribute the Survey, and compile and use Survey Data. Respondents NRCCUA and ASL each pay a substantial portion of the cost to produce and distribute the Survey.
8. Survey Data is used by Respondents. Respondent NRCCUA markets Survey Data primarily to colleges and universities, which use the information to target high school students for recruitment purposes. Respondent ASL uses Survey Data to create lists of college-bound students that it sells to commercial entities for use in marketing. Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.
9. Respondents have disseminated or caused to be disseminated marketing materials and privacy statements, including but not limited to the attached Exhibits A through D. These marketing materials and privacy statements contain the following statements regarding the use and disclosure of personal information collected through the Survey:
 - A. “As you know, NRCCUA is a membership organization that represents over 850 colleges and universities. These universities use the NRCCUA survey to contact your students, whose interests and abilities match the institution’s offerings. Your priority is to help your students succeed, and this survey is one more way you can boost your students’ chances.

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By completing this survey now, your students will receive the information they need to help them make an informed college choice.” (Exhibit A, cover letter to educators accompanying Survey).

- B. “This data is used by colleges, universities and other organizations to assist students and their families by providing them with valuable information. The National Research Center for College and University Admissions advocates responsible and secure use of the information obtained voluntarily through this survey.” (Exhibit B, privacy statement found on the Survey).
- C. “Use of this survey data is authorized by the National Research Center for College and University Admissions for the purposes of research and dissemination of college and career information, and other information helpful to students and their families in the transition from high school to college.” (Exhibit C, privacy statement found on the NRCCUA Web site).
- D. “The National Research Center for College and University Admissions builds educational bridges by providing a communications link between high schools, college-bound high school students, and our member colleges and universities. NRCCUA is a non-profit organization serving the needs of each.

Since 1972 our mission has been to make the important process of selecting a college education or career path easier for students. Our annual surveys enable more than 4 million high school students to indicate their unique college and career preferences to over 1000 member colleges and universities.” (Exhibit D, NRCCUA Web site home page).

- 10. Respondents have disseminated or caused to be disseminated marketing materials that accompany the Survey, including but not limited to the attached Exhibits E through G.

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These marketing materials contain the following statements regarding the funding of the Survey:

- A. “Assisting educators and their students with the college selection process has been our mission for over 25 years. As a result of completing the survey last year, over 2 million students from 24,000 high schools are receiving information that will be invaluable to them as they plan for the future. With your assistance, this year’s effort will be even more significant.

This service is provided at no cost to you or your students! It is completely funded by our members, 850 colleges and universities who include most of the top national and regional colleges and universities as ranked by *U.S. News & World Report*. ” (Exhibit E, cover letter to educators accompanying Survey) (emphasis in original).

- B. “Please read the brief instructions, and pass out the enclosed surveys to the sophomore, junior and freshmen students in all of your classes. Your students will receive valuable information on admissions, financial planning, scholarships, and other relevant information to help them plan intelligently for their future. All of this is free to your students because it is funded by our member educational institutions.” (Exhibit F, cover letter to educators accompanying Survey) (emphasis in original).

- C. “These survey results are provided at no cost to participating high schools, NRCCUA is funded by its member colleges and universities for the purpose of distributing helpful educationally-related literature to students.” (Exhibit G, report to educators).

11. Through the means described in Paragraphs 9 - 10, Respondents have represented, expressly or by implication, that:

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- A. Information collected from high school students through the Survey is shared only with colleges, universities, and other entities providing education-related services.
- B. The Survey is funded solely by educational institutions.

12. In truth and in fact:

- A. Information collected from high school students through the Survey is shared not only with colleges, universities, and other entities providing education-related services, but also with commercial entities for marketing purposes.
- B. The survey is not funded solely by educational institutions, but also receives substantial funding from ASL and others for commercial purposes.

Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

13. The acts and practices of Respondents as alleged in this Complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-eighth day of January, 2003, has issued this Complaint against Respondents.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent American Student List, LLC (“ASL”) is a Delaware limited liability company with its principal office or place of business at 330 Old Country Road, Mineola, New York 11501.

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2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. “Personally identifiable information” or “personal information” shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address; (d) a telephone number; (e) a Social Security Number; (f) an Internet Protocol (“IP”) address or host name that identifies an individual; (g) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual; or (h) any information, including, but not limited to, grade point average, date of birth, academic or occupational interests, athletic or extracurricular interests, racial or ethnic background, or religious affiliation, that is combined with any of (a) through (g) above.

2. “Noneducational-related marketing purpose” shall mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. Provided, however, that “noneducational-related marketing purpose” does not apply to the collection, disclosure or use of personally identifiable information from or about a student for the exclusive purpose of developing, evaluating, or providing to students or educational institutions (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and

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instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under 20 U.S.C. §1232h(c)(4)(A) or its implementing regulations to be an “educational product or service.” Provided further that, for purposes of determining whether any specific activity is covered by subsections (a) through (e) above, or should be deemed to be an “educational product or service,” any official written interpretation disseminated to the public by the Department of Education regarding such activity shall be controlling.

3. “Survey” shall mean the survey that is distributed or caused to be distributed by Respondent under the name “National Research Center for College and University Admissions.”

4. “Student” shall mean any elementary school or secondary school student.

5. Unless otherwise specified, “Respondent” shall mean ASL and its successors and assigns and its officers, and its agents, representatives, and employees.

6. “Clearly and conspicuously” shall mean as follows:

A. In print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made

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through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

7. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondent, in connection with the collection of personally identifiable information from an individual, shall not misrepresent in any manner, expressly or by implication, (a) how personally identifiable information is collected or will be used or disclosed; or (b) how the collection of personally identifiable information is funded.

II.

IT IS FURTHER ORDERED that Respondent, in connection with the collection of personally identifiable information from students, shall not use or disclose such information for any noneducational-related marketing purpose, unless it discloses clearly and conspicuously (a) the existence and nature of such noneducational-related marketing purpose; and (b) the types or categories of any entities to which the information will be disclosed. Such disclosures shall be made in the following locations:

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(1) in all privacy statements published by Respondent that refer or relate to the collection of personally identifiable information from students;

(2) in all communications to students, parents, educators, or educational institutions that refer or relate to the collection of personally identifiable information from students; and

(3) in all questionnaires, survey instruments, or other documents through which Respondent collects personally identifiable information from students.

Provided that the disclosures required by this Part II are in addition to, and not in lieu of, any other disclosures that Respondent may be required to make, including but not limited to any disclosure required by state or federal law.

III.

IT IS FURTHER ORDERED that Respondent shall not use or disclose for any noneducational-related marketing purpose any personally identifiable information collected through surveys distributed prior to the date of service of this Order. For purposes of this Part only, “noneducational-related marketing purpose” shall exclude use or disclosure for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

IV.

IT IS FURTHER ORDERED that Respondent ASL and its successors and assigns shall, for a period of five (5) years after the date of issuance of this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this Order, including, but not limited to:

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- A. a sample copy of each different survey form, privacy statement, or communication relating to the collection of personally identifiable information to students, parents, educators, or educational institutions containing representations about (a) how personally identifiable information will be used or disclosed or (b) how the collection of personally identifiable information is funded. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web;
- B. a sample copy of each different document containing the disclosure required by Part II of this Order; and
- C. all invoices, communications, and records relating to the use or disclosure of personally identifiable information for any noneducational-related marketing purpose.

V.

IT IS FURTHER ORDERED that Respondent ASL and its successors and assigns shall deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order. Respondent shall deliver this Order to such current personnel within thirty (30) days after the date of service of this Order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondent ASL and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this Order, including, but not

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limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, the Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that Respondent ASL and its successors and assigns shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

VIII.

This Order will terminate on January 28, 2023, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

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C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Analysis

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements, subject to final approval, to (1) a proposed consent order from The National Research Center for College and University Admissions, Inc. (“NRCCUA”) and its officer Don M. Munce (“Munce”), and (2) a proposed consent order from American Student List, LLC (“ASL”). The proposed orders are substantively identical. NRCCUA is a student survey company that supplies student data to colleges and universities and other entities for recruitment and marketing purposes. ASL is a commercial list broker that supplies names for youth marketing campaigns.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements and take other appropriate action or make final the agreements’ proposed orders.

This matter concerns representations made about how detailed, personal information collected from high school students through a survey would be used, and how the survey is funded. The proposed respondents distribute a survey to high school teachers and guidance counselors with the request that they have their students complete the survey. The survey collects from students personal information including name, address, age, race, religious affiliation, and academic, career, and athletic interests. NRCCUA and Munce then market personal information collected through the survey primarily to colleges and universities, which use the information to target high school students for recruitment purposes. NRCCUA also provides survey information to ASL. ASL uses survey information to create lists of college-bound students that it sells to commercial entities for use in marketing.

Analysis

Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.

The Commission's complaint charges that the proposed respondents falsely represented that information collected from high school students through the survey is shared only with colleges, universities, and other entities providing education-related services when, in fact, such information is also shared with commercial entities for marketing purposes. The complaint also alleges that the proposed respondents falsely represented that the survey is funded solely by educational institutions when, in fact, the survey also receives substantial funding from ASL, a commercial entity.

Part I of the consent orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from an individual, from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. Part II of the orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose," from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed.

The proposed orders define "noneducational-related marketing purpose" to mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. The definition specifically excludes the use of personal information in connection with certain activities determined to be "educational products or services" under the recently enacted No Child Left Behind Act, namely (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-

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cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under the No Child Left Behind Act or its implementing regulations to be an “educational product or service.” In addition, the proposed orders provide that when determining whether any specific activity is an “educational product or service,” any official, written, publicly-disseminated interpretation by the Department of Education regarding such activity shall be controlling.

Part III of the orders prohibits the proposed respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the orders. In addition to the educational purposes excepted from the definition of “noneducational-related marketing purpose,” Part III also permits the proposed respondents to use such information for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

The remainder of the proposed orders contains standard requirements that the proposed respondents maintain copies of privacy statements and other documents relating to the collection, use or disclosure of personally identifiable information; distribute copies of the orders to certain company officials and employees; notify the Commission of any change in the corporation that may affect compliance obligations under the order; and file one or more reports detailing their compliance with the orders. Part VIII of the proposed orders is a provision whereby the orders, absent certain circumstances, terminate twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed orders, and is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Analysis

These proposed orders, if issued in final form, will resolve the claims alleged in the complaint against the named respondents. It is not the Commission's intent that acceptance of these consent agreements and issuance of final decisions and orders will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

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IN THE MATTER OF

BAXTER INTERNATIONAL INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-4068; File No. 0210171

Complaint, December 20, 2002--Decision, February 3, 2003

This consent order addresses the acquisition by Respondent Baxter International Inc. from Wyeth of substantially all of the assets related to Respondent Wyeth's generic injectable pharmaceutical business, operated by Wyeth and its ESI Lederle division. The order, among other things, requires the respondents to divest all of Wyeth's assets relating to propofol – a general anesthetic commonly used for the induction and maintenance of anesthesia during surgical procedures and as a sedative for patients who are mechanically ventilated – to Faulding Pharmaceutical Company, or another Commission-approved acquirer, no later than ten business days after the acquisition. The order also requires the respondents to terminate all rights and interests in GensiaSicor's (1) pancuronium, (2) vecuronium, and (3) metoclopramide products – which are respectively (1) a rapid-onset, long-acting neuromuscular blocking agent used to temporarily freeze muscles during surgery or mechanical ventilation and to assist in the intubation process; (2) an intermediate-acting neuromuscular blocking agent that temporarily freezes muscles during surgery, mechanical ventilation, or intubation; and (3) an antiemetic used for the prevention and treatment of nausea and vomiting for patients undergoing certain types of chemotherapy and for post-operative treatment – and divest all of their pancuronium, vecuronium, and metoclopramide assets to GensiaSicor. In addition, the order requires the respondents to terminate Baxter's co-marketing agreement with Watson Pharmaceuticals, Inc., pursuant to which Baxter promotes Ferrlecit®, – an injectable iron gluconate product used to treat iron deficiency in patients undergoing hemodialysis – by March 14, 2004, in order to give Baxter the incentive to continue developing and ultimately launch the iron gluconate product it acquired from Wyeth.

Participants

For the Commission: *Yolanda R. Gruendel, Joanne C. Lewers, Stephanie C. Bovee, Jennifer Clarke-Smith, Sylvia M. Brooks, Ann Malester, Jeff Dahnke, Roberta S. Baruch, John Howell, and Mary T. Coleman.*