S. HRG. 111–337

ENSURING A LEGAL WORKFORCE: WHAT CHANGES SHOULD BE MADE TO OUR CURRENT EMPLOYMENT VERIFICATION SYSTEM?

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JULY 21, 2009

Serial No. J–111–36

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
55–520 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESS

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

ADDITIONAL SUBMISSIONS FOR THE RECORD

Submissions for the record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee, lists:

Pattinson, Neville, Vice President Government Affairs, Gemalto, Inc., Arlington, Virginia,

Gemalto e-Government 2.0: Identification, Security and Trust, Exploring European Avenues Report, September 2007

Gemalto e-Government 2.0: The keys to success, choosing and building the pathway to success; best practices and success factors, June 2009

ENSURING A LEGAL WORKFORCE: WHAT CHANGES SHOULD BE MADE TO OUR CURRENT EMPLOYMENT VERIFICATION SYSTEM?

TUESDAY, JULY 21, 2009

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:30 p.m., Room 226, Dirksen Senate Office Building, Hon. Charles E. Schumer, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Whitehouse, Sessions, and Cornyn.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK, CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER SECURITY

Chairman SCHUMER. Okay. The hearing will come to order.

We'll allow each of the members here to make an opening statement and then we'll turn to Congressman Gutierrez. We're honored you've come across the Capitol Building to be here with us.

Well, about a month ago, I articulated principles for immigration reform that I believe can pass through Congress with bipartisan support. Each of the principles was based on a fundamental notion that the American people are both pro-legal immigration and anti-illegal immigration. The American people will not accept any legalization of those currently in the United States illegally unless and until they're convinced that the government is very seriously committed to preventing future waves of illegal immigration.

That's why I previously said that any comprehensive immigration reform bill must achieve operational control of our borders and our ports of entry within 1 year of enactment. But in order to completely prevent future waves of illegal immigration we must recognize that, no matter what we do on the border and at our ports, jobs are what draw illegal immigrants to the United States. When an immigrant has the choice between making $1 per day in Oaxaca Province or making $40 per day in the United States, one cannot expect the immigrant to remain in Oaxaca and subject their family to extreme deprivation.

We can only prevent illegal immigrants from working in the United States if we create a tough, fair, and effective employment

verification system that holds employers accountable for knowingly hiring illegal workers. In the past, our employment verification laws have placed employers between a rock and a hard place. Employers have been required to make subjective determinations about identity documents provided by employees in order to determine whether the employee is legally able to work in the United States.

Employers who accept all credible documents in good faith may still be targeted by ICE for turning a blind eye towards illegal immigrants in their workplace. Furthermore, when employers have to make on-the-spot subjective decisions about who is qualified to work and who is not, they can face potential lawsuits from employees who are actually U.S. citizens but who were wrongfully profiled as illegal immigrants.

Employment verification systems that require employers to make subjective determinations about an employee's identity or legal status are bound to fail. So we must instead adopt a system that relies upon a non-forgeable identification system to completely and accurately identify legal workers. The system must be non-forgeable and airtight. This is the only way, in my opinion, to stop future waves of illegal immigration.

Attempts in the past to create employment verification systems have been half-hearted and flawed. The current E-Verify system is an example of a half-hearted and flawed system. Under the current E-Verify system, an employer merely verifies whether the name, date of birth, Social Security number, and citizenship status given by a potential employee match the exact same information contained in the Social Security Administration's data base, along with other government data bases.

The E-Verify system does not prevent an illegal immigrant from using the name, accurate Social Security number, and address of a U.S. citizen to get a job. For instance, if an illegal immigrant wants to say that he is John Smith, who is actually a U.S. citizen from Buffalo, and he knows John Smith's Social Security number and he can get a fake ID with John Smith's address—all very easily accomplished—nothing about E-Verify will stop that illegal immigrant from getting a job.

In addition, E-Verify does not prevent U.S. citizens from voluntarily providing their name, Social Security number, and address to their illegal immigrant friends, families, or employees in order to game the system. That is why it's not surprising that many of the companies which have been raided by ICE in the last few years for employing illegal immigrants have actually used the E-Verify system.

Simply put, it's not difficult for illegal workers to scam the system by providing the personal information of a legal worker. The only way the American people will have faith that our comprehensive immigration reform bill will stop illegal workers from obtaining jobs is if we implement an employment verification system that is tough, fair, easy to use, and effective and which relies on a non-forgeable biometric identifier.

A truly effective employment verification system must possess the following 10 characteristics in order to prevent employers from hiring illegal workers and to be accepted by the American public:

First, any new system must rely upon employers to check the immigration status of their employees against a government verification system. This is the simplest and most effective way to stop the flow of future illegal immigrants. Any system which relies upon employers to check the immigration status of their employees, however, must give employers clear guidance, rapid response, and must be inexpensive and easy to use.

Second, the system must authenticate the employee's identity by using a specific and unique biometric identifier. This identifier could be a fingerprint, an enhanced biometric picture, or other mechanism. If fraud is rampant or even permissible, the system can't work and will necessarily fail. No employment verification system will be worthwhile if it cannot stop illegal workers from obtaining employment simply by presenting the Social Security number or address of a legal worker, and that's the main flaw of the E-Verify system.

Proposals to give legal workers PIN numbers or other security codes that they can use to authenticate their identity with the employer will similarly not stop illegal workers from gaining such PIN numbers and providing this information to their employer in order to obtain employment, but it's virtually impossible for an illegal worker to forge a fingerprint or an enhanced biometric picture.

That's why it's critical that any future employment verification system require employees to prove their identity through their unique biometric features rather than by requiring workers to provide Social Security numbers or PIN numbers to an employer, who then enters the information into the system. It's the only effective way to combat future waves of illegal immigration.

Third, the system must apply to all people, citizens and non-citizens alike. The only way to prevent fraud is to make sure that everyone is uniformly in the system. By creating a uniform system, illegal workers will no longer be able to use the name and Social Security number of U.S. citizens in order to obtain a job.

Everyone will verify their identity and their immigration status in the same way and there will be no ability for people claiming to be U.S. citizens to go through a system that requires less proof of identity than a non-U.S. citizen. Illegal workers have used this disparity for years in order to obtain employment.

In addition, a uniform system will have the advantage of removing potential invidious discrimination that immigrant workers currently face from employers who must make subjective determinations about their employees' citizenship. And, either by design or not, all too often the way the employee looks, their last name, is used by the employer to separate legal from illegal, and that's a very bad and un-American way to do things.

Fourth, the system must be easy to use for both employers and employees, must not be expensive, and must quickly give an employer an answer as to whether the employee can be legally hired. All businesses, but especially small businesses, should be able to implement this new system of employment verification with minimal costs of compliance. No business should be financially or logistically burdened by a new employment verification system. The system should not impede employers from hiring legal workers or prevent legal workers from obtaining employment.

Fifth, the system should exonerate employers of any and all potential liability if they use the system and the system says that a worker is legal. A clear advantage of a biometric-based system is it would tell employers instantly and definitively whether their employee has legal status. If the system does tell the employer that his employee is authorized to work, the employer should never have to pay any fines if that employee turns out to be unauthorized.

Sixth, on the other hand, the system should severely punish employers who fail to use the system or who knowingly hire illegal workers after using the system by levying stiff fines for initial offenses, unpalatable fines for secondary offenses, and prison sentences for repeat offenders. Employers should know that if they fail to use the system or use the system and hire a known unauthorized employee, they'll be audited and will be caught and severely punished.

Seventh, the system should not require American workers to pay any money to the government in order to obtain employment. Although a new employment verification system will have costs, these costs can be covered by fees and fines charged to those seeking legalization and through fees charged to future immigrants, who will gladly pay these fees to live and work in the U.S. By creating a uniform employment verification system, the fees that immigrants currently pay for work permits can be used to pay for the creation and implementation of the new system that future immigrants and citizens will jointly use.

Eighth, significant and substantial protections must exist to ensure the system does not prevent Americans from working. Among other things, workers must be permitted to legally keep their jobs while correcting any potential problems in the system, and employers will be prohibited from firing any employees while they're lawfully trying to rectify their status with any new system. As a corollary, employers must not be punished for allowing employees to work while their employees are legally attempting to correct any technical problems that prevent the employee from being authorized.

Ninth, any new biometric-based employment system must have extensive checks at the beginning of the system to prevent illegal aliens from creating a false identity to enter into the new data base. And, as I mentioned before, we need to do this where the entity administering the new employment verification system will have access to public records/government data bases to ensure that the person seeking to enter the new employment verification system is, in fact, the person they claim to be and the person has legal status.

Finally, tenth, the system must have the strictest privacy and civil liberty protections and must only be used for employment. The American people must have confidence the only goal of an employment verification system is to prevent future waves of illegal immigration, which will raise American wages and working conditions. The government should be prevented from using any employment verification data for any other purpose, and strict fines and prison sentences should be levied to all persons who use the system for any purpose not permitted by law.

All of these characteristics are based upon the fundamental principal that the goal of an employment verification system must be to change the calculation currently made by employers in order to make it extremely unattractive for employers to hire illegal workers. A system with these 10 characteristics will be easier to use, less discriminatory, tougher, and more effective than the current E-Verify. A biometric system will be supported by business groups because it will be easier to use than the current system and will provide employers with clear safe harbors.

A biometric-based system will also be supported by labor and immigrant groups because it will take away the employer's ability to make subjective determination about an employee's legal status simply by looking at documents and determining their validity, which has previously invited invidious discrimination against immigrants and retaliation against union organizers.

In conclusion, we have several distinguished witnesses here to discuss how the current E-Verify system operates, the ways in which a new system can be created that adds a biometric identifier, and I look forward with great interest to their testimony.

I now want to recognize the distinguished Ranking Member, Senator Cornyn, for an opening statement.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman.

I want to express my appreciation to all of the panelists who are joining us today. Congressman Gutierrez, it's good to have you here.

I also want to acknowledge Lynden Melmed, who's worked closely with my office in the past, and the subcommittee as well, on these issues and now is in private law practice. I look forward to hearing the views of all of our panelists with regard to how we can improve the E-Verify system.

I agree with Senator Schumer, the E-Verify system is broken and we must act to fix it. In 1986, Congress clearly recognized that employers should verify that the workers they hire are eligible for employment or face strong sanctions if they wilfully evade our labor laws, but Congress did not provide the tools to employers needed to carry out those mandates.

So today, 20 years later, the problem remains: our laws are not enforced, our employers are frustrated, and the people are cynical of the government's will to act. We have, however, made some improvements in enforcement and employment verification over the past few years. The Department of Homeland Security's E-Verify program has great promise and I think is headed in the right direction, but the program needs expanded legal authorities, additional resources, and other improvements before we can begin to hope that it will meet its aspirations.

Like many of my colleagues, I support an effective employment verification system. An effective system must be reliable, accurate, and not unduly burdensome to small businesses. An effective system must include a secure, tamper-proof card that is easily verifiable and gives employers surety when it comes to an individual's identity and authorization to work in the United States.

I see three challenges. Most everyone agrees we need to improve our employment verification system, but the first challenge relates to the mechanics of employment verification. In other words, how will employment verification work in practice? We must ensure that any process will be user-friendly to both the employer and the employee.

Would the individual simply swipe a card through a card-reader or would they have to get online somehow? What would a secure card look like, and what types of biometric data would be available on it? Would the employer and the employee get a real-time response in a matter of seconds or would they have to wait days for an answer? Would the employee have a simple process to correct any inaccuracies in the agency data bases? An effective system must get all these questions right to earn the confidence of both workers and employers.

The second challenge relates to costs. How much will it cost taxpayers to get an effective E-Verify program up and running? Last year, U.S. Citizen and Immigration Services estimated a mandatory E-Verify program could cost about $765 million over 4 years, and that's only if it covers new hires. To cover both new hires and current hires, that number rises to $838 million. The Social Security Administration also estimated that a mandatory E-Verify program would cost about $281 million over 5 years and require 700 new employees. These costs are significant and highlight that if we do not resource our E-Verify program adequately, our workers and employers will become frustrated and they'll never buy into the system.

On the other hand, if we give the agencies the resources they need in order to get the job done right, that can help turn around public perception, and E-Verify can help restore lost confidence in government when it comes to enforcing our immigration laws.

Our third challenge relates to identity theft. In other words, how can we improve information sharing among all levels of government to deter identity theft before it happens and prosecute the bad actors when deterrence doesn't work.

Technology is clearly the key. We must create interconnectivity between the data bases maintained by various agencies, including the State Department, the Social Security Administration, the Internal Revenue Service, and the Bureaus of Vital Statistics in every State. And as we improve this connectivity, we must ensure that we minimize errors and inaccuracies and balance the lawful disclosure of information with the individual's right to privacy.

So, Mr. Chairman, I want to express my gratitude to you for focusing our discussion on the important component of employment verification in solving our broken immigration system. We have got to get this effort right in order to have a crack at any larger reform effort. The American public will not bestow their faith upon us if we pass immigration reform without an effective, accurate, and enforceable employment verification program.

I look forward to hearing the witnesses' perspectives on this issue and the concrete solutions that I know each of you will bring to the challenges that confront us.

Thank you, Mr. Chairman.

Chairman SCHUMER. Senator Whitehouse.

STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Mr. Chairman. I don't have an opening statement. I just, as somebody who was witness to the acrid tone and the ugly thoughts and words that accompanied the melt-down of our recent immigration reform effort, I just want to observe that it takes a bold legislator to want to go back into that blasted wasteland, and I'm delighted that you are doing it. I am proud that you are doing it.

I applaud the bipartisan tone that I have detected. There was a lot of overlap between the statements of the Chairman and the Ranking Member, and I think this is important work to get done. I also understand that one of our witnesses, the Republican witness, is a former staffer to Senator Cornyn, and also a graduate of the University of Virginia Law School. So, things are just getting better and better, and I really appreciate what you two are doing.

Chairman SCHUMER. Thank you for those nice words, Senator Whitehouse.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM ALABAMA

Senator SESSIONS. Thank you, Chairman Schumer. It is, indeed, a challenge. But one thing I'm absolutely convinced of, that we can create a lawful immigration system that we can be proud of. After initially thinking the second proposal that came forward last year was one that might be effective, I studied it and came to believe it was not, and the American people agreed with that.

So I think you're raising some important questions. E-Verify is not strong enough. I think it's a good system. I'm baffled that people would not want to use it or that would oppose it as it is, because it's free and quick and works in a number of instances. I agree with you, a more comprehensive identification matter is important, Mr. Chairman.

I know Senator Kyl worked on that in-depth. He was the master of all the details of that, and I shared that view. But it's the kind of thing that's not easy. We've got people on the left that don't want a card, people on the right that don't want a card, then you've got people that really like the illegal immigration occurring and they don't want a card. So it's not a little, easy thing to do, but your leadership might make a difference. So let's see what we can't do to go forward and develop a system that can actually work. But count me a skeptic. I've got to be, show me how this is going to actually work. I think that's where the American people are, but maybe we can do some good this time.

Thank you.

Chairman SCHUMER. Thank you. The only point I'd make here is, I believe we need a biometric. It could be a card. That's one of the things we're looking at. It doesn't necessarily have to be a card.

Senator Feingold.

STATEMENT OF HON. RUSS FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I'm glad that the Committee is taking up this issue. I want to say, too, how much I appreciate that you are working tirelessly to draw attention to a number of changes we need to make the current employment verification system, E-Verify, a better system, and I applaud your efforts.

I've been concerned about recent efforts to make E-Verify mandatory and to expand its use to federal contractors without first fixing problems with the system. Employment verification is a very promising idea and it has tremendous potential to ensure that U.S. jobs only go to U.S. citizens and those who are legally authorized to work in the U.S., but we need to get it right before we expand our reliance on electronic verification.

Our current system, E-Verify, remains riddled with errors and other inaccuracies. According to a 2006 report of the Social Security Administration's Inspector General, the data set on which E-Verify relied contains errors in 17.8 million records, affecting 12.7 million U.S. citizens. If E-Verify becomes mandatory before these errors are fixed, millions of Americans could be misidentified as unauthorized to work, and I think that is an unacceptable result.

I understand that U.S. Citizenship and Immigration Services has been working to improve the accuracy of E-Verify, but we still have a long way to go. According to recent reports, if E-Verify becomes mandatory for all U.S. employers, roughly 600,000 workers, most of whom are U.S. citizens, would be deemed ineligible to work, and that is a very large number. It's equal to the entire population of the largest city in my State, Milwaukee. I recognize that no employment verification system will be completely error-free, but that kind of error rate, in my opinion, makes this system unworkable.

In 2008, Intel Corporation, a very large employer, reported that 12 percent of the workers that they ran through E-Verify came up as "tentatively non-confirmed." All of these workers were eventually cleared as work-authorized, but Intel had to invest significant time and money to correct these errors, which is something that many smaller businesses would be unwilling or unable to do for their staff.

I am particularly concerned about these error reports because almost half of all businesses that use E-Verify report that they use E-Verify to pre-screen job applicants. This means that employers are making hiring decisions based on erroneous information and they are never notifying applicants of this information so the applicants can contest and correct it.

Any permanent mandatory employment verification system must contain sufficient procedural protections for workers who are initially deemed unauthorized to work. Workers must be given a simple, straightforward means to appeal any data errors. Employer verification proposals should also contain sufficient provisions to ensure that any personally identifiable information that is collected by the government is kept completely confidential. We must be very careful to establish safe, secure systems that will protect the electronic transmission of any personal information.

Mr. Chairman, I strongly believe that we need to secure our borders, we need to fix our broken immigration laws, and we need to deal with the fact that there are millions of undocumented individuals in this country, and we need to do it now. But we also need to be very conscious that thousands of American citizens and legal immigrants could lose their jobs if we mandate the use of an electronic verification system before these errors are fixed. This would cause massive disruption, not just in the lives of these workers, but also to the already fragile U.S. economy.

I thank you, Mr. Chairman, for the chance to make those remarks.

Chairman SCHUMER. Well, I thank you for your thoughtful remarks. Some of the principles we enunciated would, in a broad brush, address those. Obviously the devil is in the details in getting them all done, but I agree with your comments, the thrust of your comments, completely.

It's now our honor—and he's waited patiently—to introduce the Honorable Luis Gutierrez. He represents the Illinois Fourth District. He's done that with great distinction for eight terms, 16 years. We served in the House together, I'm honored to say, and were friends there. Until this year when I left the Senate gym, we spent a lot of time in the House gym talking about things together.

Luis Gutierrez is the first Latino to be elected to Congress from the Middle West. He serves as chair of the Democratic Caucus Immigration Task Force and as chair of the Congressional Hispanic Caucus Immigration Task Force. He was named to the Judiciary Committee in the 110th Congress, and he's remained there, serving on the Immigration Subcommittee.

He chairs the Financial Services Subcommittee on Financial Institutions and Consumer Credit. Along with Congressman Jeff Flake of Arizona, he co-sponsored bipartisan immigration reform in 2007 known as the STRIVE Act, which called for, among other things, a biometric-based system of employment verification. I just want to say this: Congressman Gutierrez has traveled the country—he's a national figure—in his passion that we do immigration reform. I don't think there's a member of the Congress who cares more about it or has spent more time about it than Congressman Gutierrez, and we really appreciate that.

Your entire statement will be read into the record, and you may proceed.

STATEMENT OF HON. LUIS GUTIERREZ, A U.S. REPRESENTATIVE FROM THE STATE ILLINOIS

Representative GUTIERREZ. Thank you. Chairman Schumer, Ranking Member Cornyn, and members of the subcommittee, thank you for this opportunity to testify on employment verification.

I first want to commend you, Mr. Chairman, for holding this hearing and for your steadfast leadership on this issue, and for what I consider very creative approaches to developing employment verification systems as a means to reduce future waves of illegal immigration.

I want to share with you that it's not just my years of work on this issue that brings me here to testify before you today, it is the

countless men and women I have met across this country who have been exploited in the absence of a system that holds employers accountable for their actions.

It is because of the mothers who toil in sweat shops in New York and Los Angeles to feed their children. It is because of 16-year-old boys who I met in Iowa who work 17-hour shifts six days a week without overtime on the kill floor of a meat-packing plant. It is because of U.S. workers who have tried, time and time again, American citizens, to unionize their shop and failed to do so because there is the availability of an exploitable workforce. It is for the women who face demands of sex in exchange for decent wages, decent hours, and decent working conditions, and it's for all those small business owners who have been unable to get ahead of the competition because he or she plays by the rules, when corrupt employers down the street choose not to.

As you know, Mr. Chairman, the obligation to protect good workers and decent employers are the driving force behind the need not only to overhaul our employment verification system, but also to initiate real, lasting, comprehensive immigration reform. In fact, any employment verification system must be part of comprehensive immigration reform.

To ensure a legal workforce, the system must implement smarter border security, establish a program to fill true gaps in our workforce, keep families together, and require—require—the estimated 12 million unauthorized individuals currently living and working in the U.S. to register and fully integrate into our society.

I know some in Congress believe that a mandatory employment verification system alone would fix our broken immigration system by encouraging undocumented immigrants to self-deport. However, like it or not, we've come to depend on the contribution of these hard-working immigrants and they have become an integral part of our families, of our communities, and of our workforce.

Moreover, it would arbitrarily separate families and punish 4 million U.S. citizen children who have undocumented parents. I assure you that the separation of families is not needed to build support for comprehensive immigration reform; polls have shown again and again the vast majority of Americans already do. However, the American people do want Washington to lead and develop workable solutions within comprehensive immigration reform that will end illegal immigration as we know it.

So let me be clear: the end of illegal immigration is only possible through effective employment verification as a part of comprehensive immigration reform. Effective employment verification must maintain and provide accurate data; be rolled out prudently under a realistic time line as its accuracy and privacy protections are established; allow workers to review and correct their own employment eligibility record and have access to administrative and judicial review; protect individuals from discrimination; be paired with robust oversight and enforcement, including random audits with employers.

With regard to a biometric system that Chairman Schumer is currently exploring, I regard the following as advantages over the current system we have. It would provide workers greater power over their employment records. It would prevent prescreening and

other misuses of the system by requiring employee consent. The swipe of a card, along with a fingerprint, would prevent individuals from inventing an identity and assuming another identity to get a job.

As Congress examines biometrics as part of a new and better system, I want to encourage you to ignore the naysayers, those who claim it cannot be done. Don't listen to them: they do not speak for real change or workable solutions or an end to illegal immigration as we know it. Rather, they want to produce gridlock, prevent action, and protect the status quo.

Let me repeat: incorporating an effective employment verification system is the only hope for truly ending illegal immigration. We can do this, and we must do this, this year. In the end, this is not a question of whether or not we can craft an effective system, rather, it is a question of political will.

I am grateful to all of you for allowing me to come and testify here this afternoon. I want to say to my dear friend Chairman Schumer, millions of people are counting on you and relying on you and your leadership and your commitment to comprehensive immigration reform, and I hope that the bond that Senator Kennedy and Senator McCain were able to have in the past Congresses is the same kind of bond that you and Senator Cornyn are going to be able to develop on this very important issue.

Thank you so much.

[The prepared statement of Representative Gutierrez appears as a submission for the record.]

Chairman SCHUMER. Well, I want to thank you, Luis Gutierrez. You are an inspiration in terms of all you have done, and your passion, but also your intelligence and your practicality, realizing how we can get this done. There are lots of people on both sides of the aisle who would like to sort of make a lot of speeches, but are unwilling to put their nose to the grindstone and get it done. If we listen to your remarks, Senator Cornyn's remarks, my remarks, you can see that, yes, we can. Yes, we can do this.

I know you have another place to go. Well, we all did our opening statements. I want to thank you very much for being here.

Representative GUTIERREZ. Thank you so much. Thank you so much, Senators.

Chairman SCHUMER. Okay.

We'll now begin our second panel. Let me introduce them as they come forward. Okay. While people are getting seated, I'm going to do the introductions so we can proceed.

On the left side—on our left, your right, audience—of the panel is Michael Aytes. He serves as Acting Director of the U.S. Citizenship and Immigration Services, USCIS, within the Department of Homeland Security, DHS. He was named to this position in April 2008. Prior to his appointment, Mr. Aytes served as Associate Director of U.S. CIS Domestic Operations, where he was responsible for processing all immigration benefits and services within the U.S. Mr. Aytes has served in a variety of positions, with the former INS service, beginning his Federal career at INS in 1977. The Committee thanks him for taking the time to testify and for his years of service to this great country.

James Ziglar is Senior Fellow at the Migration Policy Institute. In addition, he serves as senior counsel at the Washington law firm, VanNess Feldman. Mr. Ziglar retired in 2008 as president and chief executive officer of Crossmatch Technologies, a leading provider of biometric technologies to the Federal Government. Before joining Crossmatch in August 2005, Mr. Ziglar was managing director and chief business strategist at UBS Financial Services.

From August 2001 until his retirement from the Federal service in December of 2002, Mr. Ziglar served the last Commissioner of the Immigration and Naturalization Service. In addition to his position as Commissioner of the INS, Mr. Ziglar served as sergeant-at-arms of the U.S. Senate—we're proud to see an alumnus do so well—and as Assistant Secretary of Interior for Water and Science.

The final witness. Do you want to introduce the final witness, Senator Cornyn? Or you can read my statement.

Senator CORNYN. Your statement is an excellent statement.

Chairman SCHUMER. We'll just ask unanimous consent my statement be put in the record, and Senator Cornyn do the introductions of Lynden Melmed.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Senator CORNYN. Lynden Melmed was assigned to my office as a detailee from the Department of Homeland Security. Somebody, a rarity, I found, during the debates in the Senate on immigration law, who actually knows immigration law and he was an invaluable resource. I'm glad to have him here today to share some insights on the E-Verify program.

Chairman SCHUMER. Great.

Senator CORNYN. Thanks.

Chairman SCHUMER. Thank you, Mr. Melmed, for being here.

Everyone, all three witnesses' entire statement will be read into the record. We're going to ask you to try to limit your presentation here to 5 minutes, and then we'll go to questions.

Mr. Aytes.

STATEMENT OF MICHAEL AYTES, ACTING DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, WASHINGTON, DC

Mr. AYTES. Chairman Schumer, Ranking Member Cornyn, Members of the Subcommittee, I'm grateful for the opportunity to appear before you to discuss our shared vision and goal of effective employment eligibility verification.

First, we appreciate the Senate support for the President's budget request to extend E-Verify for three more years. As you can imagine, uncertainty with respect to extension challenges USCIS and users of the system.

E-Verify has grown exponentially over the past several years. Over 137,000 employers are now enrolled, representing over 517,000 hiring locations. It is no longer a niche system. Today, over 14 percent of all non-agricultural new hires in the United States are run through E-Verify.

E-Verify is sometimes described as a tool to enforce the immigration laws, and it is. Others describe it as a tool for employers committed to maintaining a legal workforce, and it is also that. But we recognize the system must also effectively serve employers and

workers by giving accurate and quick verification. Our goal is to continue to improve the system's ability to instantly verify new hires, improve the accuracy of our data, and strengthen employer training, monitoring, and compliance functions. At the same time, we want to protect workers' rights.

Complaints about the system largely fall into three categories: (1) that it's inaccurate and results in erroneous mismatches; (2) that it doesn't, as many of you have mentioned, effectively combat identity theft and document fraud; (3) that the system can result in discrimination.

I'd like to discuss each briefly in turn. Today, 96.9 percent of queries result in an automatic confirmation: the worker is authorized to work. Of the remainder, less than 3.1 percent, about 1 in 10 is ultimately found to be work-authorized.

We have worked hard to reduce the initial non-confirmation rate for workers who are authorized to work. While we've made significant success in this area, we will continue to work on this problem but we must also recognize that not every mismatch in any system—today's system or a future system—can simply be prevented by adding data.

For example, if someone changes their name today through a marriage or divorce and updates their driver's license but does not update their Social Security record, it will result in a mismatch. Any form of verification must recognize the need for data changes such as result from marriage or divorce.

E-Verify was not initially designed to directly combat identity theft, I grant you. It relies on the Form I–9 process in which the worker must present an identity document, such as a driver's license, green card, or passport. But identity theft and document fraud are growing issues, not only in the immigration context. Last year, as a result, we added a new photo screening tool for DHS documents in order to combat document and identity fraud.

In the future, we plan to add U.S. passport photos and would like to be able to verify individual driver's license information because that does have a biometric, a photo, all to streamline the process and let employers quickly verify that the document presented matches what was actually issued. We are also in the final stages of developing an initiative to let individuals who have been victims of identity theft lock and unlock their Social Security number for the purpose of E-Verify.

As I mentioned, about 9 in 10 initial non-confirmations become final, most without the worker contesting the initial findings. Some highlight the potential for discrimination in that number, suggesting that some of these workers may be work-authorized but simply do not know they can contest the finding.

Any system, I grant you, even with safeguards and compliance monitoring such as E-Verify, can be used incorrectly. However, take that number in context. Some studies suggest that about 5 percent of the workforce in the United States is not authorized to work in this country. That's actually higher than the current E-Verify final non-confirmation rate of 2.8 percent.

But the system, any system, must protect the rights of workers. Any discrimination reduces the effectiveness of the program. Thus, we have expanded our information to workers and are growing a

new monitoring and compliance branch to ensure that employers use E-Verify correctly, including ensuring that workers have access to information about redress procedures.

We have also established a new process that lets workers call USCIS directly to address certain mismatches as an alternative to visiting a Social Security Administration office. We are also working to refer instances of fraud, discrimination, misuse, and illegal or unauthorized use of the system to appropriate enforcement authorities.

In summary, the program has made great strides in becoming a fast, easy, and more accurate tool to help employers and workers. It can go farther, but today it works together with the Form I–9 requirement that requires an employer show an identity document to an employer. The Administration is dedicated to continuing to work to improve E-Verify to address issues of usability, fraud, and discrimination.

Thank you for the opportunity to testify. Again, we appreciate this Subcommittee's continued support of the E-Verify system.

Chairman SCHUMER. Thank you, Mr. Aytes.

[The prepared statement of Mr. Aytes appears as a submission for the record.]

Chairman SCHUMER. Before Mr. Ziglar proceeds, I would note that all three of our witnesses, when they were in government, were appointed by Republican people, either Republican Presidents or Senators. So there!

[Laughter.]

Senator CORNYN. They must know what they're talking about, Mr. Chairman.

Chairman SCHUMER. Mr. Ziglar.

STATEMENT OF JAMES ZIGLAR, SENIOR FELLOW, MIGRATION POLICY INSTITUTE, WASHINGTON, DC

Mr. ZIGLAR. Mr. Chairman, Ranking Member Cornyn, and Senator Sessions, it is an honor to be here today to participate in the E-Verify hearing. If you will allow me a point of personal privilege—my wife said I shouldn't mention this, but I have to—it was 45 years ago this week that I showed up in Washington to work for the Judiciary Committee. I have to tell you, this room has not changed much at all, except that they used to have an air conditioning unit in the corner. For 7 years, I sat back there in the back row doing what a lot of you folks are doing. So, it is a particular honor and pleasure to be here this particular week.

Chairman SCHUMER. Who did you first work for?

Mr. ZIGLAR. Senator Eastland, from Mississippi.

Chairman SCHUMER. That undoes my theory, doesn't it? Sort of. Not quite. Just somewhat.

Mr. ZIGLAR. My key job at the time, Senator, was to make sure that Senator Eastland had cigars and that Senator Dirksen had cigarettes during the hearings. You could smoke in the room at the time.

It is a real pleasure to be here, as I said. I have submitted my written testimony that has two documents that I would also like to have put into the record, if I could. One of them is an op-ed that I co-authorized with Doris Meisner, the Commissioner of INS

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under President Clinton, in the New York Times. The second one is a report that was issued yesterday by the Migration Policy Institute that relates to the E-Verify system and has some recommendations in it.

[The prepared statement of Mr. Ziglar and additional information appear as a submission for the record.]

Mr. ZIGLAR. Mr. Chairman, the E-Verify program and the policies that underlie that program are critical to the effective enforcement of our immigration laws, and that is going to be particularly true if we end up having comprehensive immigration reform.

Going back to 1996, the Congress recognized the need to implement an electronic employment verification system for the purpose of enforcing the law that prohibits the hiring of unauthorized workers by American businesses. The 1996 Illegal Immigration and Immigrant Responsibility Act also provided for three test pilot programs to evaluate the effectiveness of an electronic employment verification system. Those three programs ended up and culminated into something called the basic pilot, which is now, as we know, called the E-Verify system or E-Verify program.

The USCIS has done a great job, in my opinion, of implementing the E-Verify program and they have dramatically improved its performance since it was first launched. However, the program suffers from one very important gap in its design, and that is that it cannot authenticate the identity of individuals presenting themselves for employment, as the Chairman has very forcefully pointed out.

The program has been effective in detecting certain fraudulent documents, but when presented with legitimate information that has been stolen or is otherwise being used for fraudulent purposes, it simply cannot readily detect that situation.

Consequently, identity theft and fraud are actually being encouraged by this gap in the system. The problem is that the system is based on verifying biographical data and Social Security numbers and does not authenticate the identity of the person presenting such information.

This system, just like the I–9 system that it supplements, also puts employers in the untenable position of having to exercise their discretion in verifying information and documents presented to them. This can lead to unintentional mistakes, or sometimes encourages less than lawful and ethical behavior.

There is a way to deal with this problem of being unable to authenticate a person's true identity. Biometrics have been used for many years to identify and verify the identity of individuals, primarily in the law enforcement context. However, in the past decade, biometrics have been increasingly deployed in the civilian sector to authenticate and verify personal identity.

Numerous industries now require employees to provide a biometric, as well as biographic, data for purposes of a background check and for identification. Perhaps the best example is the transportation industry, which has developed the TWIC card, which is the Transportation Workers Identification Card. This card has a biometric imbedded in it and it is, and will be, used for verification and access control.

Other industries that are adopting or have adopted biometrics for identification and verification purposes include financial services—

which, Mr. Chairman, you know probably better than anybody, coming from New York, that if you're in the financial services industry as I once was, years ago I had to give a biometric and have a background check—health care, education, and a number of others. Indeed, the U.S. Government, under HS PD12, requires a biometric, a background check, and a card for employees and contractors.

Mr. Chairman, if we're to have comprehensive immigration reform it is critical that we have a system that is effective in dealing with the problem of unauthorized workers. The time is right to address the gap in the E-Verify system in the context of immigration reform. Biometrics technology continues to improve constantly, but the state of the technology today is more than adequate to address the problems presented in the E-Verify program.

As I mentioned in my written statement, I believe that it would border on the irresponsible not to undertake a thorough analysis of the challenges and costs of adding a biometric module to the E-Verify program. I commend your attention to the report issued by the Migration Policy Institute yesterday. It suggests three pilot programs that would provide a road map for USCIS in expanding the E-Verify system to deal with the problem of authentication of identity.

Mr. Chairman, there is a lot more that can be said about this issue, but my time has expired. I look forward to your questions.

Chairman SCHUMER. Mr. Melmed?

STATEMENT OF LYNDEN MELMED, FORMER CHIEF COUNSEL FOR USCIS, BERRY APPLEMAN & LEIDEN, LLP WASHINGTON, DC

Mr. MELMED. Chairman Schumer, Ranking Member Cornyn, Senator Sessions, thank you for the opportunity to appear today before the subcommittee.

Congress has wrestled with employment verification for over 20 years, and rightly so. It is the linchpin of effective immigration enforcement. Comprehensive reform will fail if the next generation of employment verification is not fast, accurate and reliable.

Conventional wisdom says that employers are reluctant participants in the verification process and will only participate in an electronic system if forced to do so. The recent increase in enrollment in E-Verify, which is voluntary, suggests otherwise: employers need, and want, the Federal Government to provide them with the means to verify the legal status of their workforce.

E-Verify is a strong foundation for an electronic system. During a period when enrollment has increased by over 1,000 employers a week, DHS has continued to expand its capabilities and improve its accuracy. E-Verify is not without its flaws, including one fundamental problem that other witnesses have mentioned: its inability to detect identity theft.

The government has been creative in responding to that weakness and the photo tool biometric technology now allows an employer to compare the photo presented by the worker with the photo stored in the government's database. The full incorporation of U.S. citizen passport, foreign national visa photos, and driver's license photos into the biometric photo tool would go a long way to

reducing identity theft. Congress should, therefore, give consideration to using E-Verify as a platform and expanding photo tool for currently issued documents and/or incorporating a new biometric identification document.

Irrespective of which system Congress mandates, the following elements should be included:

First, there must be simple procedures that eliminate subjective decisions by employers. Under current law, a new employee can present a combination of 26 different documents: some combinations work, others don't. Some documents require re-verification, some don't. The DHS Employer Handbook is 55 pages long. Congress must reduce the number of acceptable documents and establish simple bright-line rules that every employer can follow.

Second, there should be a single set of laws and rules for all employers nationwide. At last count, 12 States have passed laws dealing with employment verification and the result has been a complex web of laws and regulations. At one point, an employer faced the prospect of being required to enroll in E-Verify in Arizona and being prohibited from doing so in Illinois. Congress should clarify that any new verification system preempts any current or future State law that attempts to buildupon, or weaken, the Federal scheme.

Third, there should be clear standards of liability for employers. Employers may scrupulously follow the Form I–9 verification process or even go further and voluntarily use E-Verify, yet still end up with unlawful workers. As a result, even the most compliant employer could face the prospect of a DHS audit or raid, workforce disruption, and uncertainty about its liability. For employers who comply with the rules in good faith and nevertheless end up with the workers who are not lawful, there should be clear standards for when liability would attach.

Finally, employers should bear reasonable and proportional costs for any system. Employers already shoulder much of the cost of administering the paper-based verification process. After all, it's the employer that completes the I–9, retains the I–9.

The fact that so many voluntary users of E-Verify inadvertently violate its rules suggests that many employers are underestimating the costs involved in establishing and running an electronic verification system. As Congress considers expansion of E-Verify or creation of a new system, careful consideration must be given to any additional costs that will be borne by employers.

In closing, if Congress is successful in designing and implementing an employment verification system that is fast, accurate, and addresses identity theft, it will be much easier to find common ground on how to phase in such a system. But that will only be true if employers have access to a legal workforce, an open question when the economy recovers and current immigration quotas limit the availability of legal workers.

Congress should, therefore, carefully coordinate expansion of E-Verify or any alternative system with broader reforms that provide employers with the legal supply of workers they need to sustain and grow their businesses.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Melmed appears as a submission for the record.]

Chairman SCHUMER. Thank you, Mr. Melmed. We want to thank all three witnesses for excellent testimony.

We're going to limit questions to 5 minutes, but we'll go several rounds. I think I have more than 5 minutes' worth of questions, and maybe some of my colleagues do as well.

First, to Mr. Aytes. One of the major concerns, as you've heard, with E-Verify is the risk of identity fraud. We found company after company that complies with E-Verify having trouble. In December of 2006, a raid of the large food processing firm, Swift, led to the arrest of 1,200 suspected illegal workers, even though the company was using E-Verify at the time.

As of August 2008, USCIS arrested 595 workers suspected of being illegal immigrants in a raid on Howard Industries, a company that was using E-Verify since 2007. All 595 in that one were charged with identity theft and fraudulent use of Social Security numbers.

Given these incidents and the concern voiced by many, isn't there a large risk of identity fraud not captured by the E-Verify? And people, as I mentioned earlier, desperate to work will figure out that that's an easy way to go, it's not just hit or miss.

Mr. AYTES. Clearly, Senator, within the general environment of the country today there is a substantial vulnerability to identity theft not only with respect to immigration documents, but financial documents and in other contexts as well.

That is one of the reasons why we have been trying to expand access to driver's license information. It is the largest inventory, other than passport data, which we are working to add to our system of photographs to let employers know what a State saw and who they issued a document to other than creating a stand-alone process, whether it be a TWIC card, whether it be the current passport card, or whether it be a passport-like process to independently collect biometrics and issue documents and create a verification process. It's the next logical step, we would suggest, to expanding the utility of E-Verify in the identity verification field.

Chairman SCHUMER. Okay. You published a statistic that says 96.9 of employees are automatically confirmed as authorized within 24 hours through E-Verify, but isn't it true that that statistic includes false positives?

Mr. AYTES. To the extent to which there may be false positives, that someone has been able to successfully convince an employer that they are someone else, yes, sir.

Chairman SCHUMER. Yes. Okay.

Next question, I will go to—I have a bunch more questions for everybody, but I'm going to go to Mr. Ziglar. Based on your time at the INS and your subsequent professional experience, do you believe that there is a large risk of identity fraud not captured by the E-Verify system?

Mr. ZIGLAR. I think that's unquestionable, Senator.

Chairman SCHUMER. All right.

Mr. ZIGLAR. It's quite easy these days to engage in identity theft and then use that to do all sorts of things, including beat the E-Verify system.

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Chairman SCHUMER. Right.

And now for Mr. Melmed, and then I'm going to ask each of the others this question as well: do you agree that the 10 characteristics I set forth in my opening statement should serve as basic requirements for any tough, fair and effective system that would prevent employers from hiring illegal workers and will be accepted by the American public? Mr. Melmed?

Mr. MELMED. Yes, Senator Schumer. I think that the framework that you set forth is an excellent starting point for a verification system. Like any system that involves a lot of technology and a lot of different government databases there are going to be many, many tough policy questions, but I think if you start with that framework it will be a good place.

Chairman SCHUMER. Great. And I hope your boss—your former boss—was listening.

How about you, Mr. Aytes?

Mr. AYTES. Well, as a representative of the government here, let me be a little careful. I think it's a good place to start, as Lynden says.

Chairman SCHUMER. How about just as a representative of yourself? I understand this is not your organization's position, but just based on your experience. No one is holding you to it, and you don't have to say yes or no.

Mr. AYTES. Thank you, sir. I do think it's a good place to start. I think comprehensive reform which includes some changes in the verification process is going to be necessary. The President has said that, the Secretary has said that; I'm on firm ground in that respect.

Chairman SCHUMER. Great.

Mr. Ziglar?

Mr. ZIGLAR. Mr. Chairman, I think it's not only a good place to start, it's probably a good place to end.

Chairman SCHUMER. Thank you. All right.

I have 14 seconds left, but I'm going to quit while I'm ahead in the first round and call on my colleague, Senator Cornyn.

Senator CORNYN. I was reminded before the hearing of a story that I read recently about a new project to identify 1.2 billion Indians. They are taking on, on a humongous scale, something that we've been struggling with for 20 years. The predicted cost is 10•3 billion pounds for 1.2 billion citizens and will replace what right now is 20 different proofs of identity that are available and require, in the words of the gentleman who's been appointed to head up this project, "a ubiquitous online database that will have to be impregnable to protect against loss of information".

Mr. Chairman, I ask that this story from the Times Online, July 15, be made part of the record.

Chairman SCHUMER. Without objection.

Senator CORNYN. Thank you.

[The article appears as a submission for the record.]

Senator CORNYN. Why is it that we've been struggling for 20 years to do this, Mr. Melmed? Do you think it's because we lack the knowledge or is it a lack of political will?

Mr. MELMED. Senator Cornyn, I think there were two limitations over the past 20 years. The first, is technological. The capabilities

that the government has today are far superior than it had 20 years ago. Even the discussion about the issue of an identification document, when I've looked at the congressional testimony from the 1986 debate surrounding a national ID card, it is a different environment and I think Americans are much more comfortable with the use of identification throughout their lives. So I think it's a mix of both technological developments and social acceptance of the use of technology.

I think more recently, however, it's just the challenge of coordinating employment verification with the other issues related to immigration reform and the recognition that dealing with the workplace, with illegal workers in a workplace, is inextricably tied to fixing the legal side of the immigration system.

Senator CORNYN. Mr. Ziglar, I know you were Commissioner of INS for a while. I'd just like to ask if you share my view that the main reason why Congress has been unable to deal with this issue effectively so far—I'm talking about comprehensive immigration reform—is because of the lack of confidence that the American people have that we're actually serious about, as Senator Schumer said, operational security at the border. They're not confident that we are serious about establishing an effective means of employment verification.

Do you agree with that? If you disagree, tell us your views.

Mr. ZIGLAR. Well, I think that's part of the issue. I had the good fortune, I spent a year and a half after being INS Commissioner studying and teaching immigration law and history, and I learned a lot about it I wish I had known when I was Commissioner. What we're going through right now in this country has happened a number of times, where the Congress, which has more authority in the area of immigration than probably any other area of the law, if you look at the cases, where the Congress has taken literally sometimes two decades to move from an ineffective system to something that is a more effective system. It's a very volatile political issue; it always has been, always will be.

So I think one of the reasons is some lack of political will. I think the lack of trust that it could actually happen is part of it. I think with respect to the employment verification system, I would associate myself with Lynden on several of the things he said. The technology to do a really effective verification system has just now been emerging over the last decade. We're there today, but we would not have been there—we were not there in 1996 when the first electronic employment verification system was addressed by the Congress.

Senator CORNYN. Well, I mentioned to Senator Schumer that when I visit New York and want to go into office buildings, I not only have to register at the front, but someone has to come down and let me in or be there as I go through the turnstile with a machine-readable card, presumably some form of biometric included. You mentioned the TWIC card that Congress mandated for transportation workers. Is there any excuse that you can think of, from a technological standpoint now, not to provide a reliable, comprehensive means of employee verification?

Mr. ZIGLAR. I can't think of any. There is no one particular technology that shines over all the others. You could use a biometric

card and use a verification scanner. Literally, you don't necessarily even have to have the cards. I think the Chairman mentioned this in his opening statement: you could use a combination of fingerprints and iris scan, for example. The reliability factor on that is right up near 100 percent.

So, I mean, there are ways of doing this and you never have to have somebody carry a card around. I don't know about you. I carry so many cards that I can't find them, and then I lose them. So, I think that has its own set of problems. But there are lots of ways we can tackle this problem.

Senator CORNYN. Thank you very much.

Chairman SCHUMER. Senator Sessions.

Senator SESSIONS. Thank you.

Well, this is most interesting, and matters that we need to work on. I think one of the things that causes the American people to be troubled is the E-Verify, Mr. Aytes, is still a pilot program. It passed 10 years ago. It was supposed to have been in effect many years ago. Why didn't it happen? The reason is, I think it's pretty clear: lack of political will, political pressure on Members of Congress. The money didn't get appropriated and it never really occurred.

Although Congress, Mr. Ziglar, definitely has the ultimate legislative power, I'm convinced, if the President doesn't want this to happen it's not going to happen. We can give them money, we can tell them to do these things and these capabilities. If they're not leading, and motivated, and want to make it succeed, it's never going to succeed. We haven't had a President in some time that's committed to that, maybe never.

With regard to the E-Verify system, only 2.8 percent turn out to be final non-confirmation, Mr. Aytes. Is that about right, or 2.9?

Mr. AYTES. 2.8. Yes, sir.

Senator SESSIONS. 2.8. Well, I think, as you noted, 5 percent, people estimate, of workers in America are illegal, so this is not over-catching the people, apparently. But like Senator Schumer says, it indicates some people may be getting by the system and we could do better about it.

Is it possible—I think you answered this, Mr. Ziglar. I'll ask the others. Mr. Aytes, I'll start with you. Based on the system, the capabilities of the system, is it possible that not only could the business, when they punch in a Social Security number, could see if that was the proper match of the Social Security number, that is, a valid number, but also could see the picture of the applicant?

Mr. AYTES. Yes, they can see pictures of DHS-issued documents today. Soon, next year, they'll be able to see passport-issued documents. As I said, we've been trying to work with the States to get them interested in sharing their documents so we can show what they see typically in an employment context, which is a driver's license.

Senator SESSIONS. And the question, I guess, is, what pictures can they see now, or soon?

Mr. AYTES. They can see our current employment authorization document, which is issued for——

Senator SESSIONS. That's for Federal employees?

Mr. AYTES. No, Senator. That is for aliens who are authorized to work temporarily in the United States. And they can see green cards, documents that we issue to permanent residents of the United States. Those are cards that we issue to people for the purpose of their status and their employment authorization.

Senator SESSIONS. Mr. Melmed, has that got potential to be more effective than it is?

Mr. MELMED. I think there's certainly a lot of potential there. My understanding, statistically, from the MPI report that Commissioner Ziglar submitted into the record, there's approximately only 4 to 6 percent of documents used in the hiring process, about 15 million documents right now, are part of that photo tool technology system. Those are only documents currently issued by DHS in connection with the immigration system. Work is under way right now to access, as I understand it, passport photos, so anyone with a U.S. passport, an employer would be able to see the passport photo in the system. But the driver's license is the most commonly——

Chairman SCHUMER. Can I ask a question? What percentage of the American people have a passport with a picture? I think it's only like 10 percent. Is that right?

Mr. MELMED. I apologize, Senator Schumer. I don't know that number off the top of my head.

Chairman SCHUMER. Is that right, Mr. Aytes?

Mr. AYTES. I'm sorry, sir. I don't have that data.

Chairman SCHUMER. I think it's a small percentage. I'm not sure what it is. I thought it was 7 to 9, because we looked at this on the northern border and the crossing into Canada. But I'm sorry to interrupt.

Mr. MELMED. That's an important point to make because the driver's license is being used.

Senator SESSIONS. The driver's license is the one that could make a difference?

Mr. MELMED. Yes, Senator Sessions. That is the most frequently relied upon identity document during the hiring process.

Senator SESSIONS. And when we say "biometric", Mr. Aytes, I'm inclined to believe, and was active in this debate a number of years ago when Secretary Ridge was there, and I encouraged him to use the fingerprint. I noticed when he left, he said he had one bit of advice to his successors: use the fingerprint because it's a system that—we're computerized nationwide through the FBI system and it can actually work to identify somebody. If you start a new thing, like an iris, the eye, or some other, visage, it has no connection.

I mean, these may be people wanted for murder, or robberies, drug dealing, and things of that nature that would not be picked up. Some think, well, that's bad. If I go to apply for a job and they find out I'm a murderer or a drug dealer, how bad is that? As a former prosecutor, I think that's pretty good. That's how you catch criminals today, technologically, really.

Well, today it has real resonance, what we're doing, because of the unemployment rate. I'll just share this story. An Alabama contractor who does right-of-way work, has been doing so for 25 or 30 years, has a lot of employees that have worked for him for many years, has a retirement plan and an insurance program and pays

pretty good wages, all of a sudden he had an out-of-State company come in and wins every contract.

He's convinced, and he's received information from Federal investigators, that he's probably correct that most of those are not legally here. So he's going to be laying off right now, in a time of recession, American workers that probably are not over-paid, for sure, but having fairly decent wages and some benefits, and he can't compete with this. So I think getting this right is so important and I hope that we can.

Thank you, Mr. Chairman, for talking about these technical matters. I know Senator Kyl, on this particular issue, always felt there was nothing more important to get right than the kind of identification document we use, and it's complex. So, there's nothing wrong with starting and talking about it. As a matter of fact, I salute you for doing so.

Chairman SCHUMER. Thank you.

We'll now go to a second round. I just have a few questions. These are for Mr. Ziglar. They focus a little bit on the technicalities, as Senator Sessions mentioned.

First, can you provide examples where biometrics-based systems are currently being used in private industry, in the government, and other countries? Just share with us, briefly, how effective they have been.

Mr. ZIGLAR. Biometrics are fairly ubiquitous around the world now. For example, the company I retired from last year, we supplied the hardware for voting systems in Venezuela, Bolivia, the Gold Coast, a number of places, under U.N. supervision where people were enrolled, and then when they showed up to vote, they took their fingerprint to eliminate as much voter fraud as possible. That's an example.

Another example. In Germany, for example, my company owned a company in Germany that was in the facial recognition business. Now, facial recognition is not a highly reliable biometric yet. It will get there one of these days. The two most reliable that are in practice are, of course, iris scanning and fingerprints. But we deployed a number of systems in Germany in casinos that could pick out habitual gamblers, which can't go into them, or identify people that were not so good, or also identify employees. There are companies in the country now, which will remain nameless, that use facial recognition on the way in to make sure that these are, in fact, employees that are coming in. The Federal Government. In highly secure facilities, fingerprints and an iris are used to gain access without a card.

Chairman SCHUMER. Right.

Mr. ZIGLAR. So like I say, it's spreading rather substantially. In the health care industry, there are now situations where a doctor or a nurse have to give their fingerprint in order to get access to medical records, which is really a terrific way of honoring the HIPPA laws. Would you like me to go on? I could probably spend another 30 minutes talking about it.

Chairman SCHUMER. No, I get it. It's pretty extensive.

How is the cost here? I mean, we're exploring this in great detail, as you know, as Jeff mentioned. And do you think the cost of an employment verification system could be paid for by using a com-

bination of the fines and fees to the population of individuals who would be legalized as part of comprehensive reform, as well as by taking the current revenues received from immigration work permits and applications? I mean, is the cost sort of comparable?

Mr. ZIGLAR. Well, I don't know what those numbers are.

Chairman SCHUMER. Is the cost relatively reasonable for these things?

Mr. ZIGLAR. The cost is really—in fact, the costs are coming down rather dramatically in the business, having run a company and the business is coming down too dramatically. But the fact is that these things can be done very reasonably.

I know one of the issues that has been raised constantly is that employers will have to go out and buy a whole bunch of equipment and do all these——

Chairman SCHUMER. We do not intend that to happen.

Mr. ZIGLAR. That's just not true. There are other ways of getting that service on a per capita basis.

Chairman SCHUMER. Right. Right.

And finally, do you think that any employment verification system that uses PIN numbers or other security codes to authenticate an employee's identity rather than unique biometric features will have a larger risk of identity theft?

Mr. ZIGLAR. I mean, you can give somebody your PIN number.

Chairman SCHUMER. Yes. Can't give them your fingerprint.

Mr. ZIGLAR. Pretty hard.

Chairman SCHUMER. Or your face. Yes. Okay. Thank you.

Anyone want to add anything to those two questions, Mr. Melmed, Mr. Aytes?

[No response].

Chairman SCHUMER. Great. Okay.

Senator Cornyn.

Senator CORNYN. Mr. Aytes, I think you said that only 14 percent of new hires are run through E-Verify today. Did I hear you correctly?

Mr. AYTES. Fourteen percent of non-agricultural hires are run through E-Verify.

Senator CORNYN. Okay. So if you add agricultural hires, it would be——

Mr. AYTES. It drops the number quite a bit.

Senator CORNYN. Substantially larger number.

Let me put it this way: would you agree with me that we need to get all new hires run through E-Verify or some sort of identification system, whatever it be, whether it's iris scans or fingerprints, in order to make this thing work?

Mr. AYTES. Today, with the exception of two States, which have themselves decided it will be mandatory, and I think about 10 to 12 others which have some variation of a mandatory requirement, usually for State employees or State contractors, it is entirely a voluntary system presently. That was the way it was set up by the Congress. And while it's growing by 1,000 employees a week, which shows that a number of employers are interested in using this program, for it to really serve its purpose it's going to have to be used far more consistently in the workplace.

Senator CORNYN. And I understand why people would voluntarily decide to use it for their own risk aversion, particularly if ICE and others are going to come in and raid their premises and enforce the immigration laws. But realistically, this has got to apply to every employer, doesn't it, if it's going to work reliably in a non-discriminatory way?

Mr. AYTES. The President said that some form of verification system is going to be an essential element of immigration controls.

Senator CORNYN. Well, I think, Mr. Melmed, you mentioned that you think it's the linchpin. I would take your statement and the President's statement, and Mr. Aytes', and say it can't just be a component. It really is the foundation, I think, upon which it's going to be built, not only in terms of fairness and protecting private information, but also in terms of restoring the public confidence that we're actually serious about that.

Would you agree with that characterization, Mr. Melmed?

Mr. MELMED. I couldn't agree more. Certainly within the business community, having confidence that the verification system works is going to be critical to having full compliance, both the letter of the law, but also the spirit of the law. Employers right now, there's a perception that E-Verify does not work. Some of the high-profile raids, like the Swift raid that Chairman Schumer mentioned, is cited repeatedly out there as evidence that there are still flaws in the system. However, the next generation of E-Verify, by incorporating biometrics, dealing with identity theft, will increase that confidence level and that will be central to comprehensive reform.

Senator CORNYN. I'd like each one of you to comment on this question, if you would, please, starting with Mr. Aytes. Obviously we're talking about technology and feasibility of uniform employment verification, but we haven't yet begun to talk about how many more people the Department of Homeland Security is going to need to hire to do this and what sort of funds they're going to need to enforce violations of the law or other individuals who are identified through this process, perhaps.

I know it's maybe a little premature to ask you to speculate what your budget is going to need to be like, but could you just comment generally on, once E-Verify or some counterpart of reliable employment verification system is put in place, what resources will be necessary for the Federal Government to provide to make it actually work, rather than just make it technologically feasible and not feasible in practice?

Mr. AYTES. Sir, it is a little hard to extrapolate what it might cost; it will depend on the scenario. How frequently would we want to update to make sure, that if we're issuing a card for example, the card is always current, like driver's licenses get replaced periodically? Would DHS or another agency be involved? We're not the only government agency that issues identity documents. The State Department issues passport cards and the passport itself, and individual States issue driver's licenses. So, there are various scenarios.

We have outlined that to take E-Verify—the current system which is not biometrically based—nationally would cost us probably

about $200 million a year, which is a little bit more than double what our current budget is for that program.

Senator CORNYN. Commissioner Ziglar, do you have any comments on what else is going to be needed to make it work, in addition to the technology and the political will to make it happen?

Mr. ZIGLAR. Well, Senator, I think it's going to be a question of whether or not the government reaches out to the private sector to help them implement this. If they try to do it internally it will overwhelm the system. There is plenty of talent and ability in the private sector to work with the government to design a system that can be efficient and can be maintained. Is it going to cost money? You betcha. Is it worth it? You betcha.

Senator CORNYN. Any comments you'd care to make, Mr. Melmed, on that regard?

Mr. MELMED. Yes, Senator Cornyn. The cost will be significant. Beyond just the cost, the process involved in expanding the system involves appropriations, procurement, hiring employees and screening those employees, as well as implementing policy and regulations. All that said, the cost of not doing it, of not having an effective enforcement system in the workplace, is too significant.

As I said in my opening statement, I don't think reform will work. So I think the question really is how to pay for it and how much to spend on new technology and what you're getting in return for each additional stage of technology, but it obviously must be done, and it must be paid for. Creative ways need to be found to pay for it.

Senator CORNYN. Mr. Chairman, I'd note that today, for me to access my laptop computer, I have to swipe my fingerprint over a portal, which gains access to it. I just can't imagine that this is an infeasible thing to do. I congratulate you for focusing on this important linchpin, as it's been called, because I do believe that we are not going to get comprehensive immigration reform done unless we get this done right.

Chairman SCHUMER. And on that optimistic note, we will thank our witnesses and call the hearing to a close.

[Whereupon, at 3:48 p.m. the hearing was adjourned.]

[Additional material is being retained in the Committee files, see Contents.]

Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Question#:	1
Topic:	biometrics
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: There was a lot of discussion during the hearing about creating a biometric-based federal employment verification system, or altering E-Verify to include biometric data. I am concerned about how the government would create and safeguard a database that contains biometric information from millions of U.S. citizens.

If Congress legislates that E-Verify should contain biometric identifiers, what systems do USCIS and the Social Security Administration (SSA) currently have in place to ensure that U.S. citizens will not be subject to identity theft or misuse of this biometric data?

Response: USCIS currently has processes in place to assure that personally identifiable information in E-Verify is maintained and treated in accordance with all applicable privacy and IT security laws, including the Privacy Act of 1974 and E-Government Act of 2002. It is important to note that the data used by E-Verify comes from many other large scale systems in the Department of Homeland Security (DHS), Social Security Administration (SSA), and the Department of State, all of which comply with the aforementioned authorities. Furthermore, System of Records Notices and Privacy Impact Assessments have been completed for the E-Verify program, consistent with requirements set forth by the Privacy Act of 1974 and the E-Government Act of 2002.

We note that SSA does not capture any biometric information for its program administration purposes.

Question:

What additional protections should Congress require to assure that any new system maintains the privacy of U.S. citizens and prevents leaks of personally identifiable information?

Response: Congress and the Administration have already established a robust set of requirements through the Privacy Act, the E-Government Act of 2002 and other legislation that establishes strong penalties for willful unauthorized release of personally identifiable information. Specifically, the Privacy Act provides for the possibility of civil causes of action against the agency and criminal penalties against the individual. In addition, an individual employee may be subject to other penalties, such as an adverse employment action for the mishandling of information.

Question#:	1
Topic:	biometrics
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

An expansion of the use of PII or the inclusion of biometric data would require further legal and policy analysis to determine options for implementation and safeguarding of information as allowable by the Privacy Act and E-Government Act.

Question:

What safeguards should Congress require to ensure that any biometric data collected by USCIS or SSA will only be used for employment verification purposes and will not be shared with other governmental entities?

Response: Biometric information is privacy-sensitive information that would be subject to the Privacy Act of 1974, E-Government Act, and other legislation. Biometric information should also be subject to heightened safeguards on use. It is critical that DHS ensure that any sharing procedures and policies protect the freedom, information privacy, and other legal rights of Americans. The existing robust set of requirements already establishes strong penalties for unauthorized release and use of personally identifiable information. Specifically, the Privacy Act provides for the possibility of civil causes of action against the agency and criminal penalties against the individual. In addition, an individual employee may be subject to other penalties, such as an adverse employment action for the mishandling of information. Also, the Information Sharing Environment (ISE) has issued the *Privacy and Civil Liberties Implementation Guide for the ISE (Implementation Guide)* to Federal agencies to ensure the ISE is established and used in a manner that protects the privacy and civil liberties of Americans.

Question#:	2
Topic:	costs
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: It is my understanding that the Department of Homeland Security (DHS) has estimated that administering a mandatory E-Verify program that applies only to new hires could cost the agency approximately $765 million for the next three years. Other projections indicate that total costs for the government, workers and businesses could equal $11.7 billion per year.

What additional resources will be necessary to implement and maintain a mandatory biometric-based employment verification system?

Response: DHS is not able to determine the amount of resources needed at this time, given the number of uncertainties in terms of implementation. As an example, it would be much less costly for the U.S. Government as well as employers and employees if E-Verify were able to reuse photos or other biometrics that were already collected as part of the issuance of document the employee presents than if a new collection / enrollment program must be created. However, additional staff for both DHS and the Social Security Administration will likely be required to efficiently address any initial mismatches that occur. DHS will also need additional staff to deter and correct misuse by employers and to educate the U.S. public – both workers and employees – about the program.

Question:

How many additional workers do you estimate USCIS and SSA will need to hire in order to authenticate the identity of 150 million U.S. citizen workers?

Response: It will not be possible to estimate the number of additional workers USCIS and SSA would need to hire to authenticate workers until an authentication system is more defined (i.e., whether government staff or third-party venders perform the authentication and how extensive the authentication process is). Additional staff will be necessary for the actual authentication of identity. Additional staff for both DHS and the Social Security Administration will also be required to efficiently address any initial mismatches that occur. DHS will also need additional staff to deter and correct misuse by employers and to educate the U.S. public – both workers and employees – about the program.

Question#:	3
Topic:	new start
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: Some in Congress have proposed that we scrap E-Verify in its entirety and start with a new program based on the Health and Human Services database to facilitate child support enforcement. Do you agree?

Response: No. The Department of Health and Human Services Office of Child Support Enforcement's National Directory of New Hires database is used to assist in locating parents and enforcing delinquent child support payments. While the National Directory contains data which confirms whether an individual was hired, it does not contain information on whether that individual was authorized to work. Moreover, the data are collected and submitted by the states through various methods and as a result, delays in data collection ensue. Modifying the National Directory to allow for the collection of data which would confirm work authorization status would be burdensome on states and employers, and would require additional system and process changes to enable employment eligibility confirmation checks. USCIS believes that E-Verify is the best available tool for employers who are committed to maintaining a legal workforce.

Question#:	4
Topic:	mandatory
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: Do you think E-Verify should be mandatory for all employees right now? If no, why not?

Response: Under current Federal law, use of E-Verify is voluntary, with the exception of certain Federal employers and immigration law violators. A Federal Acquisition Regulation (FAR) to be implemented beginning September 8 will require Federal contractors who are awarded a new contract on or after the effective date of the rule to verify new hires and existing hires working on federal contracts (some exceptions and exemptions apply, see www.dhs.gov/E-Verify for more detailed information).

The Administration supports a three year reauthorization of E-Verify as USCIS continues to work to improve and expand the program. The Department believes that a phased in approach is the appropriate method for a mandatory E-Verify program. Both DHS and SSA will have to increase resources to have sufficient staff to address initial mismatches with records. DHS will also need to increase its programs to address a mandatory program, including a wide scale outreach to the American public, including workers and an even more robust monitoring and compliance program.

Question#:	5
Topic:	fraud
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: You mentioned that USCIS is working to improve fraud detection and system misuse in the current E-Verify program. However, I am concerned to learn that Westat still found substantial employer noncompliance with the employer rules even with E-Verify in place.

How many employees has USCIS currently dedicated to the Monitoring and Compliance Branch?

Response: Currently, USCIS has 33 full-time employees dedicated to the Monitoring & Compliance (M&C) Branch, of which 29 are dedicated solely to E-Verify.

Question:

Are these employees the same employees as those who handle fraud detection issues generally for USCIS or are they solely dedicated to E-Verify?

Response: These 29 employees work solely for E-Verify to detect and deter system misuse; prevent the fraudulent use of counterfeit documents; safeguard personally identifiable information; and, when applicable, refer instances of fraud, discrimination, misuse and illegal or unauthorized use of the system to enforcement authorities including Immigration and Customs Enforcement and DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Question:

What types of cases will USCIS refer to ICE?

Response: Per our Memorandum of Agreement with ICE, the USCIS Verification Division, at its discretion, will refer significant cases where it suspects an employer of a specific incident, or a pattern or practice of:

- Misuse, abuse, and/or fraudulent use of E-Verify occurring at critical infrastructure sites, designated under current Homeland Security Directives; Presidential Directives or other Executive Orders (Critical Infrastructure Protection Referrals);
- Violations regarding the knowing employment of unauthorized aliens;

Question#:	5
Topic:	fraud
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

- Criminal activity (Criminal Employer Referrals), such as alien smuggling, harboring illegal aliens, domestic transporting, encouraging or inducing conspiracy or aiding and abetting as set forth in 8 U.S.C. §§ 1324 and 1324a(f); or document fraud, 18 U.S.C. § 1546(b)(3); or identity and aggravated identity theft, 18 U.S.C. §§ 1028, 1028A;
- Failure to use E-Verify for all new hires as required under the E-Verify Memorandum of Understanding; or
- Retaining employees after an E-Verify Final Non-confirmation.

Question:

Do they include individual violators who might only receive a civil fine? Or are they limited to broad fraud schemes or cases that are susceptible to criminal prosecution?

Response: USCIS does not specifically focus on either individual violators or broad fraud schemes. In the course of monitoring employer use of E-Verify, USCIS identifies and analyzes user/employer activity for indications of system-related misuse, abuse, fraud and potential discrimination. Based on the results of initial and follow-up monitoring of employers receiving compliance assistance, individual users, as well as their employers, could be referred to ICE for further investigation and potential enforcement action for instances or patterns of inappropriate activity and may result in the imposition of civil and/or criminal penalties.

Question:

If ICE refuses to take a case, what does USCIS do with known violators? Do you go ahead and approve requests for benefits or authorize employment despite the violation?

Response: USCIS monitors employer specific behavior in relation to E-Verify. Depending on the severity and circumstances of the employer's actions, they may be offered compliance assistance or have their participation in the program terminated. If the query is legitimate, the employee may receive confirmation of work authorization. E-Verify does not approve requests for benefits.

Question#:	6
Topic:	additional employees
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: If Congress mandated E-Verify how many additional employees would USCIS need to handle the anticipated volume of E-verify queries?

Response: The staff required to support mandated E-Verify will depend on the scope of the legislation, including which employers and employees are required to use the system and how the legislation would be phased in. The USCIS Verification Division maintains a scalable formula to determine staffing needs based on the different mandatory environment scenarios. The main functional areas projected to grow significantly under a mandatory environment include: Monitoring and Compliance (M&C), Status Verification Operations (SVO), Customer Contact Operations (CCO), and outreach efforts. The Verification Division is conducting additional research and analysis to determine the appropriate rate of growth for policy components and other indirect areas under a mandatory program. Note that in addition to USCIS, SSA is also responsible for significant E-Verify operations and would need additional employees to support mandatory E-Verify.

Question#:	7
Topic:	informations sharing
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: Do you think the current error rate with E-Verify would be diminished by expanded information sharing with other federal and state agencies like IRS, HHS, and State motor vehicle and vital statistics bureaus?

Response: In general, USCIS believes that expanded access to databases and information held by other Federal, State, and local agencies may help USCIS minimize mismatches and detect suspected fraud within the E-Verify system, though more study is needed. Without knowing the accuracy of a specific database, the data collection processes for the database, and/or the technology issues associated with connectivity, USCIS cannot state whether adding access to these databases would reduce or increase mismatches within the system. We would also note that while our goal is always to reduce mismatches that lead to unnecessary secondary verification of work-authorized individuals, the primary goal is increasing the overall ultimate accuracy of the system, including using new information sources to detect and deter cases of identity fraud that might otherwise be automatically verified; in other words, decreasing the initial mismatch rate is not necessarily consistent with improving the accuracy of the system.

Question#:	8
Topic:	States
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: You mentioned that USCIS is assessing use of State driver's license photos to add to E-Verify but that State's have yet to agree.

Have any States specifically stated opposition to allowing USCIS to use DMV data?

Response: Almost all the States that we have spoken to in reference to E-Verify accessing and displaying driver's license photos have expressed reservations and concern with displaying these photos to private employers, as well as funding concerns. This is due to concerns about both Federal law (the Drivers Privacy Protection Act (DPPA) and similar state laws limiting the use of this information. Nonetheless, we are continuing negotiations with states to try and secure an agreement, consistent of course with all applicable law.

Question:

What authorities or tools would you need to expedite State info-sharing agreements in this area?

Response: Specific legal authority that E-Verify is a permitted use of State driver's license information would likely help allay the reservations described above. Funding to compensate States for data access and associated staffing needs would likely expedite States' participation.

Question#:	9
Topic:	time
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: How much time and what level of resources would USCIS need to have connectivity with these agencies if info sharing were expanded?

Response: A minimum of one year of lead time to work out agreements and technological connections necessary to facilitate data sharing would be needed.

The addition of outside databases also requires expansion of secondary verification processes and resources to ensure that employees have the opportunity to contest a mismatch. While E-Verify status verifiers can resolve some issues, the involved agencies also will need to handle contested mismatches. The cost to establish technical connections would be minimal in comparison to the time and resources required of outside agencies to establish and appropriately staff secondary resolution processes. Without a statutory mandate to share information, requesting outside data owners to share data and expend resources may present challenges.

Question#:	10
Topic:	tools
Hearing:	Ensuring a Legal Workforce: What Changes Should Be Made to our Current Employment Verification System?
Primary:	The Honorable John Cornyn
Committee:	JUDICIARY (SENATE)

Question: In your opinion, what other tools could USCIS use to improve E-Verify and to better eliminate fraud?

Response: Some ideas for improving E-Verify and better eliminating fraud include:

Verifying Employers – USCIS is currently engaging in an effort to use third-party, commercial data to validate information that employers self-report when they register for E-Verify. Verifying the legitimacy of employers who use E-Verify would also be significantly enhanced through the use of Internal Revenue Service (IRS) data. Information that employers self-report during the E-Verify enrollment process, such as company name, address, and Employer Identification Number (EIN) could be verified using IRS data. This would provide USCIS a greater level of confidence that employers using E-Verify are bona fide employers and that the information they provided to E-Verify is accurate.

An Employee Self Check – Creating an in-system self-check would enable employees to check their work authorization status prior to initiating employment. Employees would have the opportunity to self-query to determine whether the system would automatically confirm their employment eligibility so they could proactively resolve any records discrepancies. However, such a self check system would have to be carefully created to ensure that it is not misused by individuals or criminal organizations in an attempt to test fraudulent or stolen documents which could result in increased incidents of identity theft. We are looking at different options for verifying the identity of users through the use of biographic data.

Identity Controls – Allowing authenticated applicants the ability to voluntarily "lock" their SSNs in the E-Verify system would prevent unauthorized individuals from using the SSN to fraudulently obtain employment eligibility confirmation through E-Verify.

Senator Cornyn Questions for the Record

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?

July 21, 2009

Lynden Melmed, former Chief Counsel of USCIS

(1) What do you think about the current civil penalties that can be imposed for violating laws on hiring illegal aliens? Are they too high? Too low?

I don't believe that the civil penalty scheme is the problem in the current verification process. While increasing the penalties might deter a few employers that otherwise would violate the law, I find the overwhelming majority of employers are trying to comply with a complex, outdated system. Ultimately, employer compliance will be improved through careful expansion and improvement of E-Verify (or comparable system).

(2) What standard would you apply to employers who violate the rules as they relate to employers sanctions? Should it be a strict liability approach or more neutral?

Employers that knowingly violate the law should be held liable for their actions. The problem lies not with the legal standard, but with the evidentiary challenges that make it difficult for the government to look backwards and determine the intent of the employer. But that problem only exists because employers are often required to make subjective decisions during the verification process – that is what happens with a paper-driven process where employers are required to judge the validity of numerous different identification and employment authorization documents. By improving and simplifying the verification process, it will be easier for the government to establish that an employer intentionally failed to comply with the law.

(3) You highlighted that there are too many documents that can be presented to show identity and work authorization and that they need to be reduced. Some of these documents are not biometrically enabled or electronically readable. Do you think all immigration documents issued by USCIS should be machine readable and biometrically enabled?

Yes. The technology is there. And I think USCIS is pretty far along, if not already there.

(4) As Chief Counsel of USCIS, you saw first-hand how the agency implemented new initiatives, whether by policy memoranda or regulations.

(5) As Chief Counsel of USCIS, you saw first-hand how the agency implemented new initiatives, whether by policy memoranda or regulations.

a. Would DHS need to publish regulations to implement mandatory changes to E-verify?

Without seeing the changes, it is difficult to render a concrete opinion. But it is safe to say that USCIS would need to issue regulations.

b. In your opinion what would be a realistic timeframe for the agency to effectively implement any changes to E-verify on a national scale?

It really depends on the scope of the changes. USCIS should be commended for how it implemented the federal contractor provisions. While there are places where the roll-out could have been improved (e.g. issuance of the government materials prior to the effective date), it was clear that the electronic systems were capable of handling the rapid expansion in data and there were no major missteps.

One issue that must be considered is that employers may have to implement significant changes to their training and hiring process to comply with any new verification requirements. That requires time and resources, and any expansion of the requirements must take those considerations into account. I'm not saying it can't be done. Employers want an improved system. But they'll need time to adapt and implement – otherwise there will be issues of unintentional non-compliance and the program will lose support. It is vital that any expansion of the verification system compliment, and not inhibit, the ability of employers to hire the workers they need to grow their businesses and contribute to the economy.

(6) As Chief Counsel you have also seen how litigation affects an agency's ability to do its job and implement initiatives passed by Congress. The fact that DHS was enjoined from implementing the "No Match" rule is an example of that.

a. Are there any authorities or changes you would recommend to minimize litigation in the employer verification context?

Implementation of the "no match" regulation was frustrating for all sides of the issue. But I don't see the litigation surrounding that rule as emblematic of a pervasive problem for the employment verification system. If Congress and the Department of Homeland Security are successful in implementing a system that works for employers – who, incidentally, overwhelmingly want such a system – then litigation should not be a major issue. If employment verification is made mandatory without providing employers with

an opportunity to supplement their U.S. workforce with legal foreign workers, then I suspect you'll see employers using litigation – and every other tool at their disposal – to achieve a better immigration system.

b. Do you agree that we need to streamline judicial and administrative review not only in the employer verification context but in immigration cases generally? If yes, why?

There is no question that litigation, especially in the removal context, presents a challenge for the Department of Homeland Security. But I have also witnessed situations where litigation was justified and served an important purpose in ensuring that the immigration laws are administered fairly. Unfortunately, there is no "one size fits all" solution to the rapid expansion in federal litigation that we have witnessed over the past few years.

Senator Cornyn Questions for the Record

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?

July 21, 2009

James Ziglar, Senior Fellow, Migration Policy Institute and Former Commissioner of INS

Response of James Ziglar to Questions for the Record submitted by

Senator Cornyn

PLEASE NOTE: AS STATED IN MY WRITTEN AND ORAL TESTIMONY BEFORE THE COMMITTEE ON JULY 21, 2009, MY TESTIMONY REFLECTED MY PERSONAL VIEWS ONLY. THE SAME PROVISO IS TRUE WITH RESPECT TO MY ANSWERS TO THE QUESTIONS OF SENATOR CORNYN

(1) Do you think that the current E-Verify program should be terminated as some suggest and have Congress create a new program?

No. In general, I believe that the E-Verify Program provides a basic structure that can be modified and expanded to incorporate a biometric(s) component. However, a complete answer to this question also involves a technical judgment that I am not prepared to answer without further analysis and a better articulation of the goals and objectives of the Congress in this matter.

(2) As former Commissioner of INS, you know the challenges to an agency in implementing any new program. From your perspective, what are the biggest hurdles USCIS will face if E-verify is expanded and mandated nationwide?

I believe that the single biggest hurdle that USCIS will face in implementing a more robust and nationwide E-Verify Program will be the process of enrolling the millions of people who will be included within the scope of the program. The implementation of the technology and the necessary data management systems also will require a large investment of time and money at the outset, but the magnitude of that task is not comparable to the resources that will be needed to enroll all required participants, in my opinion.

(3) Do you think USCIS is sufficiently resourced?

For purposes of undertaking and managing an expansion of the E-Verify Program as contemplated above, I do not believe that USCIS possesses adequate resources to undertake the task. I also believe that USCIS continues to under-funded in meeting the totality of its mission.

(4) Do you recommend that DHS contract out biometrics collection or keep it in house?

In my opinion, the biometrics enrollment process should be managed by working with a network of private sector entities that can provide high-quality, standards-based biometric collection and submission services.

(5) In your testimony, you agree that biometric technology is the key to an effective system. However, even with the advances in secure identification, such technology is still susceptible to fraud and security breaches, like "skimming" or using wireless technology to capture information emitted from a secure ID.

Although there is always a possibility that a biometric can be "spoofed," this possibility can be effectively thwarted by employing a multi-modal approach. There is no need, in my opinion, to use wireless technology for purposes of verification. I believe that the problem you are alluding to involves the "wireless chips" that are embedded in U.S. Passports. A secure identification card, if that is the technology of choice for the E-Verify Program, would not require a wireless component.

a. Do you have any recommendations for limiting potential security breaches?

Please see statement above.

b. If we were to adopt a multi-layered approach, as you suggest, requiring a secure card swipe and in-person capture of biometric information to verify identity and work authorization, what are the costs to businesses?

Although I do not have a transcript of my testimony available, I recall making the statement that the use of a secure identification card that could be "swiped" in order to match the fingerprint (or other biometric) with the biometric indicator proffered by the holder of the card was one of several methodologies that could be utilized in the E-Verify Program. I did not recommend (or object to) such an approach. It is possible to develop a system that does not utilize a secure identification card.

In any event, there will be a cost to the business community in complying with any employment verification system established by the Congress. I do not believe that it is possible to provide a reasonable estimate without having more information about the design of the system. I do know that the private sector will be able to provide, at reasonable cost, enrollment, processing and verification services to employers who do not choose to purchase, install and manage their own systems.

(6) In your testimony you recommend a phased approach to implementing a mandatory employer verification system.

a. Do you think a completely operational and 100% mandatory verification system should be in place before we consider addressing the undocumented population in the U.S.?

I do not think that we can afford to wait until a completely operational system is in place. That effort will take at least several years and it is my view that there is an urgent and immediate need to deal with our broken immigration system.

b. If no, how do you ensure that the current fraud documentation is not introduced into the new employer verification system?

The problem of identity fraud cannot be eliminated completely, even with a biometrically-based system since the initial determination as to the identity of a person is the operative event. However, once a person has adopted an identity, that identity is "locked in" and will follow him or her in the future. Over time, a biometrically-based system will sort out and dramatically reduce the identity fraud problem.

Unless the strategy is to suspend all employment of individuals in our economy until an improved and expanded E-Verify Program is completely operational, there is no way to ensure that further identity fraud will not occur. Obviously, the notion of suspending all employment to combat this problem is absurd and analogous to "throwing the baby out with the bath water."

In the interim, identity fraud could be reduced by further restricting the number of documents that can be used to establish identity. In particular, documents that are not as susceptible to counterfeiting should be considered.

SUBMISSIONS FOR THE RECORD

Statement of the U.S. Chamber of Commerce

ON: "ENSURING A LEGAL WORKFORCE: WHAT CHANGES SHOULD BE MADE TO OUR CURRENT EMPLOYMENT VERIFICATION SYSTEM?"

TO: THE SENATE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER SECURITY OF THE COMMITTEE ON THE JUDICIARY

BY: ANGELO I. AMADOR

DATE: JULY 21, 2009

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Statement on
"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

Before
The Senate Subcommittee on Immigration, Refugees and Border Security
Committee on the Judiciary

Angelo I. Amador
Executive Director of Immigration Policy
U.S. Chamber of Commerce
July 21, 2009

Chairman Schumer and Ranking Member Cornyn, thank you for allowing the U.S. Chamber of Commerce to introduce this statement for the record. My name is Angelo Amador and I am executive director of immigration policy for the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

In April of this year, the Chamber released a study prepared by its Labor, Immigration, and Employee Benefits Division, with cooperation from Dr. Peter A. Creticos, President/Executive Director of the Institute for Work and the Economy. The purpose of the report was to collect and disseminate objective data on the impact on businesses of E-Verify[1] and other proposed electronic employment verification systems (EEVS), while providing ideas on the efficient implementation of such new mandates. By reference herein, I would like to make it part of my statement in its entirety.

In this statement, I will address two main points. First, I will outline the business community's historic support for fair, efficient and workable mandatory employment verification systems that work for businesses both large and small, under real life conditions. Second, I will describe what an E-Verify or other EEVS legislative mandate must have to gain the support of the Chamber and many others in the business community.

The Chamber is encouraged that the Subcommittee is examining what changes should be made to our current employment verification system, which should also consider the challenges of expanding E-Verify. Particularly, the Chamber encourages the Subcommittee to emphasize issues related to system usability and the burdens imposed on employers.

[1] There is no reference in U.S. law to an "E-Verify" program. However, it is accepted that the creation of the program commonly known as "E-Verify" was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. IV, subtit. A, 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note). As amended, the IIRIRA instructs the Secretary of Homeland Security that she is to conduct various "pilot programs of employment eligibility confirmation." IIRIRA § 401(a). E-Verify is one such "pilot program," also known as the "Basic Pilot."

The Chamber has taken a leading role in representing businesses that want to work with Congress in drafting a reasonable and workable EEVS, particularly if it will be mandated on all employers. The Chamber is not alone; companies themselves and other trade associations from across the industry spectrum have been extremely engaged in the subject. The reason is simple; in the U.S. there are close to eight million establishments, employing about 120 million people, and these new requirements will affect all of them, whether or not they hire immigrants.[2]

The stakes are extremely high, and the concerns of the business community of how a new mandate will be constructed cannot be overstated. While much of the debate has concentrated on the issue of undocumented workers, employers view E-Verify and other EEVS proposals much more broadly. After all, they have an impact in the day-to-day activities, obligations, responsibilities, and exposure to liability of the employer, regardless of whether it even hires immigrants.

Finally, some congressional offices have approached the Chamber to ask about Secretary Napolitano's July 8 decision to implement regulations mandating the use of a modified version of the E-Verify program on most federal contractors and subcontractors. I can only imagine that a question in the minds of the members of this Subcommittee is how the Secretary can mandate this program on any employer when the law clearly states that "the Secretary of Homeland Security may not require any person or other entity to participate in [the E-Verify] program."[3]

However, as you may know, the Chamber, together with the Associated Builders and Contractors, the Society for Human Resource Management, the American Council on International Personnel, and the HR Policy Association, filed a lawsuit challenging the legality of the regulation in question. This litigation is pending with a hearing scheduled for August 21, 2009, in the US District Court for the District of Maryland, Southern Division. Thus, I am not at liberty to discuss our position in this pending litigation and will allow instead the Plaintiffs' official filings to speak for themselves. As to the Administration's position, its response to our Motion for Summary Judgment is due next week and we will then all be able to read its arguments on the legality of the proposed mandate.

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[2] For the latest statistics on U.S. Businesses, including number of firms, number of establishments, employment, and annual payroll, please go to the U.S. Census Bureau webpage www.census.gov/econ/susb/. Also, the Bureau of Labor Statistics (BLS) reports the level of employment in the civilian labor sector for June 2009 at 140 million. (See http://www.bls.gov/news.release/empsit.nr0.htm.) I use the latest Census data, instead of BLS, because it better divides the data by the number of employees for both establishments and firms.

[3] IIRIRA § 402(a).

BUSINESS SUPPORT FOR MANDATORY EMPLOYMENT VERIFICATION SYSTEMS

Support for the initial mandate in 1986.

Some have argued that the current "I-9" mandatory employment verification program was supported by business back in 1986 because employers wanted to have a tool to find out who was an unauthorized worker and use that information to force those workers to work longer hours and in poorer conditions. This reason is unlikely given that most undocumented workers were legalized in the same legislation that created the current mandatory employment verification system. Still, even now, some are arguing against a new mandatory employer-based program under similar grounds. The truth is that employers are willing to do their part to address this controversial issue as long as the system is fair and workable.

Support for government-based verification.

Nevertheless, if the federal government wishes to take over the duty of verifying employment authorization, employers would probably welcome the idea, as long as no new fees or taxes accompany such an effort. It has been noted that between 1979 and 1981 Labor Department experts designed a work authorization verification system for new hires for the Select Commission on Immigration and Refugee Policies (SCIRP).[4] That proposal made a federal agency responsible for verifying the worker's employment authorization status.[5] Under that plan, employers would only have to verify the identification number the worker received from the federal agency doing the verification.[6]

A similar idea is being proposed now by the AFL-CIO and Change to Win with an added secured identification card with biometrics issued by a federal agency and a distinctive work authorization number issued to the worker for each new job.[7] Once again, employers would only be in charge of verifying the number with the federal agency.[8] Again, the Chamber has never opposed a government-based verification proposal, and has yet to see one introduced as legislation. Instead, the Chamber and other business groups have endorsed various employer-based proposals because they seem to be the ones that gain traction, as recent votes in the floor of the Senate attest.

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[4] Marshall, Ray. Economic Policy Institute Briefing Paper #186: "Getting Immigration Reform Right," March15, 2007, pp. 2-3.

[5] *Id.*

[6] *Id.*

[7] Parks, James, "Here's How to Fix Nation's Broken Immigration System," (*sic*) April 16, 2009, found at http://blog.aflcio.org/2009/04/16/heres-how-to-fix-nations-broken-immigration-system/, asserting that this approach has been adopted by both the AFL-CIO and Change to Win as their proposal for an EEVS. The complete proposal is found in "Immigration for Shared Prosperity: A Framework for Comprehensive Reform" by Ray Marshall, Economic Policy Institute, April 16, 2009.

[8] Marshall, Ray, Economic Policy Institute, "Immigration for Shared Prosperity: A Framework for Comprehensive Reform," April 16, 2009.

Deciding which E-Verify or similar program to support.

The Chamber and other business groups have supported a new mandated EEVS, under certain circumstances, since at least 2005, because employers do want the tools to ensure that their workforce is in fact authorized to work. However, employers only support approaches that are comprehensive in nature and take into account the divergence in types of establishments and firms in the United States.

An establishment, defined as "a single physical location where business is conducted or where services or industrial operations are performed," include factories, mills, stores, hotels, movie theaters, mines, farms, airline terminals, sales offices, warehouses, and central administrative offices.[9] One cannot expect that the less than 20,000 firms with more than 500 employees, which hire over 50% of all workers in the U.S., will have the same resources and concerns as the four million firms with less than four employees.[10]

Thus, while most trade associations support a mandatory EEVS, each group tends to support the program that more closely reflects the resources and concerns of their constituency. Almost by definition, the core membership of the Society for Human Resource Management, the HR Policy Association, and the National Association of Manufacturers, tends to be firms with a well equipped and trained Human Resources division. These trade associations have formed a coalition, The HR Initiative for a Legal Workforce, that seems to have a preference for a new program that would rely on new technology as well as biometrics.[11]

On the other hand, the core membership of the National Association of Home Builders (NAHB) tends to be firms with a small staff and heavily dependent on the contractor/subcontractor relationship. Thus, it tends to support proposals that safeguard the independence and vitality of that relationship.

While for a home builder with twenty employees reverification of its workforce may not be a big concern, it is a colossal concern for a manufacturer with establishments in all fifty states and over 100,000 employees. In this regard, the Chamber is in the unenviable position of finding a program to support that inevitably will—and has—angered certain sectors of its membership. Currently, 96% of the Chamber's member companies have fewer than 100 employees, 70% of which have 10 or fewer employees, and, thus, small business concerns are clearly a top priority for the Chamber. At the same time, large corporations also play an integral role in the Chamber's policy making process. Thus, the Chamber can only support an E-verify mandate that addresses the concerns of both large and small employers.

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[9] Definition found in the U.S. Census Bureau webpage at http://www.census.gov/eos/www/naics/faqs/faqs.html#q2.

[10] Data found in U.S. Census Bureau webpage www.census.gov/econ/susb/.

[11] For more information on The HR Initiative for a Legal Workforce, go to www.legal-workforce.org.

Mandatory EEVS proposals supported in the 109th Congress.

During the 109th Congress, there were two competing proposals, one passed by the House and the other passed by the Senate. The House EEVS proposal found in the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) contained some of the key provisions employers support, including safeguards for contractors if the subcontractor hired undocumented aliens without the contractor's knowledge, exemption from civil penalties for an initial good faith violation, and mitigation of civil money penalties for smaller employers.

However, the Chamber and other business groups supported the Senate version, which was the product of a bipartisan amendment by then Senator Barack Obama and Senators Chuck Grassley and Max Baucus to the Comprehensive Immigration Reform Act of 2006 (S. 2611). Unlike the House version, the Senate proposal did not have a broad reverification requirement, and it had better due process with attorneys fees for employers who substantially prevailed on the merits in an appeal of an agency action. Both chambers failed to go to conference and the proposals expired with the closing of the 109th Congress.

Mandatory EEVS proposals supported in the 110th Congress.

During the 110th Congress, there were two competing proposals; both came to the floor of the Senate. One proposal was being championed by Senator Jon Kyl, with the support of then Department of Homeland Security (DHS) Secretary Michael Chertoff, in a bill to provide for comprehensive immigration reform (S. 1639). Once again, then Senator Obama and Senators Grassley and Baucus introduced a comprehensive amendment in the form of a substitute to the EEVS title found in S. 1639. Some employer concerns were addressed in both versions, but employers split in their support.

Most notably, the NAHB supported Senator Obama's version, understandably because of its stronger safe harbor from vicarious liability for contractors. The Chamber supported Senator Kyl's version in part for procedural reasons to prevent the issue from dying in the Senate through endless debate. In the end, the procedural hurdles could not be overcome and there was never a floor vote on either the version found in the underlying bill or Senator Obama's substitute amendment.

Mandatory EEVS proposals supported in the 111th Congress.

There is not a comprehensive immigration reform package moving in either chamber at this point. However, the business community continues to support expansion of E-Verify and other EEVS alternatives outside comprehensive immigration reform. The Chamber continues to support the reauthorization of E-Verify for longer periods than Congress has been willing to do.

The Chamber has also called for more money to be allocated to address the error rates and deficiencies found in E-Verify. Finally, the Chamber continues to ask for more independent research to look at ways to improve E-Verify as well as the financial impact of

the program on small businesses.[12] The HR Initiative for a Legal Workforce supports H.R. 2028, the New Employee Verification Act (NEVA), as a better alternative to E-Verify. The Chamber does not have a preference for E-Verify, NEVA, or a new government-based program, as long as the serious and real concerns of the business community as a whole are addressed.

Because E-Verify seems to be the most popular of the different proposals in Congress right now, I will concentrate my remaining remarks in outlining the things the Chamber is looking for in a mandatory E-Verify proposal that we could support. As a final point, I want to remind you that E-Verify is anything but free. The Chamber testified last year through a current member and user of E-Verify, who explained at length the costs associated with E-Verify.[13]

NEEDS OF EMPLOYERS IN A MANDATORY EEVS

Fair and reasonable roll out.

The Chamber has been calling for a tiered approach to rolling out E-Verify or any new EEVS. Starting out with large federal contractors may not be a bad idea, given that a number of these federal contractors represent part of the less than 20,000 firms who employ over 50% of U.S. workers.

However, the amendment added by the Senate to the DHS FY 2010 Appropriations bill mandating E-Verify on federal contractors takes the wrong approach. The amendment had a blanket mandate on all federal contractors without exception and included a provision mandating employers to reverify the work authorization of current employees.

The Chamber cannot support a mandatory reverification provision in E-Verify, as was included in the Senate version of DHS FY 2010 Appropriations bill. The Chamber urges you to assist in either dropping this provision from the final DHS FY 2010 Appropriations bill or amending it to address the real concerns of the business community. If you are inclined to assist in amending it, instead of deleting it, we urge you to work on eliminating the reverification provision, creating a reasonable applicability threshold standard, clarifying that there should be no subcontractor flowdown, and creating a commercial item exemption. The reasons for some of these requests are explained in more detail below.

Regardless, the best approach for a broad E-Verify mandate would be to move from one phase to the next as the system is being improved to take care of inaccuracies and other inefficiencies ascertained through the earlier phase. This would also allow DHS to properly prepare for the new influx of participants. In addition, the needs of the different types of firms and establishments need to be considered during the roll out. Many

[12] Several letters have been sent to Congress on this issue, copies of which are available upon request.
[13] Laird, Mitchell, "Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on the Social Security Administration's (SSA'S) Ability to Serve Retirees, People with Disabilities, and Workers." House Subcommittee on Social Security of the Committee on Ways and Means, May 6, 2008.

legislative proposals have failed to include even a study on a telephonic option for small businesses.

The Chamber urges that in any mandated roll out of E-Verify, businesses with less than fifty employees be exempted, as Congress studies the impact of such a mandate on small businesses and potential alternatives for compliance, such as a telephonic option. While these smaller businesses do not employ the majority of workers in the U.S., they still create millions of jobs in the U.S. economy. The burdens placed upon these entrepreneurs must be considered. Furthermore, if allowed to grow and prosper without being swamped in government bureaucracy, they may become the next global leaders. Let's remember that Apple, along with many other (now large) businesses, began in someone's garage.

The contractor-subcontractor relationship should be preserved.

It is critical to the employer community that contractors do not bear vicarious liability for subcontractor actions unless the contractor knew of the actions of the subcontractor. In other words, without evidence of direct knowledge by the general contractor, it should not be held liable for undocumented workers hired by a subcontractor, particularly when both would be required to independently verify the work authorization of their own employees. Without such protection, an employer could be open to liability even for the violations of its peripheral contractors—e.g., a water delivery company or landscaping contractor.

The House voted overwhelmingly for an amendment to H.R. 4437 in 2005 to ensure that general contractors would not be held liable for the actions of a subcontractor, when the contractor is not aware that the subcontractor was hiring undocumented workers.[14] Members voting in favor of this safe harbor for contractors included Representatives Lamar Smith, James Sensenbrenner, and Pete King, three of the main proponents of H.R. 4437.

To employers, it is also unclear how enforcement would flow down or up from contractors to subcontractors and vice-versa. Would a contractor be liable for a subcontractor's negligence in utilizing E-Verify, e.g., preverifying applicants? Or, is the contractor liable only if the subcontractor is not using E-Verify, after being required to do so? What actions must the contractor have to take to make sure that the subcontractor is complying with an E-Verify mandate without opening itself to liability under other labor laws? Thus, the Chamber urges you to make sure there is a safe harbor for contractors operating in good faith, while a subcontractor is unbeknown to him or her to be abusing the E-Verify, or another EEVS.

[14] Roll Call Vote 657, Representative Westmoreland of Georgia, Amendment to H.R. 4437, Recorded Vote of December 16, 2005, 9:38pm.

Verification should apply to new hires only.

The Chamber does not oppose the strictly voluntary reverification provision added by the Senate to the DHS Appropriations bill. The Chamber objects only to mandatory reverification provisions. While some small size employers would not mind reverifying their workforce, all employers that have contacted the Chamber with a significant number of employees list this item as their number one concern. It is not surprising that when the government has considered a program in which it is in charge of verifying work authorization, it limits the system burdens to only new hires.

Businesses already spend approximately 12 million hours each year documenting the legal status of the nation's 50 to 60 million new hires. As then Senator Obama, together with Senators Grassley and Baucus, explained in a letter to former DHS Secretary Chertoff, requiring current workers to go through E-Verify is duplicative of current procedures and redundant given the large number of employees starting or changing jobs every year.

One of the Chamber's foremost concerns is to ensure that any new E-Verify mandate does not become too costly or burdensome for employers. Existing employees have already been verified under the applicable legal procedures in place when they were hired. Reverifying an entire workforce is an unduly burdensome, costly proposition, and unnecessary given how often workers change jobs in the United States.

Under a mandated E-Verify, employers would already need to train employees to comply with the new requirements and devote a great deal of human resources staff time to verifying work eligibility, resolving data errors, and dealing with wrongful denials of eligibility. The rate of an initial response being something other than "employment authorized" reported by Chamber members large and small according to their own data is closer to 15%. Employers would be more amenable to allow DHS to obtain data from the W-2 process and ask employers to reverify workers flagged by this procedure, as Senator Obama's amendment to S. 1639 in 2007 envisioned.

There should only be one E-Verify law.

The current federal employment verification system is clearly in need of an overhaul. States and localities have responded to the lack of action at the federal level with a patchwork of employment verification laws. This new patchwork of immigration enforcement laws expose employers, who must deal with a broken legal structure, to unfair liability and the burden of numerous state and local laws. These attempts are undermining the ability of the federal government to oversee and enforce our national immigration laws and put an undue burden on businesses attempting to deal with a new patchwork of different state and local laws.

A new E-Verify mandate needs to address specifically these attempts by states and localities to interfere with federal immigration law. Specifically, it should amend the preemption provision that already is contained in federal law, but that states and localities—aided by certain courts—have sought to circumvent.

Employers must know what their responsibilities are under immigration law, and having one federal law will help alleviate any confusion about employers' role under the law.

Enforcement provisions must be fair.

Full and fair enforcement of an E-Verify mandate should take into account transition times for the new system to be fully in place and protect employers acting in good faith. Businesses are overregulated and piling on fines and other penalties for even small paperwork violations is not the answer. A new broad E-Verify mandate should include language similar to the one found in the House EEVS version of 2005 providing relief from civil penalties for a first time offense, if the employer acted in good faith.

Employers should also be given some time to rectify paperwork violations/errors made in good faith. For example, just last week, I was informed about an employer being fined because some of its I-9 forms did not contain the employer's own address. An opportunity to rectify minor paperwork violations will protect employers that are doing their very best in good faith to comply with the myriad of complicated federal regulations.

DHS, not trial attorneys, should be in charge of enforcing E-Verify provisions.

The Chamber believes that a new E-Verify mandate should not be used to open the door to a barrage of new causes of action unrelated to the hiring or firing of employees based on their work authorization status. DHS should have primary authority over the enforcement provisions of any E-Verify mandate.

Enforcement of employment verification laws resides properly with the federal government. Accordingly, the Chamber maintains that DHS, as the federal agency tasked with responsibility for immigration enforcement, should have sole enforcement authority over prosecutions for violations of section 274A of the immigration code. A broad E-Verify mandate provides the perfect opportunity to clarify that only DHS has enforcement jurisdiction over these issues.

You may be aware that the federal RICO statute has recently been used by private attorneys seeking to enforce immigration law. Not only does this invade the province of the federal government as sole enforcer of federal immigration policy, it also perverts the federal RICO statute into a use that is contrary to the intent of the statute.

Thus, there should be language prohibiting private rights of action against employers for matters that should be enforced by DHS. Furthermore, the power to investigate any labor or employment violations should be kept out of a system created exclusively for the purpose of verifying employment eligibility. The Chamber continues to call for a simple and reliable system, which includes reasonable penalties for bad actor violators.

Liability standards and penalties should be proportionate.

The Chamber agrees that employers who knowingly employ work unauthorized aliens ought to be prosecuted under the law. This current "knowing" legal standard for liability is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should, therefore, be maintained. Lowering this test to a subjective standard would open the process to different judicial interpretations as to what an employer is expected to do. Presumptions of guilt without proof of intent are unwarranted.

The Chamber does not oppose efforts to increase penalties. However, the penalties need to be proportionate to the offense and comparable to other penalties in existence in the employment law arena. If penalties are too high, and too unyielding, employers who are assessed a penalty, but believe that they did not violate the law, will be forced into an unnecessary settlement because they cannot afford to pay both the legal fees necessary to fight the citation, and gamble that they might end up with a penalty that is so high that it devastates their businesses.

Penalties should not be inflexible, and I would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties, rather than tying them to a specific, non-negotiable, dollar amount. A number of additional penalties and causes of action have been suggested as proper penalties in a broadly mandated E-Verify. These range from debarring employers from federal government contracts to expansion of the current antidiscrimination protections.

Penalties must be tailored to the offense and the system must be fair. Automatic debarment from federal contracts is not an authority that should be given to DHS. Indeed a working process already exists in current law under the Federal Acquisition Regulations (FAR). Finally, the Chamber objects to expansion of antidiscrimination provisions found in current law. Employers should not be put in a "catch-22" position in which attempting to abide by one law would lead to liability under another one.

Role of biometric documents in E-Verify.

One of the main flaws of E-Verify is the uncomplicated manner through which an undocumented alien can fool the system through the use of someone else's documents. The issues of document fraud and identity theft are exacerbated because of the lack of reliable and secure documents acceptable under E-Verify.

Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver's licenses, passports, and alien registration cards (green cards).

All of these documents could be made more tamper and counterfeit resistant. In fact, in 1998, the federal government began issuing green cards with a hologram, a digital photograph and fingerprint images and by next year all green cards currently in existence should have these features. With fewer acceptable work authorization documents, the issue of identity theft can more readily be addressed.

The new verification process will need to require a certain degree of inter-agency information sharing. When an employer sends a telephonic or internet based inquiry, the government must not only be able to respond as to whether an employee's name and social security number matches, but also whether they are being used in multiple places of employment by persons who may have assumed the identity of other legitimate workers.

As the verification system is developed and perfected, it should continue to move closer towards the use of biometric technology that can detect whether the person presenting the document relates to the actual person to whom the card relates. Obviously, as biometric technology is rolled out, it is important to address who would actually pay for the readers and the implementation of the technology. Further, there will be legitimate issues of practicality in implementing biometrics in many workplaces.

An E-Verify check needs to be allowed to start earlier and be finalized sooner.

The employer needs to be able to affirmatively rely on the responses to inquiries into E-Verify. Either a response informs the employer that the employee is authorized and can be retained, or that the employee is not and must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work.

DHS and the Social Security Administration must be given the resources to ensure that work authorization status changes are current. This will help avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant's legal status.

The Chamber understands that due process concerns must allow the employee to know of an inquiry and to then have the ability to challenge a government determination. Thus, at the very least, employers should be able to submit an initial inquiry into the system after an offer of employment has been made and accepted. Presumably this could be done two weeks before the first day of employment so the clock starts running earlier. The start date should not be affected by an initial tentative nonconfirmation.

Of course, for employers that need someone immediately, the option of submitting the initial inquiry shortly after the new employee shows up for his or her first day at work should continue to be available. In the case of staffing agencies, current law allowing for submission of the inquiry when the original contract with the agency is signed should be kept in future laws.

A maximum of 30 days, regardless of when or how the inquiry is made, and taking into consideration time to submit additional information and manual review, should be the outer limit that the system should take from the date of initial inquiry until a final determination is issued by the government.

The government should also be held accountable for E-Verify.

The government must also be held accountable for the proper administration of E-Verify. There must be an administrative and judicial review process that would allow employers and workers to contest findings. Through the review process, workers could seek compensation for lost wages due to a DHS agency error.

Meanwhile, if an employer is fined by the government due to unfounded allegations, the employer should be able to recover some attorneys' fees and costs—capped at perhaps $50,000—if they substantially prevail in an appeal of the determination. Again, a reasonable appeals process with attorneys' fees for employers, if they prevail on the merits, is not a new idea. It was part of Senator Obama's amendment to S. 2611 in 2006 that passed the Senate with overwhelming support in a vote of 59 to 39.

E-Verify should have limited bureaucracy or additional costs.

DHS will need adequate funding to maintain and implement an expansion of E-Verify. The cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, there should not be overly burdensome document retention requirements. The more copies of official documents are kept in someone's desk drawer, the increased likelihood of identity theft. Under current law, an employer does not need to keep copies of driver licenses, social security cards, birth certificates, or any other document shown to prove work authorization.

The employer must certify under penalty of perjury that those documents were presented. The requirement to copy and store copies of this sensitive documentation in any future E-Verify mandate should be carefully analyzed not only from the cost perspective to employers, but also from the privacy perspective of workers. At the same time, workers should have access to review and request changes to their own records to resolve issues, prior to approaching the employer.

An expansion of E-Verify should not serve as a back door to expand employment laws.

The new system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment authorization, not expansion of employment protections, should be the sole emphasis of an E-Verify mandate. In this regard, it should be emphasized that there are already existing laws that govern wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes.

The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And of course, formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances.[15] A GAO report titled "Workplace Regulations: Information on Selected Employer and Union Experiences" identified concerns regarding workplace regulations that employers continue to have to this very day.[16] The report noted that enforcement of such regulations is inconsistent, and that paperwork requirements could be quite onerous.

Most importantly, the report concluded that employers are overburdened by regulatory requirements imposed upon their businesses and many are fearful of being sued for inadequate compliance. The cost of compliance continues to grow at an alarming pace. A 2005 study by Joseph Johnson of the Mercatus Center[17] estimated the total compliance cost of workplace regulations at $91 billion (in 2000 dollars) and a follow up study by W. Mark Crain for The Office of Advocacy, U.S. Small Business Administration,[18] estimated the total compliance cost of workplace regulations at $106 billion (in 2004 dollars). Within a four year span, the cost grew at a rate of $15 billion, or $3.75 billion per year.

CONCLUSION

After several years of debate, the issues and solutions outlined here are not new. The Chamber urges you to continue to engage the business community to create a workable EEVS mandate.

It is easy to ignore the drawbacks of E-Verify and simply pass a law mandating it. It is harder to pass a responsible mandate that accommodates the different needs of the close to eight million establishments in the U.S., which are extremely different in both size and levels of sophistication. A mandatory EEVS should be fast, accurate and reliable under practical real world working conditions, and include:

- A fair and reasonable roll out of a broad mandate;
- No expansion of liability beyond the knowing standard for contractor/subcontractor relationships;
- Application only to new hires;
- Clarification that federal jurisdiction preempts state and local laws;
- An investigative and enforcement system that is fair;

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[15] For example, one treatise on employment discrimination law alone stretches over 2,000 pages. Barbara Lindemann and Paul Grossman, "Employment Discrimination Law," ABA Section of Labor and Employment Law, 3rd Edition, 1996.

[16] U.S. Government Accountability Office Report, "Workplace Regulation: Information on Selected Employer and Union Experiences," GAO-HEHS-94-138, Washington DC, pages, June 30, 1994, pages 25-53.

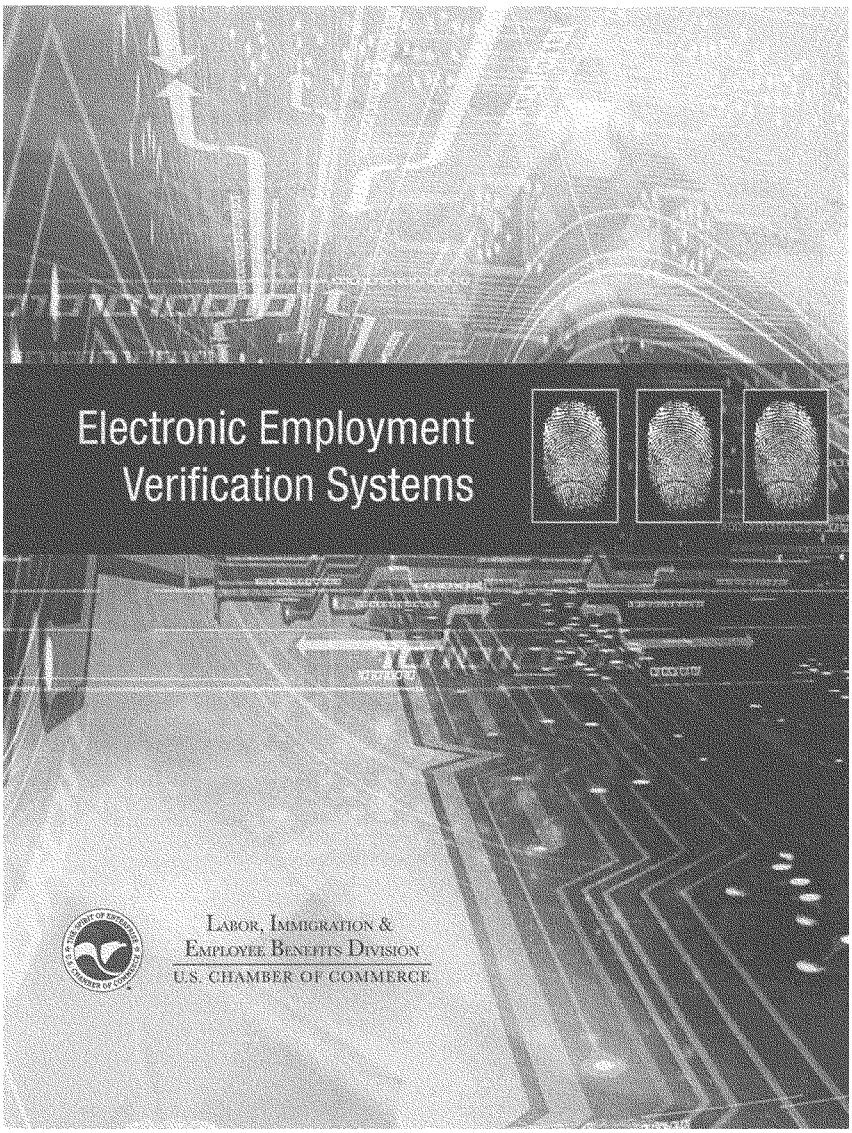
[17] Johnson, Joseph. "The Cost of Workplace Regulations", Mercatus Center, George Mason University, Arlington, Virginia, August 2001.

[18] Crain, Mark W. "The Impact of Regulatory Costs on Small Firms," Report RFP No. SBHQ-03-M-0522, Lafayette College, for the Office of Advocacy, U.S. Small Business Administration, September 2005.

- Provisions to protect first-time good faith "offenders" caught in the web of ever-changing federal regulations;
- DHS, not trial attorneys, should have enforcement authority;
- Penalties should be commensurate to the offense;
- No expansion of antidiscrimination laws or debarment outside the FAR system;
- A reasonable number of reliable documents with biometric identifiers, when possible, to reduce fraud;
- Verification to begin when a firm offer of employment is made and accepted, followed by reasonable system response times—at the most 30 days;
- Accountability structures for all involved—including our government;
- Limited bureaucracy and sensible document retention requirements; and,
- No expansion of labor laws within the EEVS framework.

Under a broad mandate, employers will be required to utilize and comply with all its provisions and, therefore, the Chamber should continue to be consulted in shaping the system. Meanwhile, the Chamber stands ready to continue assisting in this process.

Thank you again for this opportunity to share the views of the Chamber, and I look forward to further discussions.

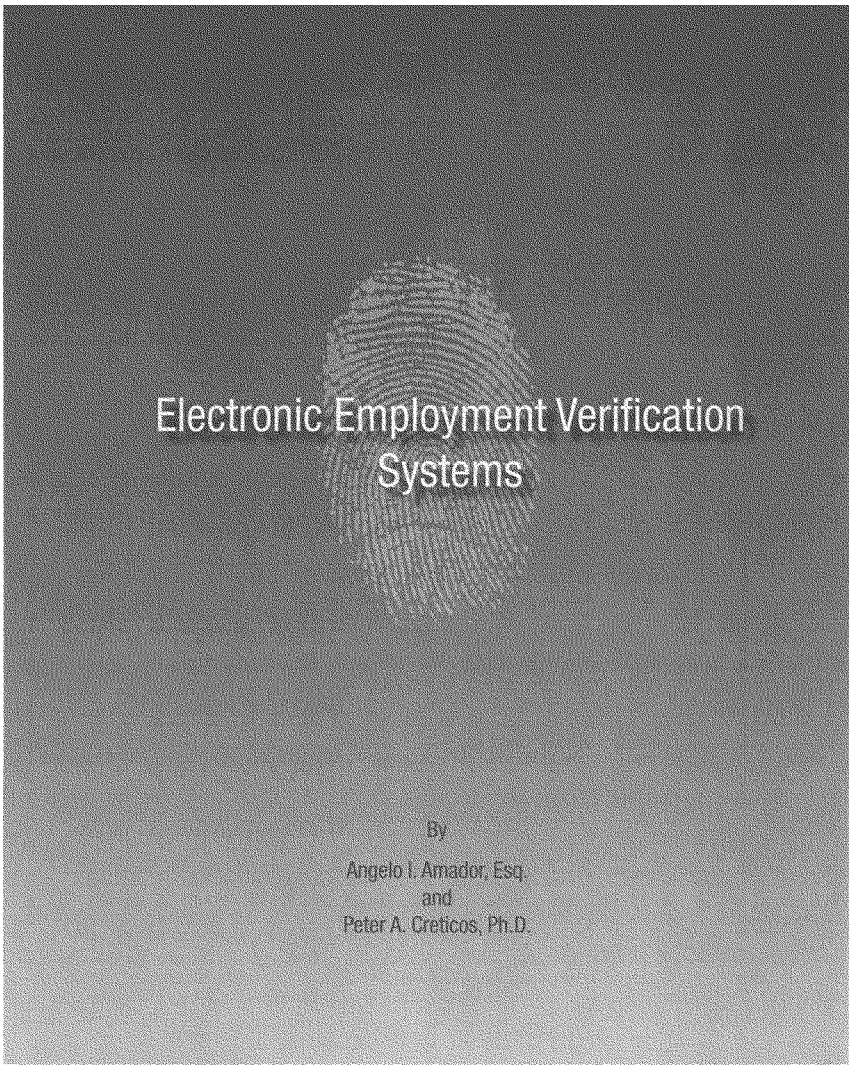

Electronic Employment
Verification Systems
Labor, Immigration &
Employee Benefits Division
U.S. Chamber of Commerce

ABOUT THE STUDY

This study was prepared by the Labor, Immigration, and Employee Benefits Division of the U.S. Chamber of Commerce with cooperation from Peter A. Creticos, Ph.D., President/Executive Director of the Institute for Work and the Economy. The purpose of this report is to collect and disseminate objective data on the impact on businesses of existing and proposed electronic employment verification systems (EEVS) while providing ideas on the efficient dissemination of such new mandates.

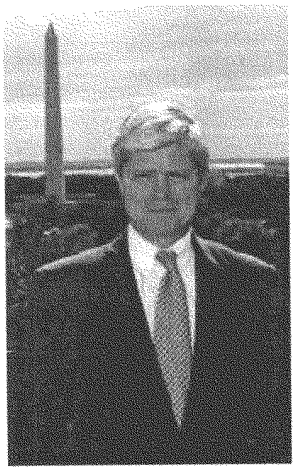
ABOUT THE U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is the world's largest business federation representing more than 3 million businesses of every size, sector, and region. The Chamber's Labor, Immigration & Employee Benefits Division formulates and analyzes the Chamber's policy in the areas of labor law, immigration, pension, and health care. The Division regularly participates in, and in some cases chairs, many national coalitions to help define and shape national labor, immigration, and employee benefits policy. www.uschamber.com/issues/lieb_policy


Electronic Employment Verification Systems
By
Angelo I. Amador, Esq.
and
Peter A. Creticos, Ph.D.

Message from the Chamber

Dear Readers:



The Labor, Immigration, and Employee Benefits Division of the U.S. Chamber of Commerce has taken a leading role in calling for the creation of a workable electronic employment verification system (EEVS). The Chamber supports a new EEVS within the context of comprehensive immigration reform because employers want the tools to ensure that their workforce is, in fact, legally authorized to work in this country.

This report was commissioned due to the need for a clear analysis of current programs and proposals from the perspective of employers, who will be at the forefront of all compliance issues and mandates. A new EEVS must recognize that the more than 7 million employers in the United States are extremely different in both size and level of sophistication. Accordingly, a mandated EEVS should accommodate these differences.

The Chamber opposes attempts by states and localities to create a patchwork of immigration enforcement laws—exposing employers who must deal with a broken legal structure to unfair liability.

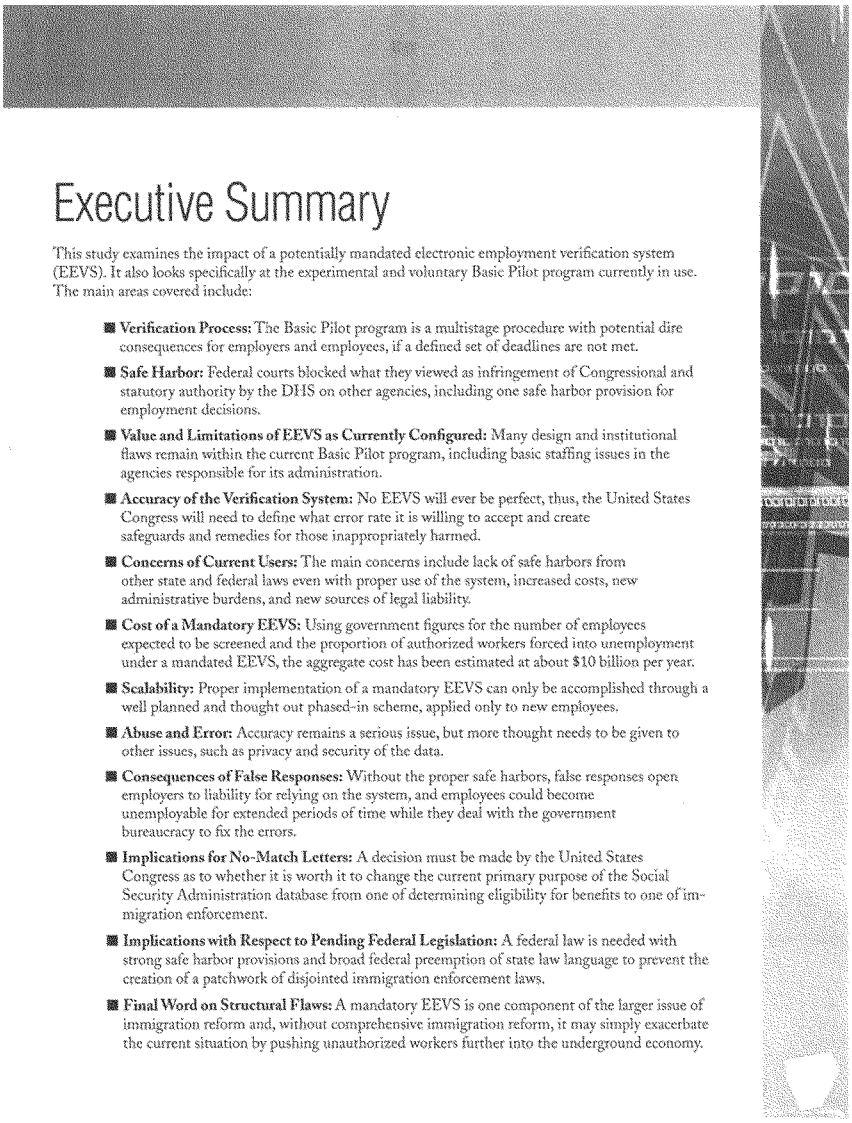
Many states and local governments are attempting to either force employers and retailers to bear the cost of helping shield undocumented workers or are trying to impose additional, and often conflicting, worksite enforcement requirements. For this reason, the Chamber is engaged in litigation across the country to maintain the legal framework in which the federal government alone has jurisdiction over immigration laws.

We will continue to monitor this issue and encourage other businesses to be part of the solution by joining the U.S. Chamber of Commerce's efforts to create an efficient, workable, and reliable EEVS.

Sincerely,

Randel K. Johnson
Vice President,
Labor, Immigration, and Employee Benefits
U.S. Chamber of Commerce
Washington, DC
April 2, 2009

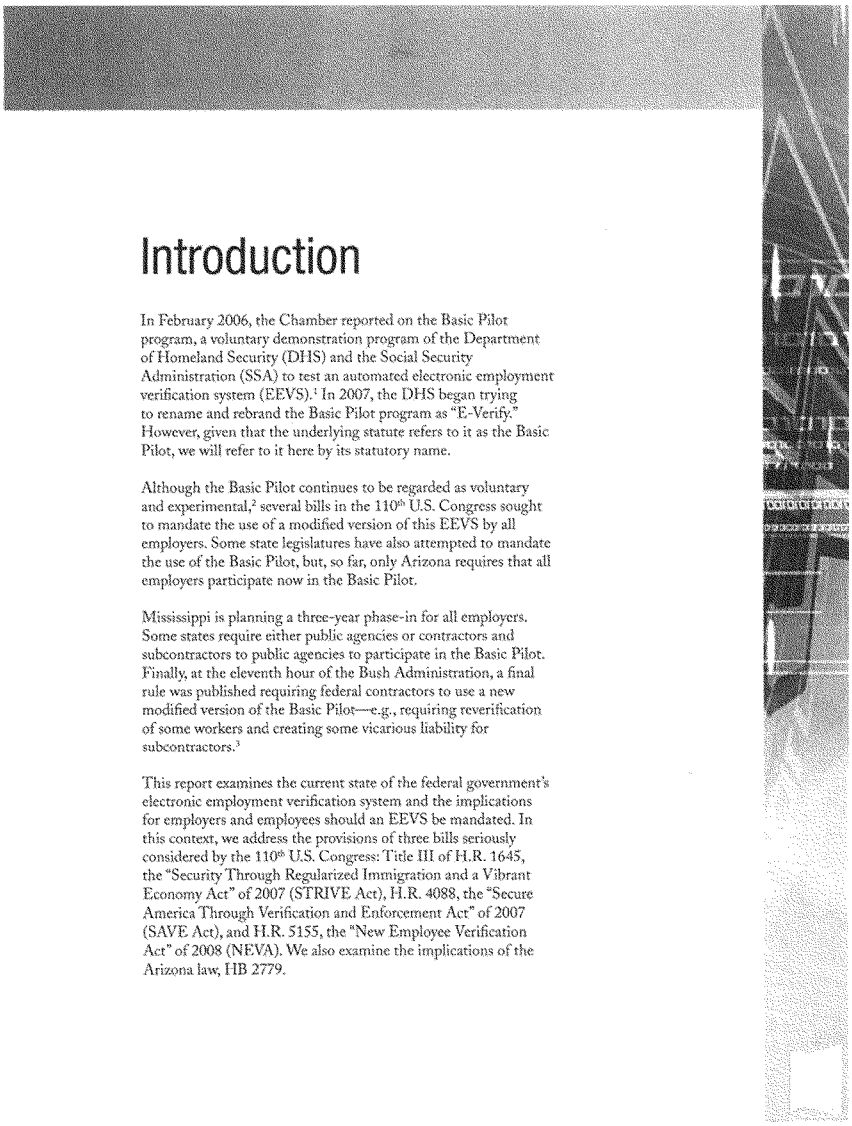
Table of Contents



Executive Summary

This study examines the impact of a potentially mandated electronic employment verification system (EEVS). It also looks specifically at the experimental and voluntary Basic Pilot program currently in use. The main areas covered include:

- **Verification Process:** The Basic Pilot program is a multistage procedure with potential dire consequences for employers and employees, if a defined set of deadlines are not met.
- **Safe Harbor:** Federal courts blocked what they viewed as infringement of Congressional and statutory authority by the DHS on other agencies, including one safe harbor provision for employment decisions.
- **Value and Limitations of EEVS as Currently Configured:** Many design and institutional flaws remain within the current Basic Pilot program, including basic staffing issues in the agencies responsible for its administration.
- **Accuracy of the Verification System:** No EEVS will ever be perfect, thus, the United States Congress will need to define what error rate it is willing to accept and create safeguards and remedies for those inappropriately harmed.
- **Concerns of Current Users:** The main concerns include lack of safe harbors from other state and federal laws even with proper use of the system, increased costs, new administrative burdens, and new sources of legal liability.
- **Cost of a Mandatory EEVS:** Using government figures for the number of employees expected to be screened and the proportion of authorized workers forced into unemployment under a mandated EEVS, the aggregate cost has been estimated at about $10 billion per year.
- **Scalability:** Proper implementation of a mandatory EEVS can only be accomplished through a well planned and thought out phased-in scheme, applied only to new employees.
- **Abuse and Error:** Accuracy remains a serious issue, but more thought needs to be given to other issues, such as privacy and security of the data.
- **Consequences of False Responses:** Without the proper safe harbors, false responses open employers to liability for relying on the system, and employees could become unemployable for extended periods of time while they deal with the government bureaucracy to fix the errors.
- **Implications for No-Match Letters:** A decision must be made by the United States Congress as to whether it is worth it to change the current primary purpose of the Social Security Administration database from one of determining eligibility for benefits to one of immigration enforcement.
- **Implications with Respect to Pending Federal Legislation:** A federal law is needed with strong safe harbor provisions and broad federal preemption of state law language to prevent the creation of a patchwork of disjointed immigration enforcement laws.
- **Final Word on Structural Flaws:** A mandatory EEVS is one component of the larger issue of immigration reform and, without comprehensive immigration reform, it may simply exacerbate the current situation by pushing unauthorized workers further into the underground economy.



Introduction

In February 2006, the Chamber reported on the Basic Pilot program, a voluntary demonstration program of the Department of Homeland Security (DHS) and the Social Security Administration (SSA) to test an automated electronic employment verification system (EEVS).[1] In 2007, the DHS began trying to rename and rebrand the Basic Pilot program as "E-Verify." However, given that the underlying statute refers to it as the Basic Pilot, we will refer to it here by its statutory name.

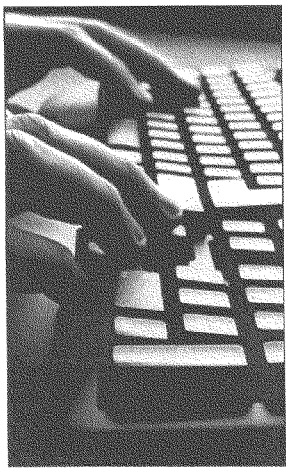
Although the Basic Pilot continues to be regarded as voluntary and experimental,[2] several bills in the 110th U.S. Congress sought to mandate the use of a modified version of this EEVS by all employers. Some state legislatures have also attempted to mandate the use of the Basic Pilot, but, so far, only Arizona requires that all employers participate now in the Basic Pilot.

Mississippi is planning a three-year phase-in for all employers. Some states require either public agencies or contractors and subcontractors to public agencies to participate in the Basic Pilot. Finally, at the eleventh hour of the Bush Administration, a final rule was published requiring federal contractors to use a new modified version of the Basic Pilot—e.g., requiring reverification of some workers and creating some vicarious liability for subcontractors.[3]

This report examines the current state of the federal government's electronic employment verification system and the implications for employers and employees should an EEVS be mandated. In this context, we address the provisions of three bills seriously considered by the 110th U.S. Congress: Title III of H.R. 1645, the "Security Through Regularized Immigration and a Vibrant Economy Act" of 2007 (STRIVE Act), H.R. 4088, the "Secure America Through Verification and Enforcement Act" of 2007 (SAVE Act), and H.R. 5155, the "New Employee Verification Act" of 2008 (NEVA). We also examine the implications of the Arizona law, HB 2779.

Primer on EEVS

The Immigration Reform and Control Act of 1986 (IRCA) established that employers must verify the identity and employment authorization of employees. At the same time, employers were subject to sanctions for knowingly hiring unauthorized workers. A related provision was enacted to protect employees from employment discrimination based on national origin or citizenship status.[2] This led to the implementation of the Employment Eligibility Verification Form (I-9 form) on which employers certify that employees have produced acceptable documents that prove their identity and employment eligibility. These documents must reasonably appear to be genuine on their face.

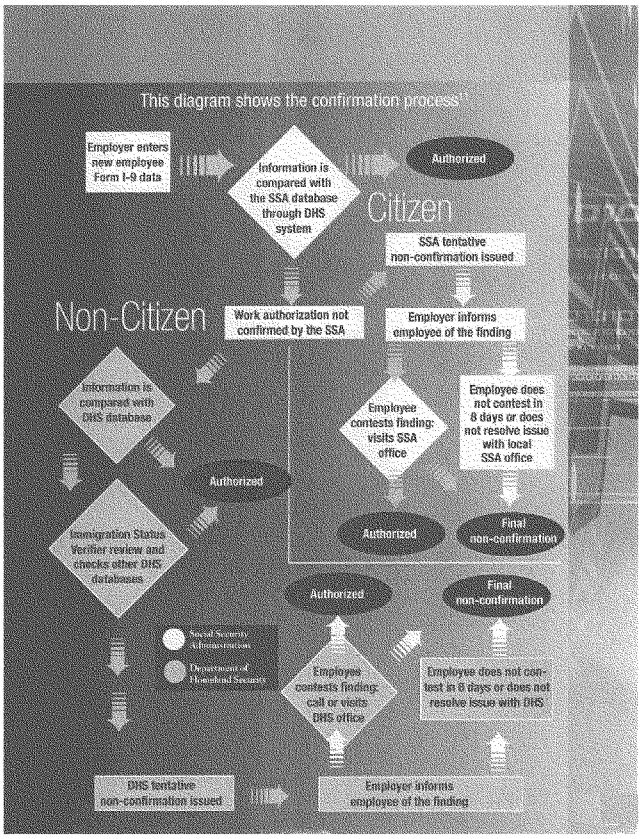


The I-9 form must be retained for three years after the employee's date of hire, or one year after the date that the employment of the worker is terminated, whichever is later.[3] The Basic Pilot modifies this process by requiring employers who volunteer to participate in the program to submit an inquiry via the Web to the SSA and to the U.S. Citizenship and Immigration Service (USCIS), which falls under the jurisdiction of the DHS, seeking confirmation that the information presented by the individual matches the records maintained by the two agencies.[4]

The Basic Pilot program itself has been evolving. Originally, the program was one of three pilots created by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA). These programs were developed to test alternative types of electronic verification systems before deciding on any large-scale employment verification program. Only the Basic Pilot program has survived, and this has been modified to operate as a Web-based system.[5] The earlier version of the Basic Pilot program required employers to install and operate software on a computer. The new Basic Pilot program requires an Internet connection and an Internet browser and does not require any special software.

Verification Process

The Basic Pilot program is a multistage procedure with employment verification conducted primarily by two federal agencies: verification by the SSA and verification of non-citizens by the DHS. The first step is that the participating employer records all pertinent information of a new employee by completing the I-9 form. The employer may not prescreen prospective employees through the Basic Pilot.[6] If the documents presented by the employee appear to prove her or his identity and employment eligibility, the employer then enters the data from the I-9 form onto Internet forms of the Basic Pilot system.


This diagram shows the confirmation process[1]
Employer enters new employee Form I-9 data
Information is compared with the SSA database through DHS system
Authorized
Citizen
SSA tentative non-confirmation issued
Non-Citizen
Work authorization not confirmed by the SSA
Employer informs employee of the finding
Information is compared with DHS database
Employee contests finding: visits SSA office
Employee does not contest in 8 days or does not resolve issue with local SSA office
Authorized
Authorized
Final non-confirmation
Immigration Status Verifier review and checks other DHS databases
Authorized
Final non-confirmation
Social Security Administration
Department of Homeland Security
Employee contests finding: call or visits DHS office
Employee does not contest in 8 days or does not resolve issue with DHS
DHS tentative non-confirmation issued
Employer informs employee of the finding

Only representatives of the employer who have successfully completed an online training program are authorized to enter this data. The information entered by the employer is compared with the SSA database. If the information matches and the new employee presents documents which prove that he or she is a citizen, the employer receives a response stating that the employee is authorized to work. If the work authorization for someone who claims to be a United States citizen is not confirmed by the SSA database, the employer receives a notice of tentative non-confirmation, and the employer is required to notify the employee of the non-confirmation.

The employee may contest the finding within 8 federal working days, which usually requires a visit to an SSA office. The SSA is required to resolve the issue within 10 working days of the notice and either determines that the employee is authorized to work or issues a notice of final non-confirmation. An employee who fails to contest the finding also is the subject of a notice of final non-confirmation.

If the individual is not a citizen, the I-9 information is compared to the SSA and the USCIS databases, whereupon the SSA and the DHS will either determine immediately that the individual is authorized to work in the United States or forward the data to an Immigration Status Verifier (ISV), who reviews the I-9 information and checks other DHS databases. If the ISV verifies that the individual is authorized to work in the United States, a notice to that effect is transmitted to the employer. If this information cannot be verified, a notice of tentative non-confirmation is issued to the employer, who must then inform the employee of the notice and rights to challenge the notice.

The employee has 8 federal working days to contest the finding and attempt to resolve the matter by either calling or visiting a DHS office. The DHS will either resolve the matter in the employee's favor or issue a final notice of non-confirmation. An employee who receives a tentative non-confirmation and does not challenge it within 8 working days will automatically be the subject of a notice of final non-confirmation.

Employers are required to terminate the employment of all employees for whom they have received a final notice of non-confirmation or when it is resolved unequivocally that the employee is not authorized to work in the United States.[9] If the employer does not fire the worker, it faces a rebuttable presumption that it knowingly hired an unauthorized worker.[10]

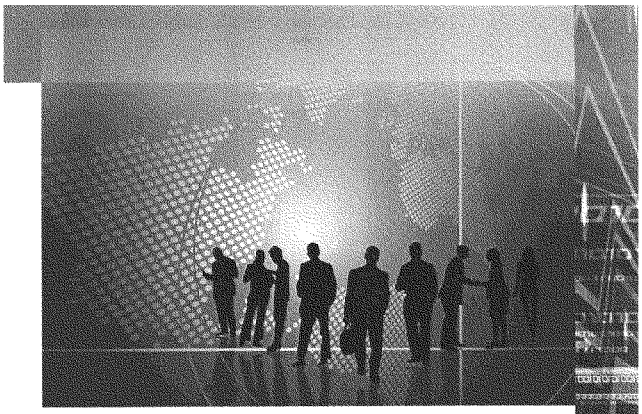
Pursuant to the terms of the memorandum of understanding between employers participating in the Basic Pilot and the federal government, an employer may not terminate an employee or otherwise take adverse action. Adverse action includes refraining from new hire training or placing the employee on leave, while a worker is waiting for a final resolution from either government agency on a tentative non-confirmation.

Safe Harbor

In the event of an investigation into a participating employer's hiring practices, the Basic Pilot's Memorandum of Understanding between the DHS and the employer calls for a presumption that the employer did not violate any sanctions laws if the employer received a confirmation of the identity and employment eligibility of workers.[12] Employers are not provided a safe harbor, however, from immigration worksite enforcement, i.e., raids.[13]

Also, the DHS argues that employers are not liable under any law for any action taken in "good faith" on information provided through the Basic Pilot.[14] Notwithstanding the arguments raised by the DHS, it appears that Arizona law (HB 2779) does not provide the same safeguards for employers participating in the Basic Pilot inasmuch as they may be successfully prosecuted for hiring a worker who has been determined through the Basic Pilot to be authorized to work in the U.S., but is, in fact, not authorized to work. The question in the case of Arizona's law is whether the employer should have been expected to know that the worker was not authorized.[15]

Furthermore, federal courts have also blocked what they view as infringement by the DHS on other agencies' statutory authority through rulemaking.[16] At least one federal district court was skeptical of the DHS's ability to provide blanket safe harbors to employers for employment decisions based on the DHS's guidelines.[17] In one of the rulings, the federal court held that the DHS "impermissibly exceeded its authority—and encroached on the authority of [other agencies]—by interpreting" other legal provisions "to preclude enforcement where employers follow [the DHS] safe-harbor framework."[18]



It is clear, however, that Congress does have the authority to create a blanket safe harbor for employers to make decisions based on the Basic Pilot without fear of future liability and litigation, despite errors in the system. In fact, any new EEVS mandate should include both strong safe harbor provisions and broad federal preemption of state law language to steer clear of the issues outlined above.

Value and Limitations of EEVS as Currently Configured

The Basic Pilot is intended to serve as a quick and reliable means of checking the work authorization of new employees. While there have been some positive improvements to the Basic Pilot since its creation, there is also strong evidence that many negative issues still remain. A recent evaluation conducted by Westat for the Department of Homeland Security concluded that most employers using the Web-based verification program "found it to be an effective and reliable tool for employment verification and indicated that the Web Basic Pilot (E-Verify) was not burdensome…[A] few employers reported experiencing some difficulties with the Web Basic Pilot, such as unavailability of the system during certain time, problems accessing the system, or training new staff to do verifications using the system."[7] However, the users were mostly big companies or staffing agencies and none had to re-verify their workforce.

In addition, some employers expressed frustration with the interactions with the SSA and the USCIS in relation to the Web Basic Pilot, citing that local SSA representatives were not familiar with the program, did not return phone calls, were unable to answer questions, and sometimes made mistakes that resulted in final non-confirmation findings for work-authorized employees. Several employers also commented that there was a lack of coordination between the SSA and the USCIS on keeping up-to-date records on immigrants. Many employers requested faster turnaround time requirements for the SSA and the USCIS.[8]

Despite many improvements over the course of the Basic Pilot program, the problems that remain make it unsuitable as a reliable, efficient, and fair means of determining the work authorization of new employees.

Challenges to the EEVS

Accuracy of the Verification System

Steven L. Schaeffer, Assistant Inspector General for Audit, SSA Office of the Inspector General, testified in June 2007, that a recent audit 2,430 records found that 136 Numidem records[23] contained discrepancies in the name, date of birth, citizenship status of the number holder, or the number holder was determined to be deceased.

As a result, the SSA estimated discrepancies in approximately 17.8 million (4.1%) of the 435 million Numident records.[24] This fact could result in incorrect feedback, not only under the Basic Pilot, but through any EEVS relying on the SSA database. Although some number holders are no longer working and would not be included in a request to verify their work authorization, significant portion of the number holders with discrepancies would be required to visit an SSA office to correct their information.

The most recent evaluation of the Web Basic Pilot by Westat concluded that, on average, 96% of employees attesting to be U.S. citizens came back work-authorized on the first query, in contrast with only 72% of employees attesting to be lawful permanent residents and 63% of employees attesting to be aliens authorized to work (e.g., H-1A and H-1B workers).[25] U.S. citizens born abroad were especially susceptible to an erroneous tentative non-confirmation with 9.8% of naturalized citizens erroneously being tentatively non-confirmed.[26]

In May 2008, Richard M. Stana, Director, Homeland Security and Justice Issues, General Accountability Office, testified on the challenges of implementing a mandatory electronic employment verification program. On the basis of data provided by the USCIS and the SSA, about 7% of Basic Pilot queries cannot be immediately confirmed or denied as work authorized by the SSA and about 1% cannot be confirmed or denied by the USCIS because employees' information does not match information in either the SSA or the DHS databases.[27]

Quick facts:

4.1% of social security records contain discrepancies.

Under the Basic Pilot:

- Only 4% of recent newly hired workers in the United States were processed using the Basic Pilot.
- 93% of the cases were found to be work authorized using the SSA and DHS databases.
- 7% were never resolved and only 0.2% were found to not be work authorized.
- Naturalized citizens were much more likely than non-citizen employees to receive initial non-confirmations.
- It is costly to both employers and employees to clear up false negatives.
- Employers face possible prosecution for false positives in Arizona because they are not afforded safe-harbor.

The errors encountered by naturalized citizens are due to data collection and sharing problems that exist between the SSA, the DHS, and the U.S. Department of State. Currently, the SSA relies on the naturalized citizen to update the SSA records. This is especially problematic for minor children who become citizens due to the naturalization of their parent or parents. In addition, some errors occur because employees fail to update name changes or other information in the SSA database. The GAO reported that the USCIS and the SSA are planning various initiatives to help address these weaknesses and reduce delays in the verification process.[28]

Concerns of Current Users

Under the new Arizona law, all employers in the state, regardless of size, must use the federal government's voluntary Basic Pilot program to validate the legal status of employees hired after December 31, 2007.

Employers who "knowingly" hire two unauthorized aliens in a three-year period could have their business licenses permanently revoked. A close examination of the law indicates that "knowingly employing unauthorized aliens" does not necessarily require actual knowledge.

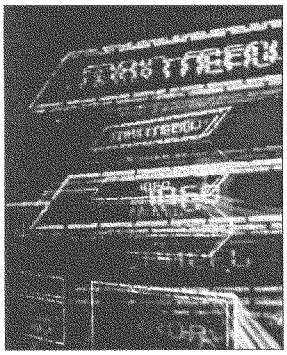
Mitchell C. Laird, Esq., President, MCL Enterprises, Inc., testified on behalf of the Chamber before the House Subcommittee on Social Security of the Committee on Ways and Means.[2] He told Congress that Arizona's new law could have devastating consequences for his company, which owns 24 Burger King® restaurants in the state. He anticipated hiring approximately 900 new workers in 2008 to maintain a workforce of about 600. At that hiring rate, two bad hires over three years would be better than a 99.9% successful hire rate. However, it would still expose the company to the possibility of losing its license, which would mean the displacement of some 600 legal Arizona workers.

Mr. Laird testified that Arizona's law was harmful legal and economic policy for several reasons. First, it undermines the federal government's ability to oversee and enforce national immigration law and leaves Arizona employers feeling uncertain about their responsibilities and liabilities under immigration law. Second, mandatory and expedient compliance is costly.

Despite a significant investment in training for their employees to use the Basic Pilot, he estimated that as many as 10% of all I-9 forms will have errors upon their initial submission to their administrative offices. In most cases, the error is made by employees while filling out their personal information and is not detected by store managers.

Even after receiving a good I-9 to work from, the initial response in 14% of the Basic Pilot queries is something other than "employment authorized," which means the employer must incur additional administrative costs to resolve the matter. MCL Enterprises is fortunate to have the staff to deal with these issues and allow for redundancy and backup. For smaller Arizona businesses, the burdens and potential for liability are even greater.

Mr. Laird also explained how Arizona's new immigration law can lead to discriminatory hiring practices and lawsuits against employers. At MCL Enterprises, only 3.2% of United States citizens



have received an initial response other than "employment authorized" compared with 73% of resident aliens. Because of this discrepancy, resident aliens are more expensive to employ. That, and the threat to businesses of losing their licenses over a bad hire, could increase the likelihood of hiring decisions being based on appearance, nationality, or language skills.

Finally, Mr. Laird called for a single, federal workforce enforcement policy that is fast, accurate, and reliable under real-world working conditions, while not creating incentives for employers to treat applicants unequally based on appearance.

Concerns with the Basic Pilot program by its users go beyond small businesses. One multi-billion dollar company, which voluntarily chose to participate in the program, explains the significant costs that it is experiencing in implementing the Basic Pilot program: "[Our] company is moving to a web-based I-9 application that incorporates E-Verify through a designated payroll agent. Project implementation is extensive and costly to setup a robust process that will accommodate HR personnel changes, required training and other changes. The company has a team of about 8 professionals so far working on the project, including IT resources and a dedicated Project Manager."[28]

The American Council on International Personnel finds this scenario widespread for large companies with several business units.[29] As with small business owners in Arizona, the tentative non-confirmation procedures were found to be extremely troublesome. The same multi-billion dollar company reported that "in their experience, corrections at the Social Security Administration (SSA) usually take in excess of 90 days. Employees must wait four or more hours per trip, with repeated trips to the SSA frequently required to get their records corrected."[30]

Costs of a Mandatory EEVS

Employers are required under IRCA to make a good-faith effort to hire only those who are work authorized. There is a fine line, however, between compliance and enforcement, and the potential increased demands on employers—especially if the use of the Basic Pilot or some successor EEVS is mandated—tends to push employers increasingly toward becoming proxy enforcers of federal and state immigration law. As the mission creeps toward enforcement, any new costs to employers may be seen as unfunded mandates that reduce their overall competitiveness. This is troublesome under good economic conditions, but especially so in light of current economic conditions.

Both employers and employees are burdened by tentative non-confirmations irrespective of the outcome. Because employers are prohibited from taking any adverse actions against workers whose status is still pending, these employers may incur training and other costs while they wait for a final determination. In the event that the employee is determined to be not work authorized or receives a final non-confirmation, the investment in time and wages is lost.

Although it is a violation of the agreement between the employer and the federal government to either take adverse action against a tentatively non-confirmed employee by limiting that person's duties/training or to use the Basic Pilot as a pre-screening tool, Westat determined that several employers violated these prohibitions. Some of

these violations were deliberate attempts to flaunt the system, but many appeared to respond to the financial reality of the burden imposed on the employer while waiting for a final confirmation.

From the perspective of the employee, such actions by the employer can be discriminatory against foreign-born workers and often result in real costs to those workers. Even in those instances where the employer follows the full letter of the agreement, employees receiving tentative non-confirmation must often take time from work, sometimes without pay, to clear up discrepancies in either the SSA or the USCIS database, or in both databases.

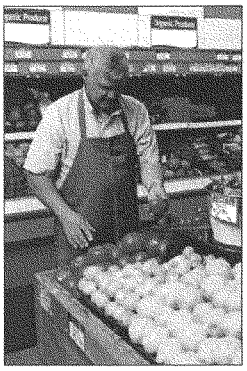
In addition, the employee may only learn of a tentative non-confirmation from the employer. Employers who use the Basic Pilot as a pre-screening tool, or who improperly dismiss the employee, may inadvertently fail to inform the worker of the tentative non-confirmation. This leads to an automatic final non-confirmation.

Furthermore, Westat reports that 84% of the employers who used the Web Basic Pilot spent $100 or less in initial setup and 75% said that they spent a similar amount annually to operate the system. About 4% of long-term users said that they spent $500 or more for startup, and 11% said that they spent $500 or more annually for operating costs. While these costs are considerably below the original Basic Pilot program, they nevertheless average $125 for setup and $728 in annual program costs.[31] But, the costs for lawyers and human resources professionals of dealing with tentative nonconfirmations as well as the total social costs of employees who lost their jobs due to their inability to correct the errors on time were not considered by Westat.

However, using the government's Regulatory Impact Analysis for the rule mandating the use of the Basic Pilot program on most federal contractors and subcontractors, we can calculate the actual annual costs associated with the forced unemployment of authorized workers, due to flaws in the current Basic Pilot, if the program was mandated broadly. Using the government's figures for the number of employees expected to be screened and the proportion that would be authorized workers forced into unemployment, the aggregate opportunity cost is about $10 billion per year.[32]

According to Westat, the system setup and maintenance costs also vary considerably by industry. For example, low-wage and low-skill industries, such as accommodations and food services, incurred an average setup cost of $61. Higher-skilled industries, such as mining, utilities, and construction incurred a setup cost of $405. Average annual maintenance costs ranged from $144 for employers in "other industries" to $1,795 in public administration and social services.

Also, maintenance costs were higher for employers who verified employees at multiple locations than for those who verified at only one location ($1,653 versus $490).[33] Once again, the social costs of authorized workers forced into unemployment as a



result of their inability to resolve the SSA and/or the DHS records mismatches are substantial and overwhelm the costs outlined in the Westat report.

	Setup costs	Maintenance costs[34]
All employers	$125	$726
< 100 employees	$100	$459
100 – 250 employees	$138	$608
251 – 500 employees	$90	$727
501 – 1,000 employees	$151	$322
> 1,000 employees	$151	$1,512

Based on surveys conducted by Westat, the most frequently mentioned cost areas for setup are training, telephone fees for Web access, and computer hardware. Operating costs included those related to training of replacement staff, wages for verification staff, and computer maintenance.[35]

These surveys are not able to adequately assess the real costs to employers who may be required by law to use the Basic Pilot since the universe of employers who participated in the web-based survey conducted by Westat was made up only of those who volunteered to participate in the program. Such a self-selected sample is subject to substantial bias and cannot be used to measure the challenges to be faced by other employers who would be forced to use the Basic Pilot system.

In addition, the sample of small businesses that were surveyed deliberately excluded employment agencies and temporary help agencies, a group of users who comprise a disproportionate share of all users. Case studies were only done with employers who were likely to speak either English or Spanish. Further, telephone interviews, instead of on-site interviews, were conducted with employers located in areas deemed by the interviewer as unsafe.[36] These case studies would therefore exclude businesses wherein the predominate language used at the business is something other than English or Spanish.

Communities of businesses with high concentrations of non-Latino, immigrant owned businesses, such as San Francisco (Asian), Chicago (Eastern European, Asian), New York (Asian, Eastern European, African), Minneapolis-St. Paul (African, Asian), and others, may have very different experiences with the Basic Pilot. These differences may be due to deviations in spelling, first name/last name naming conventions, and other culturally influenced factors. Also, by avoiding businesses in areas perceived to be unsafe, the case studies excluded those businesses where system abuses may be greatest.

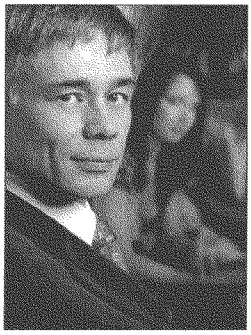
Because the current Basic Pilot is web-based and is not supported by an alternative telephone-based verification system, the transition to the Basic Pilot will require many employers to incur thousands in extra technology-related expenses. Consequently, the Westat study substantially understates the costs incurred by many employers implementing the Basic Pilot. At a minimum, these costs include:

- Purchase of computer hardware, monitor and peripherals such as a printer ($1,000)
- Purchase of other electronic peripherals, such as a modem ($100).
- Purchase of Internet service and associated monthly fees ($300 per yr).
- Basic computer training, including Internet training.
- Cost to train and retrain human resources staff responsible for operating the Basic Pilot program.
- Cost to employers in resolving tentative non-confirmations.

Although the popular conception exists that business is "plugged into" the Internet, we expect that many small businesses operate profitably without relying on the Internet. These include many "cash and carry" retail vendors and many service providers—especially those who rely on word-of-mouth business (e.g., plumbers, electricians, roofers, landscapers, and gardeners). But for the mandated use of the Basic Pilot, these businesses would not be otherwise incurring the expense of a computer and Internet service.

One can expect that some indirect operating costs (e.g., the cost of training workers who are found not to be work authorized) may be reduced should employers be permitted to use the Basic Pilot to pre-screen workers or if the time taken to resolve temporary unconfirmed cases is reduced.

However, even these actions are not without added costs to workers who are work-authorized, but denied employment



due to errors, and to employers who hire workers who represent the least path of resistance. In either case, those workers who are tentatively non-confirmed but are authorized to work in the United States, many of whom are naturalized citizens, face a presumption that they are not authorized unless they can demonstrate otherwise.

This shifts the burden of the cost from the federal government to either the employer who must wait to have the case resolved or to the worker who may improperly be denied work or must take the time and incur the expense of fixing an error in the federal database. It also puts the federal government dangerously close to having to authorize the continued employment of every newly hired worker.

Scalability

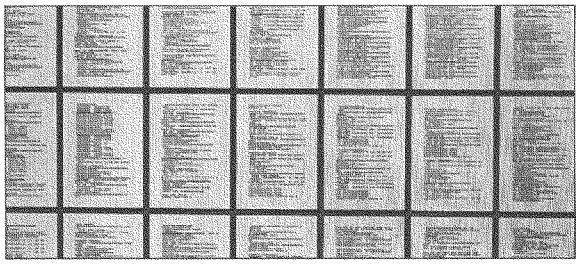
In May 2008, the GAO reported that there are more than 61,000 employers participating in the Basic Pilot program nationally, of whom about half are active users.[57] In fiscal year 2005, the SSA handled approximately 980,000 queries. In fiscal year 2007, this grew to more than 1,800,000 queries, an increase of 90% in two years. Should every employer be required to use the Basic Pilot, the system will somehow have to handle approximately 60 million new job queries.[58]

This represents more than a 30-fold increase over fiscal year 2007. According to a letter sent to colleagues by the Chairman of the House Ways and Means Committee and the Chairman of the Subcommittee on Social Security, the Department of Homeland Security will have to register approximately 4,000 employers per day in order to enroll all employers within four years.

The GAO reports that according to the USCIS, a mandatory EEVS could cost the agency $765 million for fiscal years 2009 through 2012 if only new hires are queried through the program and about $838 million for the same four-year period, if new hires and incumbent workers are queried. The USCIS did not break down the staff costs, but, currently, it employs only 121 staff nationwide for the Basic Pilot.[59]

Staffing would increase based on a formula that addresses monitoring and compliance and status verification needs as the number of employers using the system increases. The SSA has estimated that expansion of a mandatory Basic Pilot would cost $281 million for fiscal years 2009 through 2013 and would require a total of 700 new employees for a total of 2,525 additional workers per year over the same five-year period.[60]

These added burdens on the USCIS and the SSA raises serious questions as to whether the marginal value achieved in identifying the 5% of workers who are found to not be work authorized[61] is justified as massive resources are diverted to operating and maintaining an EEVS that all employers must use. While it is arguable that this conforms to the core mission of the USCIS, it is less apparent that the added costs associated with improved employer compliance are central to the core mission of the SSA.



Testimony by Richard E. Warsinskey, President, National Council of Social Security Management Associations, points out that in the face of staffing losses in the agency's field offices, the added burden in verifying the work authorization of those receiving a notice of tentative non-confirmation will dramatically increase the funding needs for the SSA.[42] Absent any increase in funding or staffing, any marginal improvement in the databases used to determine individual eligibility and benefits may be more than offset in a significant deterioration in beneficiary services.

Increased human resources costs borne by the USCIS and the SSA are not the only consequence of a massive scale-up of an EEVS. The Westat study says that the distribution of the current set of users does not reflect the national distribution of industries and sizes of businesses; for example, users of the Basic Pilot are distributed more heavily to large employers. In addition, testimony by the U.S. Public Policy Committee of the Association for Computing Machinery notes that significant architectural problems may be expected as the USCIS and the SSA are scaled-up to meet employer demand.

Generally, every 10-fold increase in scale results in new, and unexpected architectural problems.[43] In light of the fact that 4% of all the Basic Pilot inquiries cannot be immediately verified under current limited use, the possible consequences of a mandated use by all employers are significant and potentially devastating.

Abuse and Error

The Basic Pilot does not resolve all possible areas of abuse and error. For example, the GAO concluded in 2007 and 2008 that the Basic Pilot may help to reduce document fraud, but it cannot yet fully address identity fraud issues. Identity fraud occurs when employees present genuine documents that have been borrowed or stolen.[44] The DHS is now testing the use of photo identification to reduce the likelihood of identity fraud, but even this has its limitations since it assumes that the photo and other associated identifiers are correct and secure in the central database, that the photocopies of pictures used in the match are clear, and that employer's staff in the field doing the verifications are properly trained.

Accuracy remains a serious problem. The SSA estimates that 4.1% of its Numident records contain inaccuracies that will result in incorrect feedback. Currently, the primary means for correcting these records is when the social security number holder detects and reports the inaccuracy to the SSA. In addition, while edit checks and improved training may have reduced input errors by employers, these errors cannot be eliminated.

In fact, some "errors" may not be errors at all, but simply different cultural approaches to naming conventions (e.g., the use of hyphenation, placement of surnames, alternative spellings, and surname conventions). Also, a significant

source of errors encountered by naturalized citizens is that their status is not updated automatically on the SSA database.

The Association of Computing Machinery provides a useful checklist of pitfalls that may become problems for a full-scale EEVS:

- Difficulties in maintaining accuracy, correctness, and timeliness of the databases.
- Inconsistencies among widely distributed systems with distributed data entry.
- A tendency to place excessive faith in the trustworthiness of the system's responses.
- A lack of scalability with respect to ever-growing enormous databases, massive numbers of unauthorized users, and consequent communication and access limitations.
- The complexity of requirements imposed by added layers of auditing and accountability, contributing to further problems with respect to system security and integrity as well as data privacy.
- The complexity of audit trails and notification of access to audit trails.
- Problems associated with mission and features creep as further applications are linked to the originally intended uses.
- Piggybacking by other agencies.

In addition, the Association of Computing Machinery warned of other possible abuses including phishing attacks wherein employers receive fraudulent e-mails from a seemingly reliable and appropriate source asking them to verify the names, social security numbers, and other personnel information; hacking attacks; and fraud and identity theft committed by individuals who capture the information on I-9 forms for input into the Basic Pilot.[8]

Finally, the Department of Homeland Security is vulnerable to cyber-attacks. In a report prepared by Ranking Member Tom Davis of the House Committee on Oversight and Government Reform, the DHS earned a computer security grade of "D" in fiscal year 2006. This was up from an "F" in fiscal years 2005, 2004 and 2003.

Consequences of False Responses

Clearly, both employers and employees are adversely affected by false negatives: responses indicating that an individual is not authorized to work in the United States and is later found to be authorized. Employers incur recruiting costs, wages, training expenses, and the disruption associated with hiring and then firing qualified and legal workers.

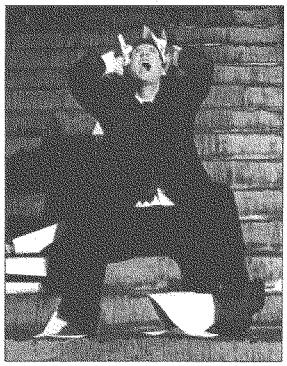
The employees suffer lost wages, periods of unsupported unemployment (i.e., they presumably are not qualified to collect unemployment benefits, welfare, or any public workforce assistance), and must carry the burden of correcting the federal databases while faced with the presumption that they are not legally in the U.S.

The consequences of a false positive can be insidious, especially in those circumstances where the employer who is acting in good faith is not given a safe harbor from adverse action by a government agency.

This is apparently the case in Arizona. The practical effect is that there will be some lingering doubt about the work authorization of every employee who is foreign-born or who may be suspected to be foreign-born (e.g., the children of foreign-born). The effect is that some employers may seek to protect themselves from prosecution by simply refusing anyone who does not fit the picture of a native-born American.

Implications for No-Match Letters

In August 2007, the DHS issued a Final Rule instructing employers on steps to take when receiving an SSA "no-match" letter. These letters from the SSA notify employers of mismatches between names and social security numbers provided by their employees and the information in the SSA's database.



In October 2007, the federal court in the Northern District of California issued a temporary restraining order and granted a preliminary injunction preventing the implementation of the final rule. The cost estimates associated with the proposed no-match rule were considered to be too great to implement through regulation and are very telling in light of their relevance to a mandated EEVS.

In March 2008, the DHS issued a supplemental proposed rule to provide additional clarification of its Final Rule. The supplemental rule intended to address three issues set forth by the court: (1) whether it supplied a reasoned analysis to justify a perceived change in the department's position—"that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized;" (2) that it exceeded its authority by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA); and, (3) whether it violated the Regulatory Flexibility Act.[44]

However, without commenting on the arguments presented by the DHS in response to the specific legal issues set forth by the court, the proposed supplemental rule still leaves unresolved three core issues with respect to no-matches.

First, the DHS generally points to the possibility that some unauthorized workers may be discovered through the investigations conducted by employers upon receiving no-match letters as justifying the full breadth of consequences from such investigations. The SSA notes that 4.1% of its Numident database will lead to incorrect feedback on the status of social security number holders. And, while it is in the interest of the public and to the proper administration of the social security system that all errors are identified and corrected, the DHS' actions generally minimize the primary purpose of the SSA database and restates it in terms of immigration enforcement.

Second, the DHS generally dismisses the effect of the rule on business, especially small business. The DHS merely argues that only employers whose wage reports reveal at least 11 workers with no-matches and where the total number of no-matches represents more than 0.5% of the employer's total Forms W-2 in the report will be covered by the rule. The DHS generally asserts that these are "non-trivial" error levels.[45]

Although it appears that on the basis of full-time employment, this approach generally will exclude many small employers with a static workforce, it may very well adversely affect those who employ many part-time workers (e.g., fast food restaurants) or who have a high turnover workforce. In the case of large employers—for example, an employer with a workforce of 1,000—the threshold is reached with just 51 workers, a number that is arguably trivial. In addition, the DHS neglects to note that the SSA issued some 1.7 million no-match letters to employers because the original letters to the employees had been returned, due mostly to incorrect home addresses.

Finally, the DHS seems to dismiss the cost to firms that are required to investigate the status of its workers upon receiving a no-match letter. Although estimates of the unauthorized workforce suggest that it constitutes approximately 5% of the total workforce,[46] the DHS estimates, without data to support these estimates, 20% of the individuals identified in no-match letters are unauthorized workers. Using this 20% number, the total

costs per firm by employment size class is not trivial:

- $3,633 for employers with fewer than 10 employees.
- $4,020 for employers with at least 10 employees but fewer than 20 employees.
- $5,568 for those employing at least 20 employees but fewer than 50.
- $7,214 for those employing at least 50 employees but fewer than 100.
- $21,148 for those employing at least 100 but fewer than 500.
- $31,660 for those employing at least 500 workers.[9]

As the DHS demonstrates in its own filing, costs *increase* per firm as the percentage of current no-match employees assumed to be unauthorized *decrease*. In addition, what makes the claims in filing seem to be an exercise in hyperbole is that it provides calculations for the costs per firm where no-match employees assumed to be unauthorized reach 80%. Nothing in the Basic Pilot experience suggests that such proportions will be reached.

TOTAL COSTS PER FIRM BY EMPLOYMENT SIZE CLASS[15]

Employment Class Size	Percentage of Current No-Match Employees Assumed to be Unauthorized				
	10%	20%	40%	60%	80%
5 – 9	$3,737	$3,633	$3,425	$3,217	$3,009
10 – 19	$4,020	$3,891	$3,634	$3,376	$3,119
20 – 49	$5,786	$5,568	$5,132	$4,695	$4,259
50 – 99	$7,517	$7,214	$6,608	$5,998	$5,391
100 – 499	$22,488	$21,248	$18,469	$15,789	$13,110
500+	$33,759	$31,660	$27,462	$23,265	$19,067

Implications with Respect to Pending Federal Legislation

There have been several failed attempts in Congress to mandate the use of the Basic Pilot program. Eleven states[11] have stepped into the issue by mandating the use of the Basic Pilot program under certain conditions:

- Arizona – all employers.
- Colorado – employers with state contracts.
- Georgia – state agencies, contractors, and subcontractors.
- Idaho – state agencies (executive order).
- Minnesota – state agencies, contractors (executive order).
- Missouri – state agencies.
- Mississippi – all employers, phased in over three years.
- North Carolina – state agencies (executive order).
- Oklahoma – public employers, contractors, subcontractors.
- Pennsylvania – state contractors.
- Utah – public employees.

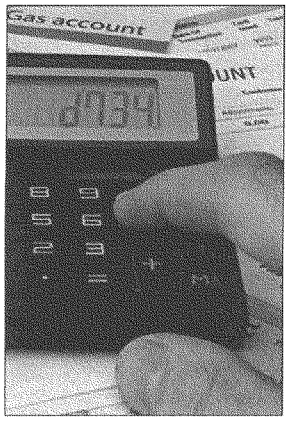
Also, Tennessee provides a safe harbor for an employer who uses the Basic Pilot from an allegation that it had knowingly or recklessly hired an unauthorized worker. Although the DHS also lists Arkansas as requiring the use of the Basic Pilot, it appears that the employer must certify that its employees are authorized, but it does not mandate the use of the system.

Finally, Illinois determined that the Basic Pilot does not meet a minimum threshold for accuracy and prohibited employers from registering for the program until such time as the SSA and the DHS databases are able to make a determination on 99% of the tentative non-confirmation notices issued

to employers within three days, unless otherwise required by law. A lawsuit by the DHS forced Illinois to suspend implementation of the law. In that case, a federal district court ruled that only the United States Congress can set the "standard for accuracy and speed."[32]

There were three popular proposals in the 110th Congress, which in one form or another addressed a mandated EEVS: Title III of the STRIVE Act, the SAVE Act, and NEVA. The STRIVE Act generally establishes minimum performance and technology standards based upon the recommendations of the Director of the National Institute of Standards and Technology (NIST).

The DHS may elect to extend the time it takes to establish such standards if, in doing so, it improves the accuracy of the system. It also lengthens the time from three days to five days that an employer has to query the EEVS upon the



date of hire. This change is noted by Westat as something requested by employers. In contrast, it extends the period for a final determination of the work authorization of a new employee and may consequently exacerbate the costs incurred by employers who must ultimately discharge a worker who is determined to be work unauthorized or who receives a final non-confirmation.

The SAVE Act mandates the use of the Basic Pilot without requiring substantive improvements in its architecture or operations (something that is accomplished presumably in the STRIVE Act by virtue of the action taken by the Director of NIST). In addition, it requires that the SSA mandates that every employer who employs someone with mismatched social security information (up from a minimum of 11 employees and more than 0.5% of the W-2 filings under current practice) be informed of the mismatch and must correct the mismatched information within 10 working days. Otherwise, the employee must be terminated.

In addition, the SAVE Act requires that any employee who is shown to be employed by more than one employer must contact the SSA to submit proof that he or she is, in fact, employed by each shown employer. One result of this proposed law is expected to be a significant increase in the number of employers who are required to investigate mismatches, many being a consequence of errors in the SSA database. As the DHS data show, these costs are not trivial, especially for small employers. In addition, the proposed law will disproportionately affect workers who hold down more than one job, including firefighters and police officers who often use their days off to moonlight.

The Congressional Budget Office, in a letter to Congressman John Conyers, Jr., Chairman of the Committee on the Judiciary, estimated the fiscal consequences of the SAVE Act as being:

- A decline of $17.3 billion in lost federal revenues for the period 2009–2018, due to an increase in the number of unauthorized workers being paid outside the tax system.
- An increase by $30 million for the period 2009–2018 for the money to be spent on salaries for new federal judges.
- An increase of discretionary spending of $10.3 billion for 2009–2013 and $23.4 billion for 2009–2018 to handle implementation.

- An increase in private-sector mandates exceeding the Unfunded Mandated Reform Act (UMRA) threshold of $135 million in at least one of the first five years the SAVE Act mandates are in effect.[51]

NEVA does away with the I-9 process and creates a new electronic verification system for employment within three years of enactment.[52] Employers would be required to participate in either the new EEVS or a voluntary biometric secure system called the Secure Electronic Employment Verification System (SEEVS). NEVA would require enrollment through state employment verification systems that rely on an existing national directory of new hires.

While it draws from various federal databases, the information contained on these databases is sufficient only to facilitate the successful operation of EEVS. SEEVS would verify the identity of an employee by accessing so-called "non wallet" identity information through tailored data mining in publicly available databases. Employers would be able to determine identity by using biometrics, which are separate from individually identifiable information.

NEVA also provides that the systems authorized meet performance standards established by an independent commission. NEVA calls for a review and appeal process for final non-confirmations and stipulates that failure to challenge a final non-confirmation is not an admission that the individual is unauthorized. Finally, NEVA preempts all state and local laws with respect to the mandated use of federal employment verification systems.

NEVA, as proposed, appears to be a fresh attempt to move away from the current, jerry-rigged EEVS by establishing a single, national database for new hire verification that addresses security issues and takes a systemic approach to resolving inconsistencies among various federal databases. While it is still susceptible to the flaws that are inherent with any very large database, it goes a

long way toward addressing several critical security and civil liberty issues. It also requires that some acceptable minimum performance standards be established. Currently, no one has established whether the 96% instantaneous response rate is sufficient, or whether it should be 98% or even 99%.

The action establishing a minimum performance standard taken by the State of Illinois in 2007 points directly to this issue since it is now at 93%. However, as the federal court in Illinois ruled, only Congress can decide what this standard should be.[57]

Final Word on Structural Flaws

A recent analysis by the Cato Institute[58] challenges the fundamental notion that a centrally administered national EEVS is able to eliminate all unauthorized work, much less do so without substantially violating the privacy of individuals, imposing substantial enforcement costs on employers, and creating a national identification system.

Separating the ideologically driven views from its policy analysis, the Cato Institute and the concerns raised by the Association for Computing Machinery are remarkably consistent and call into question whether any very large, central database will achieve the desired results.

The Cato Institute's response is interesting; it advocates a secure work authorization card that carries on it all vital information needed to establish the identity of the bearer and whether that bearer is authorized to work in the United States. This card is different than a national identity card in that the data on the card are not also contained on a national database—all the required information is present only on the card.

Because the card's use and content are limited only to employment authorization, the card is less likely to suffer from mission creep. While such a card is still subject to some fraud and misuse, the Cato Institute argues that the desired effects of reduced unauthorized work will be achieved without violating the civil liberties and privacy rights of individuals.

Also, the issue of implementing a workable, coherent, accurate and national EEVS is one part of the larger issue of immigration reform in this country. Any new employment verification system without comprehensive immigration reform may simply exacerbate the current situation by simply pushing unauthorized workers further into the underground economy.

(Endnotes)

1 *The Basic Pilot Program: An Internal Report of the U.S. Chamber of Commerce*, Labor, Immigration and Employee Benefits Division, February 22, 2006.

2 Authorization for the program, at the time of publication, ends on September 30, 2009.

3 The legality and constitutionality of this rule is currently the subject of litigation.

4 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, pp. xv–xvi.

5 *Basic Information Brief: DHS Basic Pilot/E-Verify Program*, March 2008, National Immigration Law Center, p. 3.

6 *Ibid.*

7 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, p. xv.

8 All employers sign a memorandum of understanding agreeing to adhere to Basic Pilot requirements.

9 Article II, Section C –Responsibilities of the Employer (#6) in the Memorandum of Understanding.

10 *Ibid.*

11 Source: Government Accountability Office.

12 Article II, Section C –Responsibilities of the Employer (#6) in the Memorandum of Understanding, p. 4.

13 *Ibid.*

14 *Ibid.*

15 *Assessing the Economic Effects of State Laws Addressing the Employment of Foreign-Born Unauthorized Workers*, Peter Creticos, December 2007, p. 14.

16 *See Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006) (invalidating provisions of a DHS rule that infringed on another agency's statutory authority); *See also AFL-CIO, et al. v. Chertoff, et al.*, D.E. 135 (N.D. Cal. 2007);

17 *See AFL-CIO, et al. v. Chertoff, et al.*, D.E. 135 (N.D. Cal. 2007).

18 *See* page 16 of the restraining order against implementation of the DHS's "no-match" rule issued in August 2007, *AFL-CIO, et al. v. Chertoff, et al.*, D.E. 135 (N.D. Cal. 2007); *see also Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006) (invalidating provisions of a DHS rule that infringed on another agency's statutory authority).

19 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, p. xxii.

20 *Ibid.*, p. 66.

21 The SSA Numident file contains relevant information about Social Security number holders, including name, date of birth, and citizenship status.

22 *Employment Eligibility Verification Systems: Statement for the Record before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives*, by Steven L. Schaeffer, Assistant Inspector General for Audit, Office of the Inspector General, Social Security Administration, June 7, 2007.

23 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, p. xxvii.

24 *Ibid.*, pp. xxv–xxvi.

25 Statement by Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. General Accountability Office, in Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*, May 6, 2008, p. 4.

26 *Ibid.*, p. 5.

27 Statement of Mitchell C. Laird, Esq., on behalf of the U.S. Chamber of Commerce, regarding "Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on the Social Security Administration's (SSA's) Ability to Serve Retirees, People with Disabilities, and Workers," House Subcommittee on Social Security of the Committee on Ways and Means, May 6, 2008, a full copy of the testimony can be downloaded at: www.uschamber.com/issues/testimony/2008/080506laird_eevs.htm.

28 Comment submitted by the American Council on International Personnel to the Department of Homeland Security's Interim Final Rule published at 73 Fed. Reg. 18944 on OPT Extension, June 9, 2008, p. 4.

29 *Ibid.*

30 *Ibid.*

31 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, p. 104.

32 For a detailed discussion on this issue, see U.S. Chamber of Commerce, LIEB Division Comments on Federal Acquisition Regulation Case 2007 013, Employment Eligibility Verification, August 11, 2008; and, U.S. Chamber of Commerce, LIEB Division Comments on Supplemental Proposed Rule on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, DHS Docket No. ICEB-2006-0004-0637.1, April 25, 2008.

33 *Findings of the Web Basic Pilot Evaluation*, September 2007, Westat, pp. 104–106.

34 *Ibid.*, p. 105.

35 *Ibid.*, p. 106.

36 *Ibid.*, pp. 19-34.

37 Statement by Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. General Accountability Office, in Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*, May 6, 2008, p. 3.

38 Statement of Frederick G. Streckewald, Assistant Deputy Commissioner for Disability and Income Security Programs, Office of Disability and Income Security Programs, Social Security Administration at a hearing on Employment Eligibility Verification Systems (EEVS) before the Subcommittee on Social Security, U.S. House Committee on Ways and Means, June 7, 2007.

39 Statement by Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. General Accountability Office, in Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*. May 6, 2008, p. 4.

40 *Ibid.*; In a "dear colleague" letter, the House Ways and Means Committee estimated that the first year of HR 4088 (see below) will cost $1 billion.

41 The estimate of 5% is derived from the Westat study, p. xxv.

42 Testimony of Richard E. Warsinskey, President, National Council of Social Security Management Associations before the U.S. Senate Committee on Finance, May 23, 2007.

43 Testimony of Peter G. Neumann on behalf of the U.S. Policy Committee of the Association for Computing Machinery before the Subcommittee on Social Security, U.S. House Committee on Ways and Means, June 7, 2007.

44 *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System*: Statement of Richard M. Stana, Director Homeland Security and Justice Issues, June 2007, p. 3; and Statement by Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. General Accountability Office, in Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*. May 6, 2008, p. 3.

45 Testimony of Peter G. Neumann on behalf of the U.S. Policy Committee of the Association for Computing Machinery before the Subcommittee on Social Security, U.S. House Committee on Ways and Means, June 7, 2007.

46 *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis*, Department of Homeland Security, 8 CFR Part 274a, ICE 2377-06, DHS Docket No. ACEB-2006-0004, pp. 5–6.

47 *Ibid.*, pp. 23–24.

48 Immigrants constitute 15.6% of the United States workforce; it is estimated that about 1/3 of the immigrants in the United States are unauthorized.

49 *Ibid.*, p. 36.

50 *Ibid.*

51 Source: National Conference of State Legislatures, unpublished working notes, may be higher now.

52 *See United States v. Illinois*, No. 07-3261 (C.D. Ill., March 12, 2009).

53 Letter to Honorable John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives from Peter R. Orszag, Director, Congressional Budget Office, April 4, 2008. According to the letter mandates on other units of government are not likely to exceed the UMRA threshold of $68 million.

54 A detailed analysis by Susan Schoenfeld, Senior Legal Editor, Society for Human Resource Management (SHRM), is found in an article published online by SHRM, *The Outlook for New Employment Legislation in 2008*, March 12, 2008.

55 *See United States v. Illinois*, No. 07-3261 (C.D. Ill., March 12, 2009).

56 *Policy Analysis; Electronic Employment Eligibility Verification: Franz Kafka's Solution to Illegal Immigration*, Jim Harper, Cato Institute, March 2008.

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U.S. Citizenship and Immigration Services

WRITTEN TESTIMONY

OF

MIKE AYTES
ACTING DEPUTY DIRECTOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES

FOR A HEARING ON

**"INTERIOR ENFORCEMENT OF IMMIGRATION LAWS:
ELIMINATING EMPLOYER DEMAND FOR ILLEGAL IMMIGRANTS
AS PART OF COMPREHENSIVE IMMIGRATION REFORM"**

BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, REFUGEE AND BORDER SECURITY

July 21, 2009
2:00PM
226 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC

Introduction

Chairman Schumer, Ranking Member Cornyn, and Members of the Subcommittee, I am Mike Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services (USCIS). I am grateful for the opportunity to appear before you to discuss our shared goal of effective employment eligibility verification.

The Department of Homeland Security (DHS) believes E-Verify is an essential and valuable tool for employers who are committed to maintaining a legal workforce. E-Verify works by addressing illegal immigration from the demand side. Any participating company in the United States can access E-Verify through a user-friendly government website that compares employee information taken from the Employment Eligibility Verification Form (Form I-9) with more than 455 million records in the Social Security Administration's (SSA) database, our partner in the program, and more than 80 million records in DHS immigration databases.

The E-Verify Program has grown exponentially in the past several years. Some of this increase is due to a growing number of States that have enacted laws requiring all or some of the employers in their State to use E-Verify. In addition, more employers are recognizing the value of this straightforward process by which they can assure their compliance with the law. As of July 18, over 137,000 employers are enrolled, representing over 517,000 locations. An average of 1,000 employers enroll each week and participation has more than doubled each fiscal year since 2007. Employers have run over 6.4 million queries thus far in FY 2009. The volume of queries doubled from FY 2007 to FY 2008 from 3.27 million to 6.6 million, and in the first quarter of this fiscal year, based on an analysis of Bureau of Labor Statistics data, up to 14 percent of all nonagricultural new hires in the U.S were run though E-Verify.

Not only does the E-Verify Program continue to grow, but it also continues to improve. The most recent analysis of E-Verify by Westat, our independent evaluator, found that approximately 96.9 percent of all cases queried through E-Verify were automatically verified as work authorized. The 96.9 percent figure is based on statistics from October through December 2008 and represents a significant improvement over earlier evaluations. In addition, in a recent American Customer Satisfaction Index Survey, the E-Verify Program scored 83 out of a possible 100 on the Customer Satisfaction Index--well above the latest Federal Government satisfaction index of 69 percent. More than half (51 percent) of the respondents self-identified themselves as small business owners or employers.

Of all the cases verified through E-Verify, 3.1 percent of queries resulted in a mismatch, or a Tentative Nonconfirmation (TNC). A TNC is issued when the information queried through E-Verify does not match the information in SSA or DHS databases and requires further action by employers and then by employees to resolve their cases with SSA or DHS, which is a process that we - in partnership with SSA—continually strive to improve.

Of all queries being run, 0.3 percent are related to new hires who were issued a TNC and successfully contested the case. The remaining 2.8 percent of queries were found not

work-authorized either because the employee was in fact not work-authorized, chose not to contest, did not follow the necessary procedures to successfully contest, or was unaware of the TNC or the opportunity to contest because the employer did not follow proper procedures.

The Current E-Verify System: Past Program Enhancements

Under USCIS management and in cooperation with SSA, the E-Verify Program continues to increase accuracy rates, ensure that E-Verify is fast, easy to use correctly, and protect employees' rights. Recent improvements to the E-Verify Program included instituting a system change to reduce typographical errors, incorporating a photo screening tool for certain DHS documents to combat certain instances of document fraud, establishing a Monitoring and Compliance Branch to help ensure that employers are using E-Verify correctly, and adding new databases that are automatically checked by the system to further reduce initial mismatches. In addition, the E-Verify Program established a new process for naturalized U.S. citizens to call a USCIS toll-free number to address citizenship status mismatches as an alternative to visiting SSA. All these efforts were targeted to establish efficient and effective verification.

E-Verify is an increasingly accurate and efficient procedure to verify employment authorization.

In September 2007, the E-Verify Program instituted an additional automatic flag notice that allows employers to double-check the data they entered into the system for those queries that are about to result in a mismatch. This has reduced data entry errors and thus initial mismatches by approximately 30 percent.

The 2007 Westat independent evaluation found that many of the employees who are found to be work authorized after they contest the TNC were recently naturalized citizens. In May 2008, USCIS added an automatic check with USCIS naturalization data to E-Verify before issuing a citizenship-related mismatch, which reduced the number of these mismatches by nearly 40 percent. In addition, employees who receive a mismatch with SSA related to their citizenship status are now able to contact USCIS via a toll-free number to contest the finding, address the discrepancy, and verify their work authorization. Over 50 percent of employees who received a TNC for a citizenship mismatch since May 2008 have chosen to call USCIS. This process change has helped to reduce walk-ins to SSA field offices for E-Verify citizenship mismatches. Of those individuals who call USCIS to address a mismatch based on citizenship status, over 90 percent are successfully resolved by USCIS as work authorized. USCIS and SSA are also discussing further enhancements, including a direct data share initiative that would update SSA's database with naturalized citizen information. In addition, USICS has invested in a dedicated pipeline from E-Verify to SSA to handle increased growth in query volume. The development for this pipeline is ongoing and is expected to be completed in early FY10.

The E-Verify Program also added the Integrated Border Inspection System (IBIS) that provides real time arrival and departure information for non-citizens to its databases as of May 2008, which is preventing E-Verify mismatches that previously resulted from delays in data entry for persons entering the country through ports-of-entry. The addition of this

information into the E-Verify system is reducing hundreds of mismatches that occur for newly arriving workers who enter the country legally and start working immediately.

In December 2008, DHS signed a Memorandum of Agreement with the Department of State (DOS) to share passport data from the DOS's records. In February 2009, USCIS began incorporating passport data into E-Verify to help verify citizenship status information in the event of a mismatch with SSA for citizens who present a U.S. passport during the Form I-9 process. To date, over 5,200 queries that would have received TNCs under the previous procedures have been automatically verified as employment authorized as a result of this enhancement.

We continue to work to improve the system with the goal of being able to automatically verify every work-authorized person accurately and expeditiously, with a minimal number of false nonconfirmations. While there is still work to do to achieve this goal, we continue to make improvements and are committed to further investments to increase further the system's accuracy rate. Of course, non work-authorized persons will continue to receive non-confirmations, which demonstrates that the system is working as intended.

We believe E-Verify continues to grow in efficiency and ease of use for employers, and we continually strive to understand the needs of our stakeholders.
The E-Verify program is routinely reviewed by an independent evaluator in an effort to better respond to the needs of stakeholders and ensure ongoing improvement. We anticipate that the next independent evaluation will be submitted to USCIS by the end of this calendar year. According to the 2007 independent Westat evaluation of E-Verify, "[m]ost employers found the Web Basic Pilot (E-Verify) to be an effective and reliable tool for employment verification" and 96 percent strongly disagreed that E-Verify was a burden.

Ultimately, E-Verify's continuing success relies not only on increasing its automatic verification rate, but also on increased awareness and public use of the program as well as more education of U.S. citizens and work-authorized immigrants about their rights when using the system. In an effort to better understand the needs of those employers using the program, USCIS substantially increased customer service and outreach staff over the past two years to ensure that questions and issues are addressed quickly and professionally.

In FY 2008, we launched an outreach campaign aimed at educating employers about their responsibilities in using E-Verify. In addition to conducting hundreds of presentations, demonstrations, and webinars, we also held informational seminars for the public in Arizona, Georgia, Mississippi, and the metropolitan D.C. area, and conducted 239 outreach events in 24 states. E-Verify also has a toll-free informational call center that handles approximately 2,000 calls per week.

The program launched radio, print, billboard, and internet advertisements aimed at increasing awareness about E-Verify. In addition, USCIS is collaborating with the Small Business Administration (SBA) to include E-Verify information on SBA's website and to identify additional ways E-Verify information can be incorporated into SBA program activities. USCIS has also collaborated with the Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Civil Rights Division of the

Department of Justice to develop guidance for employers about how to avoid discrimination when using E-Verify. This guidance is available on the website of the Office of Special Counsel and, with USCIS' assistance, has been translated into nine foreign languages (Chinese, Haitian Creole, French, Japanese, Korean, Tagalog, Vietnamese, Russian, and Spanish).

Employees are also key stakeholders of E-Verify. USCIS has bilingual English and Spanish advertising and has online materials in eight foreign languages (Chinese, Haitian Creole, French, Korean, Tagalog, Vietnamese, Russian, and Spanish) to inform employees of their rights. The E-Verify Program has collaborated with the DHS Office for Civil Rights and Civil Liberties to prepare bilingual English and Spanish videos for employers and employees to teach them about E-Verify and their rights, roles, and responsibilities.

Through monitoring and compliance, the E-Verify Program is committed to maintaining the integrity of the authorization system and effectively detecting and preventing discrimination and misuse.

A successful and effective electronic employment authorization verification program is critical to ensuring that employers have the necessary tools to ensure their work force is authorized to work in the United States. However, to be effective, the program must also include robust tools to detect and deter employer and employee fraud and misuse. USCIS first contracted for an independent review of E-Verify in June 1998 with the initial evaluation of the program published on January 29, 2002 by Temple University and Westat. USCIS has continued this process to ensure third-party review of ongoing operations as well as evaluation of new capabilities and improvements.

The 2007 independent Westat evaluation found "substantial" employer non-compliance with program rules. While the evaluation found that employer compliance with program procedures is improving, it also identified methods by which some E-Verify employers may be using the program incorrectly. Failure to follow E-Verify procedures can potentially result in discrimination and can lead to job loss for U.S. citizens and work authorized immigrants and could ultimately reduce the effectiveness of the program. USCIS is dedicated to reducing E-Verify misuse through employer training, educational outreach, print and electronic resources, and our monitoring and compliance program. Indeed, we believe that a strong monitoring and compliance program is essential to the success and acceptance of the system.

USCIS established a Monitoring and Compliance Branch dedicated to monitoring E-Verify use and providing compliance assistance. The Monitoring and Compliance Branch aims to detect and deter system misuse; prevent the fraudulent use of counterfeit documents; safeguard personally identifiable information; and refer instances of fraud, discrimination, misuse and illegal or unauthorized use of the system to enforcement authorities. The Branch has begun systematically reviewing E-Verify transaction data to detect and deter employer misuse, fraud and discriminatory practices, and offers compliance assistance to help employers use the system correctly. This approach is supported by the Case Tracking and Management System (CTMS), which was launched on June 22, 2009. The E-Verify Program has instituted procedures to refer cases of non-compliance to Immigration and Customs Enforcement (ICE) and instances of potential

discrimination under the anti-discrimination provision of the Immigration and Nationality Act to the Office of Special Counsel for Immigration-Related Unfair Employment Practices. In December 2008, USCIS signed a Memorandum of Agreement with ICE establishing guidelines for referrals and sharing of information. USCIS and the Office of Special Counsel have established mechanisms for the cross-referral of matters and the sharing of E-Verify information, and they are working to memorialize these procedures in an agreement.

To safeguard employee privacy, the E-Verify Program has established an internal Privacy Branch to ensure that program policies, practices, and procedures comply with the Privacy Act; promote transparency within the program; and to conduct Privacy Threshold Analyses (PTAs), Privacy Impact Assessments (PIAs), and develop System of Records Notices (SORNs) for system and programmatic enhancements. The Privacy Branch's mission is to protect employees' civil rights and personal information.

In addition to detecting fraud that occurs when workers provide counterfeit documents containing information about nonexistent persons, E-Verify prevents certain types of identity fraud from passing successfully through E-Verify.
Some noncitizens without work authorization use stolen identities to obtain employment. To help address this problem, the E-Verify Program introduced a photograph screening capability into the verification process in September 2007. The tool allows a participating employer to check the photos on Employment Authorization Documents (EAD) or Permanent Resident Cards (green cards) against images stored in USCIS databases, thus allowing employers to determine if the document presented by the employee as a DHS document is a complete fabrication or has been subject to photo-substitution. Through use of the photo tool, hundreds of cases of document and identity fraud have been identified, and unauthorized workers have been prevented from illegally obtaining employment.

Upcoming Enhancements to E-Verify: Fiscal Year 2010
USCIS continues to improve the system's automatic confirmation rate by incorporating additional data sources into E-Verify. Other key efforts include assisting employers in using the program correctly, continuing to conduct outreach focusing on employee as well as employer stakeholder groups, and expanding relationships with all stakeholders in an effort to further improve the program.

The E-Verify Program will continue to add new data sources to the automated initial check to reduce the number of mismatches issued by the system.
In fiscal year 2010, USCIS plans to improve the system's ability to automatically verify international students and exchange visitors through the incorporation of ICE's Student and Exchange Visitors Information System (SEVIS) data. By incorporating SEVIS nonimmigrant student visa data into the automatic initial E-Verify check, the number of students and exchange visitors who receive initial mismatches and then have to contest the initial result should be reduced. In FY2010, ICE will be launching a new version of SEVIS – SEVIS II – which will include employment eligibility information that E-Verify will be able to access electronically. Currently, the SEVIS database is checked manually by immigration status verifiers after an initial mismatch is issued.

The E-Verify Program also plans to provide automated system updates for any new hire with Temporary Protected Status (TPS) who has an expired EAD but who is within an auto-extension time period. This system enhancement will decrease the number of TPS recipients who receive an initial mismatch or TNC.

Additionally, E-Verify continues to develop other ways to reduce the number of initial mismatches and improve system performance by analyzing system data. One such effort will improve the date of birth entry field to avoid data entry errors such as reversing the day and month as is the practice in many countries outside of the United States. This mismatch reduction initiative includes improving the data-matching algorithm and improving usability to reduce data entry errors.

The E-Verify Program will continue to combat identity fraud and expand the photo screening tool.

USCIS is working to expand the types of documents available to the E-Verify system to provide photo confirmation. Currently, only DHS-issued identity documents are displayed in the photo tool, but the E-Verify Program is actively seeking to expand the types of photos available in this functionality. This would prevent one possible avenue of identity theft currently used to "game" the system. This effort will be combined with a reduction in the number of documents acceptable for Form I-9 purposes, such as those listed in the Interim Final Rule, which became effective on April 3, 2009.

USCIS is also assessing the feasibility of a state-based department of motor vehicles (DMV) data exchange that would incorporate driver's license photos into the photo tool. This would represent a significant enhancement to the system, since new hires most often present a driver's license for Form I-9 purposes. To date, no state has yet agreed to add its driver's license data to the photo tool. If launched, this functionality would be available to any state that chooses to participate.

USCIS is aware that identity fraud is a serious concern in the U.S. and is especially concerned with how this practice affects E-Verify. While USCIS cannot detect all forms of identity fraud used by an employee who is run through E-Verify, we are working to find ways to detect and deter fraud to the extent possible. Incorporating driver's license information and photos would strongly support this effort. Further, USCIS is in the final stages of developing an initiative that would enable individuals who are victims of identity theft and who have filed both a police report and a report with the Federal Trade Commission (FTC) to choose to "lock" and "unlock" their records in E-Verify.

The E-Verify Program will continue to implement enhancements to improve usability and program efficiency.

USCIS is evaluating the E-Verify registration process and is currently examining the best ways to validate the legitimacy of employers using the system, the individual registrants signing up to use the system, and those using the system after the enrollment phase. Improving the registration portion of the E-Verify Program will help ensure that E-Verify has accurate and complete information on those employers using the program.

The E-Verify Program is also working to provide an electronic Form I-9. The first phase of this enhancement includes developing a stand-alone Form I-9 in portable format that

will allow employers to electronically create, sign, and store the completed forms. In a future enhancement, the electronic Form I-9 will pre-fill the fields in E-Verify, eliminating the need for employers to input the data into the system after it was already recorded on the Form I-9. Once available, this function will decrease workload on employers and should help reduce employer input errors.

Conclusion

The E-Verify Program has made great strides in becoming a fast, easy, and more accurate tool to help employers maintain a legal workforce and comply with immigration law. The Administration is dedicated to continuing to make improvements to address issues such as usability, fraud, discrimination, and to further improve the system's automatic verification rate. On balance, E-Verify will continue to be a key element of our Nation's ability to safeguard U.S. jobs for citizens and authorized workers by combating illegal immigration.

Thank you for the opportunity to testify before the Subcommittee and we appreciate your continued support of the E-Verify Program.

- USCIS -

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Testimony of Christopher Calabrese
Counsel, Technology & Liberty Project, Washington Legislative Office

American Civil Liberties Union

Opposing a National ID System and Mandatory Employment Verification as Part of Any Comprehensive Immigration Reform Proposal

U.S. Senate Committee on the Judiciary
Subcommittee on Immigration, Refugees and Border Security

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

July 21, 2009
226 Dirksen Senate Office Building

Chairman Schumer, Ranking Member Cornyn and Subcommittee Members, on behalf of the American Civil Liberties Union ("ACLU"), America's oldest and largest civil liberties organization, and its more than half a million members and 53 affiliates across the country, we are pleased to submit this testimony. The ACLU writes to oppose any legislative proposal that would impose a mandatory electronic employment eligibility verification pre-screening system or biometric based National identity system on America's workforce.

Under any name, the original Basic Pilot Employment Verification System (also known as E-Verify) or another mandatory employment eligibility prescreening system would impose unacceptable burdens on America's workers, businesses and society at large without resolving America's undocumented immigration dilemma. The costs associated with this program cannot be denied and cannot be overstated; any benefits are speculative, at best. Additionally in recent weeks, Mr. Chairman, you have described the need for a biometric based identity system. We would be remiss if we did not make immediately clear our opposition to this idea. We believe it would create a national identification system with all the accompanying privacy, civil liberties and cost issues associated with such a system.

This testimony is divided into two parts. The first is a description of the well known existing problems with E-Verify and the second describes the myriad problems of a biometric National ID system including efficacy, cost, administrative burden and privacy.

Electronic Employment Verification

The ACLU opposes a manditory Electronic Employment Verification System for five reasons:

(i) **it poses unacceptable threats to American workers' privacy rights;**

(ii) **well-documented data error rates in both Social Security Administration ("SSA") and Department of Homeland Security ("DHS") files concerning work-eligible U.S. citizens, lawful permanent residents, and visa holders will wrongly delay the start of employment or block the ability to work altogether for lawful American workers;**

(iii) **lack of sufficient due process procedures for workers injured by such data errors;**

(iv) **both SSA and DHS are unprepared and ill-equipped to implement such a system and doing so would lead to the failure of SSA to continue to fulfill its primary obligations to the nation's retirees and disabled individuals; and**

(v) **as the Westat report highlights, we can expect rampant employer misuse in both accidental and calculated ways.**

I. Mandating Electronic Employment Eligibility Verification Poses Unacceptable Threats to American Workers' Privacy Rights

A nationwide mandatory electronic employment verification system (EEVS) would be one of the largest and most widely accessible databases ever created in the US. Its size and openness would be an irresistible target for identity theft and almost inevitably lead to major data breaches. Additionally, because the system would cover each of us (and be stored in a searchable format) it could lead to further widespread surveillance of Americans by the intelligence community, law enforcement and private parties. Existing legislative solutions fail to fully address these problems and leave Americans' privacy in jeopardy.

E-Verify currently contains an enormous amount of person information including names, photos (in some cases), social security numbers, phone numbers, email addresses, workers' employer and industry, and immigration information like country of birth. It contains links to other databases such as the Customs and Border Patrol TECS database (a vast repository of Americans' travel history) and the Citizen and Immigration Service BSS database (all immigration fingerprint information from US VISIT and other sources).[1]

The data in E-Verify, especially if combined with other databases, would be a goldmine for intelligence agencies, law enforcement, licensing boards, and anyone who wanted to spy on American workers. Because of its scope it would likely form the backbone for surveillance profiles of every American. It could be easily combined with other data such as travel, financial, or communication information. 'Undesirable' behaviors – from unpopular speech to gun ownership to paying for items with cash – could be tracked and investigated. Some of these databases linked to E-Verify are already data mined. For example, the TECS database uses the Automated Targeting System (ATS) to search for suspicious travel patterns. Such data mining could only be enhanced by the inclusion of E-Verify information.

Without proper checks, American workers would be involuntarily signing up for never ending digital surveillance every time they apply for a job. The best solution is to limit the retention period for data in the system to three to six months, unless it is retained as part of an ongoing compliance investigation or as part of an effort to cure a non-confirmation. This is a reasonable data limit for information that is necessary for the one time purpose of verifying employment. By comparison information in the National Directory of New Hires, which is used on an ongoing basis to allow states to enforce child support obligations, is deleted after either 12 or 24 months.[2] The current retention period for E-Verify (set by regulation) is an astonishing 10 years; deadbeat dads have better privacy than American workers.

Information in any employment verification system must also be strictly controlled. It should only be used to verify employment or to monitor for employment related fraud. There should be no other federal, state, or private purpose. Data should also be bound by strict privacy rules, such as those that protect Census data, 13 U.S.C. §9, which sharply limit both the disclosure and use of that information.

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[1] 71 Fed. Reg. 75449.

[2] The data retention limitation for the National Directory of New Hires is governed by 42 U.S.C. §653 (i).

Additionally, the system must attempt to guard against data breaches and attack for identity thieves. Since the first data breach notification law went into effect in California at the beginning of 2004 we know that more than 260 million records have been hacked, lost or disclosed improperly.[3] In 2007, it was reported that the FBI investigated a technology firm with a $1.7 billion DHS contact after it failed to detect "cyber break-ins" traced to a Chinese-language website.[4] The loss of this information contributes to identity theft and a constant erosion of Americans' privacy and sense of security. A comprehensive employment verification system will contain the records of more than 150 million American workers. It will be accessible by millions of employers, federal employees, and others. There is absolutely no question that an employment verification system will be breached. The question is simply how bad the breach will be and how much harm it will cause. Limiting the duration that information is held in the system will help limit the amount of personal information that will be lost or stolen.

II. Data Errors Will Injure Lawful Workers by Delaying Start Dates or Denying Them Work Opportunities

As the Subcommittee well knows, recent government reports acknowledge that huge numbers of SSA and DHS files contain erroneous data that would cause "tentative non-confirmation" of otherwise work-eligible employees and, in some cases, denial of their right to work altogether. USCIS states that 3.87% of workers receive a tentative nonconfirmation from the E-Verify system and only .37% are able to resolve the issue. It is likely that in many of these cases workers are able to work lawfully but simply don't have the time or don't know they have the right to contest their determination and seek different employment. That won't be possible under mandatory system.

The Social Security Administration also reports that approximately 17.8 million of its files contain erroneous data, 12.7 million of which concern U.S. citizens. The SSA's Office of Inspector General reports that the Social Security database has a 4.1 percent error rate. Even cutting this data error rate by 90% would leave approximately 1.78 million workers –more than 1.2 million of whom will be U.S. citizens – at the mercy of a system that provides no adequate due process for challenging and correcting erroneous data.

The causes of these data errors are similarly well known. First, legacy files produced on paper before the onset of the information age contained numerous inconsistencies or may have been lost or never updated. Second, women or men who changed their names at marriage, divorce or re-marriage may have inconsistent files or may never have informed either SSA or DHS of name changes. Third, simple key stroke errors contribute to the volume of erroneous data. Fourth, individuals with naming conventions that differ from those in the Western world may have had their names anglicized, transcribed improperly or inverted. Fifth, individuals with common names may have had their files wrongly conflated or merged with others sharing the

[3] Privacy Rights Clearinghouse Chronology of Data Breaches, http://www.privacyrights.org/ar/ChronDataBreaches.htm

[4] Ellen Nakashima and Brian Krebs, *Contractor Blamed in DHS Data Breaches*, WASHINGTON POST, Sept. 24, 2007.

same or similar name. Sixth, systems designed for one agency data function may not be readily adapted to sharing information with other systems designed to rapidly review and interpret work eligibility, thus leaving an incomplete data set to evaluate a prospective employee's eligibility or to clarify or resolve confused or erroneous data.

All of these problems make implementation of such a mandatory pre-screening system difficult, if not impossible. Congress should not mandate such a system unless and until these databases and the files they contain are substantially improved. A first step, however, to aid both SSA and DHS in carrying out their disparate but primary missions -- other than employment eligibility prescreening -- would be for Congress to mandate that both agencies systematically audit and review their files' data quality to eliminate errors. Only after such a systematic "scrub" to improve data is completed should Congress even consider mandating use of these files to pre-screen worker eligibility.

III. Pending Legislative Proposals Lack Meaningful Due Process Protections for Lawful Workers Injured by Data Errors

Workers injured by data errors will need a means of quickly and permanently resolving data errors so they do not become presumptively unemployable. Congress must prevent the creation of a new employment blacklist - the ACLU foresees a "No-Work List" – that will consist of would-be employees who are blocked from working because of data errors and government red tape.

To resolve data errors, Congress must prevent the enactment of a mandatory pre-screening system unless it has meaningful due process provisions. Such procedures should mirror the Fair Information Practices that undergird the Privacy Act of 1974, 5 U.S.C. §§ 552, et seq. and control how the government should handle data it collects about the public. Therefore, Congress should block any legislation unless it mandates that:

(i) the systems and databases used to collect and disseminate information about those attempting to work be publicly disclosed so that workers and employers are aware of them;

(ii) information collected by both government agencies and employers that is gathered for one purpose shall not be used for another purpose without individuals' consent;

(iii) workers can access information held about them in a timely fashion and without petitioning the government for access;

(iv) workers may correct, amend, improve or clarify information held about them by both the government and employers;

(v) information about employees be kept relevant, accurate, and up to date; and

(vi) information is protected against unauthorized losses such as data breaches or identity theft.

Given the inordinately high database error rates described above, it is further incumbent upon Congress to prevent the imposition of a mandatory system that fails to provide workers with a fair and just set of administrative and judicial procedures to resolve data errors promptly and efficiently. True due process would require the creation of a system to expedite workers' inquiries at both agencies, in addition to the existing opportunity – too often not communicated to employees wrongly tentatively non-confirmed according to DHS' Westat report – to submit additional information to SSA and DHS.[5] In demanding due process for workers in such a system, any worker who challenges erroneous government data deserves a presumption of work eligibility. No undocumented worker would intentionally undertake the bureaucratic nightmare of dealing with at least two federal agencies and fighting the U.S. government through separate administrative and judicial procedures.

True due process requires congressional establishment of open, accessible, efficient, and quick administrative procedures so as to get any aggrieved worker back to work and so as not to deprive an employer of its chosen employee. First, Congress must ensure that SSA and DHS hire and train sufficient staff to handle the millions of additional inquiries they will surely receive as workers try to resolve data errors. Those new government employees will be needed for the substantial increase in the manual verification workload, each verification often taking more than two weeks to complete. Thus, the ACLU urges the creation and full-staffing of 24-hour help lines at SSA and DHS. Second, when data provided by a worker conflicts with government files, the aggrieved worker must be provided a right to a quick, efficient, and fair review before an administrative law judge. Third, costs should be borne by the government for each such procedure so as to minimize injury to the worker. Fourth, the administrative law judge, or other arbiter, should be able to order the government to correct and supplement the government records at issue. Fifth, government employees should be required to correct data errors expeditiously. Sixth, the administrative law judge must be empowered to order the government to reimburse the worker's costs and to reimburse for lost wages plus interest. We would urge a strict liability standard so as to encourage the government to improve its data quality.

If the administrative process fails to resolve data discrepancies, then due process requires the right to a judicial process. Because of the costs of bringing suit, including filing fees, retaining counsel, obtaining documents, finding and presenting witnesses, and hiring experts, the government must bear the burden of any judicial process. What undocumented worker would contest a tentative non-confirmation before a federal judge – toward what end? Congress should place the legal burden on the government's shoulders to demonstrate a worker's ineligibility rather than forcing the worker to prove his or her eligibility. The Federal Tort Claims Act does not provide an adequate procedure or remedy for the hundreds of thousands who would surely be aggrieved by the imposition of a mandatory procedure. The U.S. Court of Claims reported an extensive backlog of cases and requires a worker to exhaust a six-month long waiting period before filing suit. **During that entire period of a Federal Tort Claims Act administrative procedure, plus the pendency of the lawsuit, the worker would be barred from working.**

[5] Id.

Thus, Congress must mandate an expedited federal court procedure, and judges should be empowered to order the government to correct any erroneous files and to reimburse a worker for costs and fees for bringing suit, including attorney's fees. Furthermore, federal judges should be required to order agencies to reimburse a worker for any lost wages and lost opportunity costs, plus interest. The legal standard should be one of strict liability, so that any government error leads to redress that makes the injured worker whole. Any lesser legal standard, such as negligence or recklessness, will fail to (i) assist the aggrieved worker and his or her family; and (ii) encourage the agencies to improve data quality so as to reduce the harm from such a system going forward.

V. Government Agencies are Unprepared to Implement a Mandatory Employment Eligibility Prescreening System

As recent government reports evaluating E-Verify have made clear, both SSA and DHS are woefully unprepared to implement a mandatory employment eligibility pre-screening system. In order to implement such a system, both agencies would need to hire hundreds of new, full-time employees and train staff at every SSA field office. DHS has an enormous backlog of unanswered Freedom of Information Act requests from lawful immigrants seeking their immigration files. Those files, many of which are decades old, are the original source of numerous data errors. If DHS cannot respond to the pending information requests in a timely fashion now, how much worse will the problem be when lawful immigrants, including naturalized citizens, lawful permanent residents, and visa holders need the documents immediately to start their next jobs? Consequently, DHS must hire hundreds more employees to respond to these FOIAs.

Businesses seeking to comply with any newly imposed system will also strain these government agencies. Additional problems can be anticipated in attempting to respond to employers' requests and in establishing connectivity for businesses that are located in remote locations or that do not have ready access to phones or the internet at the worksite. These agency deficiencies will surely wreak havoc on independent contractors and the spot labor market for short-term employment.

If history is our guide, agency officials will be unable to scale up the existing software platform for E-Verify to respond to the enormous task of verifying the entire national workforce and all the nation's employers. It makes little sense to adopt a system that is predestined to wreak havoc within these agencies, not to mention the lives of the thousands of Americans wrongfully impacted.

VI. Employers Will Misuse a Mandatory Employment Eligibility Prescreening System

Employers have misused and will continue to misuse any mandatory employment eligibility verification system resulting in discrimination and anti-worker behavior. From the inception of E-Verify, the U.S. Government Accountability Office and DHS studies have documented various types of misuse. Some employers have even self-reported that they screen

out workers with "foreign" surnames or fail to explain tentative non-confirmations to employees. Other employers have self-reported that they have punished employees with tentative non-confirmations by withholding wages and assignments during the period until any discrepancy is resolved.

If Congress imposes a mandatory system, it will also need to create effective enforcement mechanisms that prevent the system from being a tool for discrimination in hiring. Such discriminatory actions will be difficult to prevent and even more difficult to correct. Congress should ask: how will the government educate employers and prevent misuse of E-Verify or any similar system?

Biometric National Identification System

In addition to the problems described above with EEVS, any system which utilizes a biometric model (either as part of an ID card or stored database) for verifying identity is going to run into additional privacy problems as well as a number of other complex practical and security problems. These problems will likely keep it from acting as an effective verification system.

The ACLU believes that a biometric national identification system should be rejected for the following reasons:

i. **It runs contrary to American cultural values**
ii. **it will be hugely expensive and create a new federal bureaucracy**
iii. **it will not prevent unauthorized employment**
iv. **it will trample Americans' privacy and civil liberties**

i. **A Biometric National ID System Runs Contrary to Americans' Cultural Values**

As an initial matter it is critical to understand the vast scope of a biometric system. **Any biometric system would require the fingerprinting (or collection of some other biometric) of the entire working population of the US.** Americans will have to be treated like criminals and suspects in order to work. This process (as described below) will be far from painless. It will involve long lines, gathering identity documents, and considerable confusion and mistake. Any biometric system that goes beyond photographing individuals will face enormous cultural stigma. Not only will this create substantial backlash against the government but also against immigrants (and those who appear to be foreign) who "created" this problem.

This proposal is certain to be enormously controversial and poses a significant threat to the passage of any legislation to which it is attached, including Comprehensive Immigration Reform.

ii. **A Biometric National ID System Will be Hugely Expensive and Create a New Federal Bureaucracy**

The key to a biometric system is the verification of the individual. In other words, an individual must visit a government agency and must present documents such as a birth certificate or other photo ID that prove his or her identity. The person is then fingerprinted (or linked to some other biometric) and that print is placed in a database. It may also be placed on an identification card. This process would create a quintessential National ID system because it would be national, would identify everyone and would be necessary to obtain a benefit (in this case the right to work).

The closest current analogy to this system is a trip to the Department of Motor Vehicles to obtain a drivers' license. The federalizing of that system (without the addition of a new biometric) via the Real ID Act was estimated to cost more than $23 billion and was thoroughly rejected by the states (24 states have already rejected Real ID). The cost to build such a system from scratch is staggering. It would involve new government offices across the country, tens of thousands of new federal employees and the construction of huge new information technology systems. It is far beyond the capacity of any existing federal agency.

This system would spawn a huge new government bureaucracy. Every worker would have to wait in long lines, secure the breeder documents necessary to prove identity, and deal with the inevitable government mistakes. Imagine the red tape necessary to wrap up 150 million US workers. All of the problems of the existing E-Verify system would be magnified as workers faced another bureaucratic hurdle before they could begin their jobs.

Employers would not escape from problems with the system, either. They would have to purchase expensive biometric readers, provide Internet connections, train HR workers, and endure delays in their workforce.

These problems are not hypothetical. After spending billions the United Kingdom effectively abandoned its efforts to create a biometric National ID card, making it voluntary. Dogged by public opposition, concerns about data privacy, and extensive technical problems, the program has been an embarrassment for the British government. Conservative Party politicians (ahead in the polls) plan to scrap the program altogether if they assume power.[6]

iii. A Biometric National ID System Will Not Prevent Unauthorized Employment

Ironically, a biometric National ID system would largely fail to solve the problem of undocumented immigration. Security systems have to be judged not by how they succeed but where they fail. After enduring a host of bureaucratic hassles and costs most Americans would likely be able to enroll in the biometric system. But that does not make the system a success those workers were already working lawfully – the system only succeeds if it keeps the undocumented workers in this country from securing employment. A biometric National ID system is unlikely to do that.

[6] Michael Holden, *Plans dropped for compulsory ID cards*, REUTERS, June 30, 2009

The first and most obvious failure is that this system does nothing about employers who opt out of the system altogether (work "off the books"). Already, by some reports, more than 12 million undocumented immigrants are working in the United States. No doubt many of these workers are part of the black market, cash wage economy. Unscrupulous employers who rely on below-market labor costs will continue to flout the imposition of a mandatory employment eligibility pre-screening system and biometric National ID. These unscrupulous employers will game the system by only running a small percentage of employees through the system or by ignoring the system altogether. In the absence of enforcement actions by agencies that lack resources to do so, employers will learn there is little risk to gaming the system and breaking the law.

Employers will, however, be forced to deal with the hassle and inconvenience of signing up for E-Verify and a biometric system, and then watching as they are blocked from putting lawful employees to work on the day they are to start their employment. The inevitable result will be more, not fewer, employers deciding to pay cash wages to undocumented workers. Similarly, cash wage jobs will become attractive to workers who have seemingly intractable data errors. Instead of reducing the number of employed undocumented workers, this system creates a new subclass of employee – the lawful yet undocumented worker.

Additional failures will come when the worker is initially processed through the system. Crooked insiders will always exist and be willing to sell authentic documents with fraudulent information.[7] It is likely that undocumented immigrants will be able to contact these crooked insiders though the same criminals who they hired to sneak them into the United States. Securing identification will simply be added to the cost of the border crossing.

Worse, since 2004, more than 260 million records containing the personal information of American's have been wrongly disclosed.[8] Many individuals' personal information, including social security numbers, are already in the hands of thieves. There is nothing to prevent a criminal from obtaining fraudulent access to E-Verify (pretending to be a legitimate employer), verifying that a worker is not already registered in the system and sending an undocumented worker to get a valid biometric using someone else's information.

Additional problems inherent in any biometric will materialize both when an individual is enrolled, and at the worksite. For example, according to independent experts there are a number of problems that prevent proper collection and reading of fingerprints, including:

- Cold finger
- Dry/oily finger
- High or low humidity
- Angle of placement
- Pressure of placement
- Location of finger on platen (poorly placed core)

[7] Center for Democracy and Technology, "Unlicensed Fraud," January 2004 (www.cdt.org/privacy/20040120id_theft.pdf).
[8] Privacy Rights Clearinghouse Chronology of Data Breaches, http://www.privacyrights.org/ar/ChronDataBreaches.htm

- Cuts to fingerprint; and
- Manual activity that would mar or affect fingerprints (construction, gardening).[9]

When these failures occur it will be difficult and time consuming to re-verify the employee. Running the print through the system again may not be effective, especially if the print has been worn or marred. Returning to the biometric office for confirmation of the print is not likely to be a viable solution because it creates another potential for fraud; the person who goes to the biometric office may not be the person who is actually applying for the job. These are complex security problems without easy solutions.

Perhaps worst of all, there would be mounting pressure to "fix" many of these problems with more databases filled with identifying information from birth certificates to DNA in an attempt to identify individuals earlier and more completely. Of course this means more cost, more bureaucracy and less privacy.

From a practical point of view a biometric system is the worst of both worlds. It puts enormous burdens on those already obeying the law while leaving enough loopholes so that lawbreakers will slip through.

iv. A Biometric National ID System Will Trammel Privacy and Civil Liberties

The creation of a biometric National ID would irreparably damage the fabric of American life. Our society is built on openness, the assumption that as long as we obey the law, everyone is free to go where they want and do what they want – embrace any type of political, social or economic behavior they choose. And all without the government (or the private sector) looking over their shoulder monitoring their behavior. We at the ACLU believe this freedom is one of the keys to America's success as a nation. It allows us to be creative, enables us to pursue our entrepreneurial interests wherever they might lead and validates our democratic instinct to challenge any authority that may be unjust.

A biometric National ID system would turn those assumptions on their head. A person's ability to participate in a fundamental aspect of American life – the right to work – would become contingent upon government approval. It is almost certain that this system will be expanded. In the most recent attempt to create a National ID though a state driver's license system called Real ID, the law started by controlling access to federal facilities and air travel. Congressional proposals quickly circulated to expand its use to such sweeping purposes as voting, obtaining benefits such as Medicaid, and traveling on interstate buses, trains, and planes.[10] Under a National ID system every American needs a permission slip – one that is necessary to take part in the civic and economic life of an American.

Historically, National ID systems have been a primary tool of social control. It is with good reason that the phrase "Your papers please" is strongly associated with dictatorships and other repressive regimes. Registration regimes were an integral part of controlling unauthorized

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[9] International Biometrics Group, http://www.biometricgroup.com/reports/public/reports/false_reject_failure.html

[10] See, e.g. H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (110th Congress).

movement in the former Soviet Union and enforcing South Africa's old apartheid system. They also helped both Nazi Germany and groups in Rwanda commit genocide by identifying and locating particular ethnic groups. [11]

The danger of a National ID system is greatly exacerbated by the huge strides that information technology ("IT") has made in recent decades. A biometric National ID system would violate privacy by helping to consolidate data. There is an enormous and ever-increasing amount of data being collected about Americans today. Grocery stores, for example, use "loyalty cards" to keep detailed records of purchases, while Amazon keeps records of the books Americans read, airlines keep track of where they fly, and so on. This can be an invasion of privacy, but Americans' privacy has actually been protected by the fact that all this information still remains scattered across many different databases. Once the government, landlords, employers, or other powerful forces gain the ability to draw together all this information, privacy will really be destroyed. And that is exactly what a biometric National ID system would facilitate.

If a biometric National ID system is linked with an identity card the problems grow even greater. A card would also facilitate tracking. When a police officer or security guard scans an ID card with his or her pocket bar-code reader, for example, it will likely create a permanent record of that check, including the time and location. How long before office buildings, doctors' offices, gas stations, highway tolls, subways and buses incorporate the ID card into their security or payment systems for greater efficiency? The end result could be a situation where citizens' movements inside their own country are monitored and recorded through these "internal passports."

The sordid history of National ID system combined with the possibilities of modern IT paint a chilling picture. These problems cannot be solved by regulation or by tinkering around with different types of biometrics. Instead, the entire unworkable system must be rejected so that it does not intolerably impinge on American's rights and freedoms.

VIII. Conclusion: Congress Should Not Enact a Mandatory Employment Eligibility Pre-Screening System or Biometric National ID System

For all of the above reasons, the ACLU urges the Subcommittee on Immigration, Refugees, and Border Security to reject imposition of a mandatory employment eligibility pre-screening system and biometric National ID system. Such a system would cause great harm to lawful workers and their families while doing little to dissuade undocumented workers.

[11] Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 Fla. L. Rev. 697, 709.

Construction Industry Joint Statement for the Record

U.S. Senate

Immigration, Refugees and Border Security Subcommittee

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

July 21, 2009

Submitted on behalf of:

American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Independent Electrical Contractors
Mason Contractors Association of America
National Association of Home Builders
National Roofing Contractors Association

On behalf of the aforementioned associations, we appreciate the opportunity to submit the following statement for the official record. We would like to thank Chairman Schumer, Ranking Member Cornyn and members of the Senate Immigration, Refugees and Border Security Subcommittee for holding today's hearing on "Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

For almost a decade, comprehensive reform of U.S. immigration laws has been a top priority for the construction industry. As Congress has struggled with the proper way to move forward on this very controversial issue, construction employers have been at the forefront calling for reforms to not only the employer verification and enforcement system, but also border security measures, interior enforcement, a future flow immigrant system, and addressing the issue of how to appropriately respond to the undocumented immigrants who are currently in the United States. While we are firmly committed to a fully comprehensive approach to immigration reform, we fundamentally understand that getting the employer verification and enforcement system right is a primary component of successful reform, because it will impact every U.S. employer, not just those who use immigrant labor. We are strongly encouraged by the committee's dedication to looking into this issue as a part of the larger debate on comprehensive immigration reform, and we appreciate this opportunity to have input.

The impact and contributions of the immigrant workforce is nothing new to the construction industry. Throughout the history of the United States, new immigrants have always found our industry to be a welcoming place for them to build good careers and gain a foothold in American society. From the Irish, to the Italian, German, Chinese, and now, Hispanic, immigrant populations, the construction industry has been a place where new immigrants to our shores could begin on the road to the American dream. In fact, careers in the construction industry have traditionally been one of the quickest paths to entrepreneurship. As such, our industry has been a magnet for those immigrants willing to work hard and pursue the American Dream of owning one's own business.

Inasmuch as the presence of immigrant workers is not a new phenomenon for our industry, it is also not a dwindling one. As the native U.S. population continues to move away from jobs involving manual labor, to more service-oriented jobs, and as our U.S. population continues to age and move out of the workforce, we have found it increasingly difficult to find the workers we need to continue meeting the construction demands of our growing U.S. economy. For this reason, we continue to see the percentages of immigrant workers in our industry increase, and our organizations continue to appreciate and welcome the contributions of immigrant workers. It should also be noted that the average hourly earnings in construction is over $20.00.

Undertaking a massive reform of U.S. immigration law is not an easy task, and perhaps one of the most daunting components of it is the creation of a new employer verification and enforcement system. A new system will impact every employer and every worker in the United States. Getting the system right—creating a workable, fair and efficient process—is a complicated task, fraught with the potential for confusing regulations, bloated and languishing bureaucracies, and aggressive, devastating enforcements against employers who are legitimately trying to do the right thing. Through our comments here, we hope to share with the Subcommittee some of the most pressing concerns we have about the creation of a new system.

Keeping Perspective: Large vs. Small Employers and Key Issues of Concern

Important in any review of employer verification system proposals is the question of large versus small employers. As representatives of an industry that is predominantly comprised of small employers, we are acutely concerned with whether a new verification system will be workable for a small business, and whether the enforcement of the new system will be fair to them. Small employers, especially in our industry, typically do not have human resources (HR) departments, and they do not have HR staff. Often in our industry, companies do not have dedicated offices; instead, they do their books at their kitchen tables, and they operate their day-today business over a cell phone, and out of their pickup truck or van. We often find that our smaller members do not have frequent or common access to a computer—nevermind high speed internet access—and frankly, in many instances we still have problems contacting some of our members through the use of fax machines. A new employer verification system must be workable not only for the fortune 100 companies in the U.S., but also the small employer who has three employees, and who thinks they might have an email address but couldn't tell you what it is, because they've never tried to use it.

Common conversations surrounding the creation of a new verification system often involve the debate over the creation of tamper-proof identification and work authorization cards, and internet-only based access to the system. These conversations are concerning to small employers in our industry, not because we don't support the creation of tamper-proof identification or internet based systems, but because the creation of these things necessarily brings with it problems when trying to address the reality that every U.S. employer will need to be in compliance.

Creating tamper-proof identification is one issue, but the problem of how employers are required to use those IDs is another. Many small employers would be unable to afford the cost of expensive card readers, software and high speed internet access. And additionally, in our industry, the ability of employers to actively use these readers is hindered by the fact that, again, many of our employers are not operating on a day-to-day basis at a desk, behind a computer, in a dedicated office. A new verification system needs to address these types of issues by ensuring, if nothing else, that a new burdensome, unfunded mandate is not levied on employers requiring them to buy a lot of expensive equipment, and that any new verification system is both internet and phone-based.

Knowing Standard

Our organizations strongly believe that any verification system put in place as part of comprehensive immigration reform must maintain the current knowing standard. In order for employers to fully comply with a new system, they must be able to easily and clearly understand their role and obligations. The knowing standard, put simply, provides clarity for employers: "knowing" that someone is illegal, or that the employee of one of your subcontractors is illegal, and choosing to do nothing about it, is a violation. Our industries oppose watering down the knowing standard to a more subjective standard, such as "reckless disregard," or "reason to know." These concepts are far too broad, far too open to interpretation, and lack clear definition for employers. It is unfair to saddle employers with broadly defined standards that make it

impossible for them to know whether they are fully in compliance or will still carry liability—because the determination of their compliance will be made by someone else's definition or interpretation of the situation, rather than a clear rule.

Contractor-Subcontractor Relationships

Our associations strongly oppose creating a pattern of cross liability that would make general contractors responsible for the legal status of their subcontractors' employees. The construction industry has a unique perspective on the issue of contractor-subcontractor relationships because almost all business activity is traditionally conducted through contract. However, the issue of contractor and subcontractor liability in the verification system is broad-based, and impacts far more industries than just construction. Any business or industry that contracts with others for services—from cleaning crews, to landscapers, to caterers and equipment maintenance is impacted by the way in which Congress treats the contractor-subcontractor relationship.

While all of our groups agree that general contractors who knowingly use subcontracting relationships and subcontract labor to violate immigration law should be punished and brought to account for their actions, we also strongly believe that it is fundamentally unfair to create a blanket, direct chain of liability for all contract-subcontract relationships. Put simply, it is outrageous and unfair for the federal government to mandate that employer "A" should be held accountable for the behaviors and practices of employer "B"—especially concerning employees that employer "A" does not have the power to hire or fire. A mandate from Congress that employers could all be held responsible for the behaviors of other employers could essentially cripple the construction industry, as companies big and small struggle with how to assume massive levels of liability, while still having no power to mitigate that liability. Our associations firmly believe that, if eventually, all U.S. employers must be required to participate in a new verification system, that all employers must be held directly accountable for the legal status of their own, direct employees. A system which keeps all employers liable for their own actions and behaviors is not only fair, but will create far less confusion and problems for all employers who are trying to navigate and comply with a new verification system.

Liability for Failures of the System

Our associations fully support the inclusion of safe harbor language for employers who rely on information provided to them by the verification system. Under no circumstances should an employer who in good faith correctly complied with the new verification system, and was provided incorrect information by the system when determining final action on an employee's status, be sued by the former employee, or involved in an enforcement action by the federal government, for relying on that information.

Debarment Provisions

A major concern for our associations is language that seeks to completely change the way the procurement process is administered. There currently exists a well-tested and thorough system in place to handle alleged violations of federal law, including immigration worksite violations. The existing federal debarment process protects the government's proprietary interests; it is not

used to punish first time offenders with what is comparable to a corporate death sentence. What is often forgotten is that current Federal Acquisition Regulations (FAR) already grant the government the authority to debar businesses for a wide range of improper conduct, including commissions of a criminal offense, fraud, and immigration violations. Because of the severity of the punishment, the current debarment process includes a ten part test that differentiates habitual bad actors from those who have made a simple mistake.

Both the House and the Senate have made efforts to debar federal contractors and those seeking to become federal contractors for even simple violations of immigration law. These efforts would bypass the structure set up in the current system and totally ignore the current process as well as the ten part test. Should efforts to move forward with this idea, it will have ramifications well beyond immigration law, and would open the floodgates to using the procurement system as an enforcement mechanism for even first time paperwork violations of any federal law. Attempts to bypass the FAR process confuses the purposes of the federal procurement system and distort its mission, which federal procurement officers have long and correctly understood to be limited to protecting the government's proprietary interests.

Eligible Documents and Document Retention

Under the current I-9 system, employers are required to accept up to 27 different forms of identification as proof of identification and work eligibility in the U.S. Technically, an employer who requests documents from an applicant would have to accept a college ID and a social security card as proof of identity and work authorization—even though both documents are easily forged.

One of the main issues faced by employers today is that the rampant counterfeiting of documents puts employers at a disadvantage for being able to ensure that job applicants are truly work authorized. An employer who wonders whether the documents they have been presented are legal is still precluded from asking for more documentation for fear of discrimination lawsuits. As a result of all of the uncertainty, and rampant counterfeiting of identity documents—as well as increasing instances of pure identity theft—the construction industry supports limiting the number of eligible documents for proof of work authorization, and the creation of tamper-resistant documents that will give employers the confidence of knowing that their job applicant is eligible to work in the United States.

Additionally, our industries support the retention of the current "may" requirement in regard to the photocopying and retention of identity documents presented as part of the verification process. Under current law, U.S. employers may choose to retain copies of identity documents for their files, but they are not required to do so. We believe that while it is important to allow employers who choose to copy documents the right to do so, it is overly burdensome to require all employers to copy identity documents. For reasons previously explained, large employers have a greater ability and opportunity to copy, retain, and protect copies of identity documents than small employers. Many small employers do not have human resources departments, photocopiers or permanently secure locations to keep these photocopies. We fully support retaining "may," or providing small employers with an exemption from the requirement to photocopy all identity documents.

Verification System Implementation and Timelines

The construction industry believes that any new mandatory employer verification system needs to be phased in over a period of several years, based on size of employer. Clearly, larger employers will have more resources and time to devote to understanding how to navigate a new system, while smaller employers will need time to be trained and to understand this new regulatory requirement. Given that there are over 8 million employers currently in the United States, rapidly pushing all employers into the new system is certain to lead to problems and delays. Our associations believe that phasing in the new system provides benefits that are two-fold: giving smaller employers time to understand their obligations, while also giving the government time to adjust to the influx of employers into the system. Many in Congress as well as around the country want to see critical infrastructure use this system quickly. Our associations support this as well, as long as there as "critical infrastructure" is clearly defined. We urge lawmakers to support a gradual multi-year phase in based on size of employer, with larger employers enrolling in the system first, and smaller employers joining in last, once the system has proven that it can work efficiently.

Additionally, employers participating in a new verification system should be able to begin the verification process as soon as possible. Because of the complexity and time delay associated with getting final confirmations or nonconfirmations, employers should be able to begin the verification process once an applicant has officially accepted an offer of employment, and a start date has been established. In the first few weeks of employment, employers—especially in the construction industry—expend a lot of up front costs in job and safety training. An employer who begins the verification process at the date of acceptance of the job offer can better manage their training resources, and will know whether they need to hold off on expending those limited resources until a final confirmation comes through.

Additionally, the overall scope of the verification system, and the timeline between initiating a verification and receiving a final answer is of great concern to our industries. While we applaud proposals that require the Department of Homeland Security to respond back to an employer within 24 hours on the first confirmation/non-confirmation, we are concerned with any proposal that seeks to drag out the review process for tentative nonconfirmations over the span of several weeks. Employers need to know as quickly and efficiently as possible whether or not their new employees are work authorized and—unless employers are able to pre-verify job applicants prior to offering them the position—a system which requires employers to keep someone on the payroll for months before finding out that the person was not work authorized is simply over burdensome and a waste of the employer's limited resources. The timeline for the review of tentative nonconfirmations must provide for a rapid turnaround so that employers can be confident that their employees are legally allowed to work.

Preemption

Of great concern to our industry, and to all industries, is the proliferation of a patchwork quilt of state and local immigration laws. We strongly believe that any comprehensive immigration reform legislation passed by Congress must clearly and decisively pre-empt all state and local

immigration laws, so that employers who operate across state or local jurisdictions be it in construction or any other industry, can clearly know what their roles and responsibilities are under the law. We support the federal government's authority to enforce federal immigration law and the requirements that flow from that law, and we urge lawmakers to support strong and comprehensive preemption language.

Enforcement

Our associations strongly believe that the enforcement of immigration law should remain under the authority of the Department of Homeland Security, and that the power to investigate labor and employment violations should be kept to areas outside of the employer verification system. The system is being created to establish an efficient and workable method for determining the work authorization of U.S. workers, and its function should be strictly to accomplish that goal. Under current law, employers already have to comply with scores of requirements regarding wages, pensions, health benefits, safety and health requirements, hiring and firing practices and discrimination statutes. The costs and resources involved in complying with all of the current federal laws and regulations are significant enough without adding an additional layer on top of a new verification system that is supposed to serve a basic, functional purpose. We oppose using the verification system to broaden and expand employment protections which are already covered under existing law.

In conclusion, our associations continue to support a fair, efficient and workable employer verification system that holds every U.S. employer accountable for all of their direct employees, and that vigorously punishes willful and egregious violators of the system. The employer verification and enforcement portion of any comprehensive immigration reform bill is vitally important due to the scope of its impact on all U.S. employers and every U.S. worker, and we are eager to work with Congress as it crafts a meaningful and permanent solution to the immigration concerns that impact our country today.

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
July 21, 2009

Statement of U.S. Senator Russ Feingold
Hearing on "Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"
Senate Judiciary Committee
July 21, 2009

Thank you, Mr. Chairman. I am pleased that the Committee is once again taking up the critical issue of immigration reform. You have been working tirelessly to draw attention to a number of changes that we need to make to the current employer verification system, E-Verify, and I applaud your efforts to create a tough, but reliable mechanism to ensure that we have a legal workforce.

I have been concerned about recent efforts to make E-Verify mandatory and to expand its use to federal contractors without first fixing the current problems with the system. Employment verification is a very promising idea—and it has tremendous potential to ensure that U.S. jobs only go to U.S. citizens and those who are legally authorized to work in the U.S.—but we need to get it right before we expand our reliance on electronic verification. Our current system, E-Verify, remains riddled with errors and other inaccuracies. According to a 2006 report of the Social Security Administration's Inspector General, the data set on which E-Verify relied contains errors in 17.8 million records, affecting 12.7 million U.S. citizens. If E-Verify becomes mandatory before these errors are fixed, millions of Americans could be misidentified as unauthorized to work. That is simply an unacceptable result.

I understand that U.S. Citizenship and Immigration Services has been working to improve the accuracy of E-Verify, but we still have a long way to go. According to recent reports, if E-Verify becomes mandatory for all U.S. employers, roughly 600,000 workers—most of whom are U.S. citizens—would be deemed ineligible to work. That is a very large number. It is equal to the entire population of the city of Milwaukee. I recognize that no employer verification system will be completely error-free, but that kind of error rate, in my opinion, makes this system unworkable.

In 2008, Intel Corporation, a very large employer, reported that 12% of the workers that they ran through E-Verify came up as "tentatively non-confirmed." All of these workers were eventually cleared as work-authorized, but Intel had to invest significant time and money to correct these errors, which is something that many smaller businesses would be unwilling or unable to do for

their staff.

I am particularly concerned about these error reports, because almost half of all businesses that use E-Verify report that they use E-Verify to pre-screen job applicants. This means that employers are making hiring decisions based on erroneous information, and they are never notifying applicants of this information so the applicants can contest and correct it.

Any permanent, mandatory employment verification system must contain sufficient procedural protections for workers who are initially deemed unauthorized to work. Workers must be given a simple, straightforward means to appeal any data errors.

Employment verification proposals should also contain sufficient provisions to ensure that any personally identifiable information that is collected by the government is kept completely confidential. We must be very careful to establish safe, secure systems that will protect the electronic transmission of any personal information.

I strongly believe that we need to secure our borders, we need to fix our broken immigration laws, and we need to deal with the fact that there are millions of undocumented individuals in this country. And we need to do it now. But we also need to be very conscious that thousands of American citizens and legal immigrants could lose their jobs if we mandate use of an electronic verification system before these errors are fixed. This would cause massive disruption, not just in the lives of these workers, but also to the already-fragile U.S. economy.

TESTIMONY OF
CONGRESSMAN LUIS V. GUTIERREZ
BEFORE THE

Senate Committee on the Judiciary
Subcommittee on Immigration, Refugees and Border Security

on

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

Tuesday, July 21, 2009
Dirksen Senate Office Building Room 226
2:00 p.m.

Chairman Schumer, Ranking Member Cornyn and other Members of the Subcommittee, thank you for this opportunity to testify on employment verification systems. As you may be aware, I have worked on a mandatory employment verification system as part of the comprehensive immigration reform bills I introduced in the past with Senators Kennedy and McCain, Congressman Jeff Flake and former Congressman Jim Kolbe. I commend Chairman Schumer for holding this hearing, his steadfast leadership on this issue and his creative approach in working to develop a biometric-based employment verification system as a means to reduce future waves of illegal immigration.

I want to begin my comments with what I think is the most essential element in mandating an employment verification system that works. That is, the system must be part of comprehensive immigration reform. To ensure a legal workforce, the system must be implemented with smart border security, a future flow of workers our economy truly needs, family-based immigration that better ensures family unity and a mandatory program wherein the estimated 12 million unauthorized individuals currently living and working in the U.S. are required to register and fully integrate into society.

I know some in Congress believe that a mandatory employment verification system alone would actually fix our broken immigration system by encouraging undocumented immigrants to "self-deport." However, those who believe this do not fully understand (1) how much undocumented workers are already an integral part of our country, economy, communities and families; (2) the extent to which bad-apple employers are willing to go to exploit this source of vulnerable and cheap labor; and (3), the significant shortfalls of the current E-Verify system.

On the first point, like it or not, we have come to depend on the contributions of these hard-working immigrants, and any effort to rid the economy of five percent of our productive workforce will result in greater economic disaster for our nation. In addition, an across-the-board crackdown on the undocumented will surely result in the dissolution of the institution our country holds most dear: the institution of the American family. One or both parents of an

estimated four million U.S. citizen children are currently undocumented. To force these children to choose between their country and their parents is both unnecessary and immoral. The use of enforcement measures alone, like mandating E-Verify absent of comprehensive immigration reform, is useless political theater. The deportation of hardworking, undocumented immigrants and the separation of their families are not needed to build support of comprehensive immigration reform; polls have shown again and again that the vast majority of Americans already do.

On the second and third points, the current E-Verify system falls short of being as effective as we need it to be, because it does not prevent discrimination or misuse by employers, such as pre-screening job applicants and circumventing the system altogether. The current system also has a serious security flaw, in that it is incapable of preventing or determining fraud or identity theft.

However, the American people do want Congress and Washington to lead and develop workable solutions within comprehensive immigration reform that will end illegal immigration; and our ability to ensure a legal workforce is essential to this goal.

I would like to share with the Subcommittee what I regard to be important elements of any employment verification system, followed by my assessment of Chairman Schumer's proposal for a biometric-based employment verification system.

An Employment Verification System Must Maintain and Provide Accurate Data

Establishing an employment verification system that depends on information about the work eligibility of approximately 163 million workers is a massive undertaking and one that must be approached prudently, under a realistic timeline and with a roll-out plan for the entire workforce that is contingent upon the system's accuracy. An error rate of even one percent will result in 1.63 million workers being wrongfully denied work. This is no small number, especially in this economy where so many workers already face extraordinary obstacles to finding a job.

In addition, workers should be allowed to check their own employment eligibility record in any database on which the system depends for accuracy. If the system wrongfully determines that someone is ineligible to work, workers should have access to administrative and judicial review, including compensation from the government for attorneys' fees and lost wages.

The System Must Protect the Privacy and Security of Information

The mandatory expansion of such a system also raises legitimate privacy concerns. The Department of Homeland Security, in consultation with the Social Security Administration, would have to design and operate the system so that privacy is safeguarded by available technology, including use of encryption, regular testing of the system and implementing regular security updates. Information to be stored in the databases should be limited and only used for employment verification purposes; violations should result in stiff penalties. The system's rollout should also be contingent on its ability to keep records private.

Protection of Individuals from Discrimination

Any mandatory system should forbid employers from discriminating against job applicants or employees on the basis of nationality; terminating employment due to a tentative nonconfirmation; using the system to screen employees prior to offering employment; re-verifying the employment status of an individual in violation of the law; or using the system selectively. Civil fines for unfair immigration-related employment practices should also be increased and additional funding authorized for the dissemination of information to employers, employees and the general public about the rights and remedies of these protections.

The Need for Robust Enforcement

Of course, we cannot have a robust employment verification system without equally robust enforcement. To prevent employers from abusing or circumventing the system, random audits should be part of any new employment enforcement regime. Rooting out misuse through oversight will require adequate funding that we have been reticent to commit under the current system. We should also create significant criminal penalties for individuals who falsely attest to being authorized to work, civil penalties for employers who do not comply with the new system's requirements and criminal penalties for those who knowingly hire unauthorized workers.

A Biometric-based Employment Verification System

With regard to the use of biometrics in an employment verification system, it has the potential to address shortfalls in the current E-Verify system. This does not mean I believe that such technology is a silver bullet or that it does not come with its own set of challenges. In my last comprehensive immigration reform bill, coauthored with Congressman Jeff Flake, we included a requirement to better secure the social security card by making it a tamper-proof, biometric card. What I understand as Chairman Schumer's proposal, to actually make the entire system biometric-based, is a creative proposal that takes the system one step further.

The advantages of such a proposal, in my view, are the following:

- It provides workers access to and greater power over their employment records. Rather than waiting to find out about errors in databases through an employer, workers would apply for their biometric social security card outside of the hiring context, allowing them to address questions of eligibility on their own.

- It would prevent pre-screening and other misuses of the system on the part of the employer. Without a worker's consent, an employer would have no ability to submit a query about the worker. The use of such a card would also eliminate employer error in submitting a query to the system.

- Requiring the swipe of a card along with the verification of a biometric indicator, like a fingerprint, would significantly reduce fraud and misrepresentations of individuals

looking for work, as they would be unable to assume or borrow another's identity in the hiring process.

However, as this Subcommittee continues its examination of such an option, I would also encourage you to study the potential challenges of such a system. For one, a system that depends on a biometric card rather than a database query would require every American and legal foreign worker to obtain a card. Though not impossible, this would be a huge undertaking on the front end of rolling out such a system, and one for which we would need sufficient resources and a reasonable timeline.

It would also require employers to have access to the machines that swipe the card and collect biometric information to determine a recent hire's work eligibility. I think Congress and the American people will want to have a clear understanding of the viability and progress of such technology, the cost of rolling out access to every employer, and how it will be paid for.

Finally, the mere mention of a biometric card rightfully raises concerns about the nation taking one step closer to a national ID card, which I know is not the Chairman's intention. I imagine that the experts you have invited to testify on the second panel today will likely be able to address and elaborate on the challenges before us with regard to such a biometric-based employment verification system.

In short, with further study and consideration of the advantages of such an employment verification system, I am confident that employers and workers, immigrant and non-immigrant alike, would welcome a biometric card system as part of comprehensive immigration reform.

Thank you, once again, Mr. Chairman, for inviting me to testify on this important issue before your Subcommittee. I appreciate your commitment to comprehensive immigration reform, your work to launch the debate in earnest this year and your desire to have the Senate act on legislation this fall. The American people want thoughtful and responsible action on this issue this year, and I am confident that you and your colleagues in the Senate are ready to deliver such action. Please know that I am eager to work with Members of Congress on both sides of the aisle to reach our shared goal of ending illegal immigration and delivering comprehensive immigration reform to the American people.

Thank you, Mr. Chairman.

**STATEMENT OF STEPHEN HORN,
CHIEF LEGAL OFFICER, DUNKIN' BRANDS, INC.
SUBMITTED BY IMMIGRATIONWORKS USA TO THE UNITED STATES SENATE
JUDICIARY COMMITTEE, SUBCOMMITTEE ON IMMIGRATION, BORDER
SECURITY, AND CITIZENSHIP**

Hearing on "Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

July 21, 2009

Chairman Schumer, Ranking Member Cornyn and Members of the Committee, my name is Stephen Horn. I am the Chief Legal Officer of Dunkin' Brands, Inc., the parent company and franchisor of Dunkin' Donuts and Baskin-Robbins. I appreciate this opportunity to share with you Dunkin' Brands' experience with the E-Verify program.

Dunkin' Donuts and Baskin-Robbins shops are 100 percent owned and operated by our business partners: our franchisees. There are approximately 15,000 total Dunkin' Donuts and Baskin-Robbins shops worldwide in 44 countries. In the United States, there are over 2,200 franchisees operating more than 9,000 Dunkin' Donuts and Baskin-Robbins shops in 47 states and the District of Columbia.

Since June 1, 2006, Dunkin' Brands has required all franchisees to use the Department of Homeland Security's E-Verify/Basic Pilot Program to ensure that their new hires are legally authorized to work. The mandatory use of the Program is a provision of the Dunkin' Brands Franchise Agreement. By doing so, we have provided our franchisees a clear and effective method for following the law regarding the hiring of undocumented

workers. As a franchise system, employees of Dunkin' Donuts and Baskin-Robbins are employees of the individual franchisee, not Dunkin' Brands. The E-Verify program is in place to afford our franchisees' new employees a full and fair opportunity to resolve any questions about their eligibility to work and guarantees that those who are eligible to work get proper credit for their social security contributions. E-Verify is an effective solution that is cost-effective, fast, and removes the guesswork from document review during the I-9 process.

Since Dunkin' Brands is a franchise system, we rely on our franchisees to offer feedback about their experiences with the E-Verify Program. Most of our franchisees find the Program to be "user friendly" once they sign up and familiarize themselves with the process. E-Verify is viewed as an effective safeguard against employees who are potentially unauthorized to work versus similarly situated shops that do not use E-Verify who have employed illegal workers in the past. Franchisees understand that it is a violation of their Franchise Agreement and of federal law to knowingly employ a person who is unauthorized to work in the United States. The program helps protect the Dunkin' Donuts and Baskin-Robbins brands and is in the best interest of the Dunkin' Brands system.

We are aware of the current debate regarding the need to establish a fair, effective employment verification system. It is tough to estimate the accuracy of the program and/or how many false negatives we see since our franchisees are directly responsible for administration of the program. We realize the Program is not infallible to identify

theft as unauthorized workers using stolen IDs might still pass the E-Verify system. But as a franchisor that requires its franchisees to obey all laws in regard to operating their franchised businesses, and thus not to knowingly employ undocumented workers, we support the Congress' efforts to establish an effective system for employers.

For small business franchisees across the country, it is imperative that any employment verification system be successful, efficient, and a cost-effective solution.

In conclusion, we believe use of the E-Verify Program is the right thing to do for our franchisees, for Dunkin' Brands, and most of all, for our franchisees' workers.

# # #

HR Initiative
for a
LEGAL WORKFORCE

Statement of the
Human Resource Initiative for a Legal Workforce

Submitted to
Committee on the Judiciary
of the
United States Senate
Subcommittee on Immigration, Refugees and Border Security

July 21, 2009

The Human Resource Initiative for a Legal Workforce (H.R. Initiative) is a coalition of human resource organizations and employer groups, representing thousands of small and large U.S. employers from a broad range of sectors. The following statement is submitted by the HR Initiative on behalf of the Society for Human Resource Management, the American Council on International Personnel, the Food Marketing Institute, the HR Policy Association, the International Public Management Association for Human Resources, and the National Association of Manufacturers.

The HR Initiative supports a federal electronic employment verification system to improve on and replace the existing E-Verify system. We share with Members of this Committee a belief that effective employment verification is the lynchpin for true immigration reform. We also recognize that the current employment verification system is in need of real reform and is inadequate to meet current and future demands.

Our objective is to promote a secure, efficient and reliable system that will ensure a legal workforce and help prevent unauthorized employment – and to that end, we have been enthusiastic supporters of H.R. 2028, the New Employment Verification Act (NEVA). Introduced by Representatives Gabrielle Giffords (D-AZ) and Sam Johnson (R-TX), NEVA offers a solution. The bill would create an entirely electronic process to

prevent identity theft and ensure a fair, efficient and secure verification process and could eliminate virtually all unauthorized employment – thereby taking away a huge incentive for illegal immigration.

For far too long, U.S. employers have been saddled with insufficient and ineffective employment verification tools. Because of inherent limitations with E-Verify technology, systemic problems with the accuracy of E-Verify result in employers having no assurance that hires are legal because of both "false positives" (illegal workers approved who should not be) and "false negatives" (legal workers rejected who should not be).

Although E-Verify has been operational – as a voluntary program – since 1997, it has proven ineffectual in preventing unauthorized employment. Despite the best efforts of the men and women who administer this program in the United States Citizen Immigration Services (USCIS), E-Verify's continued reliance on outdated technology and error-prone databases, render it inadequate to meet the needs of mandated use. In fact, we believe mandating its use would divert attention from the development of a state-of-the-art employment verification system, as embodied in NEVA.

E-Verify has served a valuable purpose, and voluntary participation in the program may be the best option available today. However, it is now time for the United States to move to the next generation of employment verification. The HR Initiative believes that mandating participation in E-Verify, instead of focusing on new technology, is the wrong choice for the following reasons:

First, E-Verify is a paper-based system, and not the entirely electronic system portrayed by Department of Homeland Security (DHS) and some Members of Congress. This is because employers are still required to complete the paper Form I-9 after analyzing one or more of 25 documents that an employee can use for identity and work authorization purposes. It is only after completing the Form I-9 that an employer is permitted to enter data information into E-Verify.

Second, because E-Verify remains a paper-based system, it is unable to detect many forms of document fraud and identity theft. This is because E-Verify does not verify the authenticity of the identity being presented for employment purposes, but rather only that the identity number (Social Security and or Work Authorization) presented matches information in the Social Security and DHS databases.

Simply stated, unauthorized workers are using stolen Social Security numbers, fake certificates and fraudulently-obtained but "legitimate" photo IDs to bypass the system and gain employment. Even the E-Verify photo tool can only detect fake documents where a photo has been substituted. It cannot detect whether the document actually relates to the person presenting it.

Third, this proliferation of false or stolen documents can and does cause reputable employers to mistakenly hire individuals who are not eligible to work. At the same time, the lack of certainty and the threat of government-imposed penalties may lead some employers to delay or forego hiring legal workers who are eligible. In either case, the costs are far too high for both U.S. employers and legal workers. These deficiencies, in combination with the inadequacies of E-Verify, leave employers vulnerable to sanctions from the government through no fault of their own.

The highly publicized 2006 raids at several Swift & Co. meatpacking plants are a prime example of the shortcomings of E-Verify and its complete inability to detect document fraud and identity theft. Literally hundreds of unauthorized workers were arrested at Swift. While all were using false identities or forged paperwork, all were also approved by E-Verify. Putting aside whether persons in the company may have been complicit in the subterfuge, the obvious conclusion is that the system was – and still is – easily manipulated. Because E-Verify is so inadequate in this regard, it actually encourages identity theft.

Recently, the federal government has proposed requiring all federal contractors to use the E-Verify program for all of its newly hired employees, as well as to re-verify

employment eligibility of any other existing employee supporting a federal contract. This latter requirement, which has never been permitted under existing law, will place a huge administrative burden on federal contractors that must apply re-verification to their workforce.

Additionally, because of the database errors in the systems accessed by E-Verify (estimated as high as four percent), re-verification will undoubtedly cause the dismissal of thousands of current employees – many of whom are legal workers whose documents or DHS or Social Security records have errors. Also, because E-Verify lacks a structured system to redress errors, legal workers who are fired may be denied unemployment compensation and other social benefits.

Employers need the right tools to verify a legal workforce. We believe employers are entitled to a quick, unambiguous, and accurate answer from the government to the query whether an employee is authorized to accept an offer of employment. Unfortunately, mandating E-Verify without change will not meet this need, and may make the challenges more difficult for reputable employers and legal employees.

Rather than relying on E-Verify, we believe Congress should be working to create a uniform federal employment verification process that is secure, efficient and easy to administer. Inviting all employers to seek false security in broader re-verification would just make the problem worse.

NEVA meets this standard by building upon the lessons learned from E-Verify but changes some fundamental aspects to ensure that any mandatory system meets the needs of the government, employers and employees. For example, NEVA requires mandatory verification of all newly hired employees and mandates the use of fewer, more secure identity documents (driver's license with picture, U.S. passport, approved work authorization document), and allows individuals to update their Social Security records as well as block the use of the Social Security number within the verification system. As an added level of security, NEVA also includes an optional system for employers to authenticate and safeguard the identity of their employees through a "biometric"

characteristic – such as a thumbprint – to secure an employee's identity and prevent future fraudulent use of a Social Security number for the purposes of illegal employment.

Accurate employment verification is the only way to ensure fair and equitable treatment for those individuals who should have access to legitimate jobs. The next generation of employment verification is essential for a legal workforce - and for America's national and economic security.

The HR Initiative looks forward to working with Congress to craft an effective employment verification system.

Testimony for the Record of

JANICE L. KEPHART

National Security Policy Director, Center for Immigration Studies

Before the

SENATE JUDICIARY COMMITTEE

Subcommittee on Immigration, Border Security and Citizenship

On

Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

July 21, 2009

Testimony for the Record of

JANICE L. KEPHART, National Security Policy Director, Center for Immigration Studies

Before the

SENATE JUDICIARY COMMITTEE, Subcommittee on Immigration, Border Security and Citizenship

Ensuring a Legal Workforce:
What Changes Should be Made to Our Current Employment Verification System?

July 21, 2009

I am currently the Director of National Security Policy at the Center for Immigration Studies and a former counsel to the 9/11 Commission, where I co-authored the monograph *9/11 and Terrorist Travel* alongside recommendations that appear in the *9/11 Final Report*.[1] Prior to 9/11, I was counsel to the U.S. Senate Judiciary Subcommittee on Technology and Terrorism where I specialized in foreign terrorist activity in the United States and worked to pass the federal criminal and redress system in place today for identity theft. Today I focus on issues pertaining to border and identity security and its nexus to national security issues. In September I released an extensive report on E-Verify, and this past March a statistical analysis regarding current use of E-Verify. These two reports will be the focus of this testimony, alongside some basic facts in regard to how border issues affect national security. I have testified before the U.S. Congress ten times, and I am privileged to submit my testimony to the House Government Reform Subcommittee on Management today.

BACKGROUND

Current federal law prohibits an employer from knowingly hiring an unauthorized alien. Employers who use the federal program E-Verify in good faith, however, are able to use enrollment in E-Verify as an affirmative defense against federal law enforcement action for the hiring of unauthorized workers. A rule simply requiring federal contractors to use E-Verify considering their contracts are paid with taxpayer dollars and often have access to critical infrastructures-- is simple common sense. Federal policies that encourage employers to sign-up and use E-Verify align federal responsibility for enforcing our immigration laws with a rising tide of state laws that require use of E-Verify under defined circumstances. E-Verify further enables the federal government to more closely determine bad actor employers who knowingly, and repeatedly, hire unauthorized workers.

Mission statement by U.S. Citizenship and Immigration Services:

E-Verify is currently the best means available for employers to electronically verify the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social

[1] See www.911securitysolutions.com, for consolidated information on 9/11 Commission border work.

Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.[2]

In a report I released in September 2008, *If It's Fixed, Don't Break It: Moving Forward with E-Verify*[3], E-Verify was shown as 99.5 percent accurate with more than 1,000 employers voluntarily signing up per week. According to the most recent official study of the program by Westat, these numbers are steadily improving and E-Verify may to date be the most successful interior border program in place.

While President Obama supported E-Verify during his campaign as a program that supported American workers, on January 29, 2009, the administration announced a delay in implementation of an Executive Order due to go into effect in February 2009 that requires federal contractors to use E-Verify for workers (paid with U.S. taxpayer monies) employed on federal contracts. That delay continued to accrue more pushbacks until a recent announcement that this rule will go into full effect in September 2009. Up until recently, the U.S. Chamber of Commerce was the entity taking credit for the delay and seeking the demise of E-Verify. (In an op-ed published in *The Washington Times*[4] in August 2008, I discuss the Chamber's lobbying efforts against E-Verify.)

On a broad basis, Congress needs to stand by E-Verify and not permit any aspect of E-Verify to be a bargaining chip for an otherwise already severely troubled immigration system. Congress must keep in mind that once more blindfolding employers from determining authorized from unauthorized workers is not in our national interest. Nor is increasing job insecurity for American workers or decreasing our ability to better secure our critical infrastructure worksites.

E-VERIFY QUICK FACTS

E-Verify is fast, efficient, and inexpensive for employers to use and effective at rooting out fraud. Error rates have come down substantially and continue to drop, as the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS) streamline their matching and referrals. A great help are an increase in photos available with the Photo Screening Tool, further reducing the ability of job applicants to feign legal work status.

Most interesting is that the percentage of those not authorized to work when vetted through E-Verify mirrors the percentage of illegal workers in the U.S. workforce, about 4 to 5 percent. E-Verify is supposed to return non-matches—that is where those not authorized to work will show up. Mixing those numbers in with the small fraction of those wrongly non-matched skews the discussion of E-Verify, and must be accounted for when "problems" with E-Verify are listed.

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[2] http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1d25be0cbcf90110VgnVCM1000000ecd190aRCRD&vgnextchannel=a877be0cbcf90110VgnVCM1000000ecd190aRCRD

[3] http://www.cis.org/Everify

[4] http://www.cis.org/Everifyambush

While my September 2008 report holds many E-Verify details, some of the key facts on E-Verify follow.

• 94.2 percent of all E-Verify queries instantly verify as of 2007; as of the third quarter of 2008, 96.1 percent of employees are confirmed as work authorized before any type of mismatch notice or need for action by the employee or employer.[5] As recently as May 2009, Department of Homeland Security Secretary Napolitano confirmed that recent surveys showed that the 96.1 percent of employees reported in my backgrounder *If It's Fixed, Don't Break It*, are still accurate.

• 90 percent of the new hires who receive a tentative nonconfirmation from the SSA query (this represents 5.2 percent of all queries) either choose not to contest it or fail to establish their work authorization status

• Only 0.4 percent of all E-Verify queries are U.S. citizens who have to take action to successfully resolve a tentative nonconfirmation

• 5.1 percent of transactions receive a Social Security nonmatch; only about 1.6 percent are contested

• 4.7 percent of transactions receive final nonconfirmations; according to a Center for Immigration Studies report[6] from November 2007, approximately 5 percent of the U.S. workforce is illegal

• According to DHS, several hundred instances of document fraud have been detected

• The number of employers enrolled in E-Verify after the program became web-based in 2004 was 1,533 in the first half of FY 2005. (See a 2007 Westat report on the program.) In the first two months of 2008, 10 percent of all new hires in the first two months of 2008 were checked by E-Verify. As of August 2, 2008, there were 78,000 employers enrolled representing over 315,000 sites and over 5 million queries processed so far this fiscal year-to-date. As of January 13, 2009, 100,890 employers at over 400,000 worksites, *see* Lou Dobbs January 13, 2009[7].

In FY 2007, E-Verify received about 3 million queries, 157,000 were found to be unauthorized to work despite having evaded the I-9 process previously, stopping their illegal employment. As discussed subsequently, these numbers have increased significantly in the past six months.

• Cost to employers, according to the 2007 E-Verify Westat report, is "$100 or less in initial set-up costs for the Web Basic Pilot (E-Verify) and a similar amount annually to operate the system."

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[5] USCIS E-Verify Statistics
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f82d8557a487a110VgnVCM1000004718190aRCRD&vgnextchannel=a16988c60a405110VgnVCM1000004718190aRCRD

[6] http://cis.org/immigrants_profile_2007

[7] http://www.cis.org/griffith/kephartondobbs91309

• Enrolling in E-Verify and signing the E-Verify Memorandum of Understanding takes about 10 minutes and can be e-signed.

• As of February 2009, USCIS incorporated Department of State passport data in the E-Verify process to reduce mismatches among foreign-born citizens. However, an agreement garnered by Department of Homeland Security Secretary Chertoff with the Department of State to provide U.S. citizen passport photos, visa photos, and state-issued driver's license photos in the system as well, has been abandoned by Secretary Napolitano.

• The photo-screening tool in E-Verify helps stop identity theft and counterfeit identities and currently applies to non-citizens who supply documents with DHS photos, which represents about 3.8 percent of all queries.

• Up from September 2008, twelve states now require use of E-Verify.

- Three states – Arizona, Mississippi and South Carolina – apply E-Verify to all employers in the state, public and private. Arizona's law was challenged but upheld by the Ninth Circuit, leaving little to doubt of other states following Arizona's lead in making E-Verify mandatory for all businesses.
- Nine other states – Colorado, Georgia, Idaho, Minnesota, Missouri, North Carolina, Oklahoma, Rhode Island, and Utah – apply E-Verify to those working in the public domain: state agencies, contractors, or subcontractors.
- Tennessee encourages use of E-Verify.
- Illinois limits its use.

E-VERIFY USE AT 1 IN 4 FOR NEW HIRES

Year	Rate of E-Verify Use	Percent with E-verify
2007	1 in 19	5.2 %
2008	1 in 8	11.8 %
2009*	1 in 4	24.0 %

* Projected

US Citizenship and Immigration Services (USCIS) 2009 data up until July 4, 2009 show that E-Verify– if it stays static over the course of the remaining six months of 2009—will have grown at a rate of 274 percent since the program became fully electronic in 2007. This is despite a 20 percent drop in new hires in the past two years.

All told, current data shows that while in 2007 use of E-verify was at one in 19 new hires, in 2009 nearly 1 in 4 new hires are being vetted through E-Verify and are likely to be through the end of 2009.

The 2009 projected growth rate for E-Verify use by employers is at least 274 percent. This projection is a significant decrease from our March 2009 analysis that projected a 442 percent increase in E-Verify use through the end of 2009. These numbers were based on the first seven weeks of 2009, and the 103 percent growth rate E-Verify had between 2007 and 2008. http://cis.org/node/1087

The drop-off in growth—while still a substantial drop in four months from March (442 percent projected growth to July 2009 (274 percent projected growth) -- is less likely to be caused by the economic downturn than political factors since the decrease in new hires is about the same for the past two years. Rather, immediately after publication of my March 8th, 2009 blog on the Center for Immigration Studies website, serious concerns mounted as to whether E-Verify would be re-authorized. E-Verify was then only reauthorized for six months at the last day of its statutory life. Concerns arose as to the extent of Congressional and administration commitment to the program. All the sudden, E-Verify's future became uncertain.

Year	Queries	Growth Rate
2007	3,272,944	
		103 %
2008	6,649,788	
		84 %*
2009	12,252,394*	

274 %*

* Projected

Year	New Hires[1]	Growth Rate
2007	21,286	
		-11 %
2008	18,859	
		-10 %*
2009	17,015*	

-20 %*

[1] January to April, seasonally adjusted
* Projected

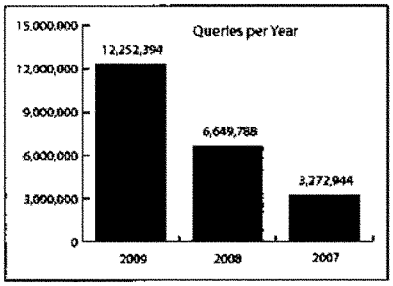
With rumors that E-Verify would be used by the Obama administration and Congressional Democratic leadership as a bargaining chip for an autumn 2009 amnesty bill, the value of signing up with E-Verify likely began to lose some of its sheen. Add to that a failure to implement the Executive Order mandating use of E-Verify for federal contracts and a solid backing away from worksite enforcement as pursued by Homeland Security Secretary Chertoff, and incentives for E-Verify use plummeted.

However, despite the seemingly negative effect of Obama administration policy on E-Verify use, employers continue to find tremendous value in E-Verify across the board, as the E-verify queries surge despite the political environment. In short, while the Obama administration is tantalizing some employers with a notion that they may be off the hook and need not sign-up with E-Verify, many other businesses continue to note the value of E-Verify by signing up with the program. This trend is likely to continue, barring some serious shift in policy.

[NOTE: These statistics are CIS numbers based on DHS data up to July 4, 2009. Growth for 2009 is projected forward based on January - July 4, 2009 data. Assume that the same number of monthly E-Verify requests remains constant at this current status until the end of the year.]

Online queries for 2009 were approaching 3 million in March 2009, almost half of the 6.6 million queries for all of 2008, a number that had more than doubled the 2007 use of E-Verify. Those numbers

translate to E-Verify being queried in 2008 for one in eight new hires, or 13 percent of new hires. That was up from a one in 19 new hires being queried via E-Verify in 2007, or about 6 percent of new hires. Those queries are now at about 6 million, nearly what they were for all of 2008, or one in four new hires. We project that if the numbers stay constant until the end of 2009, E-Verify will be queried about 12.2 million times.



According to my September 2008 report, If It's Fixed, Don't Break It: Moving Forward with E-Verify, more than 96.1 percent of these queries will be automatically verified as employment authorized. E-Verify enables compliance with federal law cheaply, efficiently and accurately—about 4 to 5 percent (476,000 to 610,000) of the 12.2 million queries this year *should* receive tentative nonconfirmations according to Center for Immigration Studies estimates of an illegal work force. The fact that 488,000 or so individuals receive this nonconfirmation is not a red light on the program, but rather a showing that E-Verify is doing its job: accurately providing employers with work authorizations *and* nonconfirmations. The one weak point is a small problem with false positives, but that problem will be persistent as DHS will need to work hard to keep ahead of fraud like it does with any program reliant on identity verification.

NUMBER OF WORKSITES USING E-VERIFY NOW OVER 500,000

In January 2009, the Department of Homeland Security announced that 100,890 employers at over 400,000 worksites had signed up with E-Verify since its inception. By mid-February, DHS numbers show nearly 10,000 more employers on board- 111,759 at 439,956 worksites. Arizona led the total number of sites using E-Verify (Arizona's law requiring that E-Verify apply to all private and public workplaces has been upheld by the Ninth Circuit) with 48,985, with California next with 47,500 sites. By July 4, 2009, the nation is at 511,228 worksites using E-Verify. Both Arizona and California are at over 50,000 sites signed up and using E-Verify for new hires with a total of 511,228 sites using E-Verify, and a total of 134,702 employers signed up to use the program. Employer use of E-Verify by state is as follows:

State	Total MOUs	Total Sites	Queries for FY 09	Queries for FY 08	Queries for FY 07
Total	**134,702**	**511,228**	**6,126,197**	**6,649,788**	**3,272,944**
ARIZONA	31,112	50,582	552,078	822,157	66,039
CALIFORNIA	10,476	51,001	697,832	673,314	301,034
MISSOURI	10,046	19,869	740,042	507,692	159,927
GEORGIA	8,629	27,954	243,691	323,367	138,633
TEXAS	6,914	40,145	545,492	708,658	433,603
FLORIDA	5,388	20,515	160,086	178,226	144,617
COLORADO	4,822	18,731	153,895	226,569	158,582
NEW YORK	3,359	24,788	106,750	99,841	87,624
VIRGINIA	3,301	17,705	136,694	135,313	57,967
SOUTH CAROLINA	3,086	9,303	176,171	120,084	52,680
ILLINOIS	3,056	21,678	115,127	136,660	110,536
NORTH CAROLINA	2,764	20,215	189,666	293,325	197,643
NEW JERSEY	2,593	8,831	73,635	91,366	66,148
MISSISSIPPI	2,530	6,544	234,535	110,524	26,409
PENNSYLVANIA	2,311	17,974	115,240	118,708	72,559
MINNESOTA	2,308	16,585	130,964	117,182	31,387
OKLAHOMA	2,179	4,952	127,442	155,736	47,765
MASSACHUSETTS	2,094	20,982	54,042	66,634	55,840
MARYLAND	2,066	9,935	173,004	166,892	34,351
OHIO	1,874	13,236	134,833	181,260	104,452
TENNESSEE	1,841	8,091	146,353	183,444	76,044
RHODE ISLAND	1,793	2,840	20,535	12,232	7,366
ALASKA	1,669	5,549	52,312	58,052	31,244
MICHIGAN	1,460	5,601	55,103	60,357	43,243
INDIANA	1,306	3,410	85,966	132,998	109,318
KANSAS	1,193	11,432	53,701	69,536	49,232
WISCONSIN	1,126	4,998	64,218	71,601	57,071
OREGON	1,092	3,848	34,115	42,030	23,721
ALABAMA	1,088	5,786	51,383	54,912	32,300
UTAH	1,035	2,780	73,965	68,912	40,493
DIST OF COL	1,014	4,232	112,038	19,897	10,680
NEVADA	924	2,530	40,114	59,460	29,787
CONNECTICUT	890	3,729	27,916	31,356	23,042
LOUISIANA	859	3,649	47,249	33,015	17,683
KENTUCKY	777	2,700	64,450	95,665	63,149

IOWA	756	3,040	56,947	72,187	53,829
NEBRASKA	754	2,579	54,782	77,306	55,920
ARKANSAS	685	3,136	73,453	129,488	133,122
NEW MEXICO	551	1,047	19,181	17,005	5,236
IDAHO	508	1,201	25,466	32,079	9,338
NEW HAMPSHIRE	324	1,034	13,199	10,172	6,308
HAWAII	316	647	10,383	6,449	3,549
DELAWARE	280	1,822	21,492	23,638	12,027
ALASKA	210	766	8,894	5,847	2,826
MAINE	192	444	6,206	8,648	5,363
WYOMING	189	377	6,049	9,550	5,468
WEST VIRGINIA	181	387	8,039	6,290	4,762
SOUTH DAKOTA	172	414	5,026	5,672	3,998
MONTANA	168	513	7,237	5,106	1,716
NORTH DAKOTA	156	415	6,510	4,261	1,800
PUERTO RICO	156	177	5,801	2,418	148
VERMONT	83	205	4,103	5,756	5,361
VIRGIN ISLANDS	24	252	2,416	885	4
GUAM	18	68	375	56	0
MARSHALL ISLANDS	2	2	1	0	0
NORTHERN MARIANA ISLANDS	2	2	0	0	0

INDUSTRY BREAKDOWN OF E-VERIFY USE

July 4, 2009 data showing the top industry breakdown (not all industries) for E-Verify use is as follows:

Industry	Total Sites
PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES	72,946
ADMINISTRATIVE AND SUPPORT SERVICES	30,863
FOOD SERVICES AND DRINKING PLACES	24,000
FUNDS, TRUSTS, AND OTHER FINANCIAL VEHICLES	21,801
SOCIAL ASSISTANCE	17,646
SPECIALTY TRADE CONTRACTORS	17,147
MANAGEMENT OF COMPANIES AND ENTERPRISES	17,025
TELECOMMUNICATIONS	16,042
OTHER INFORMATION SERVICES	12,063

CLOTHING AND CLOTHING ACCESSORIES STORES	11,978
CREDIT INTERMEDIATION AND RELATED ACTIVITIES	11,418
TRUCK TRANSPORTATION	10,723
HEALTH AND PERSONAL CARE STORES	10,343
ADMINISTRATION OF ENVIRONMENTAL QUALITY PROGRAMS	10,079
EDUCATIONAL SERVICES	10,077
RELIGIOUS, GRANTMAKING, CIVIC, PROFESSIONAL, AND SIMILAR ORGANIZATIONS	10,044
MERCHANT WHOLESALERS, DURABLE GOODS	10,002
AMBULATORY HEALTH CARE SERVICES	9,821
INSURANCE CARRIERS AND RELATED ACTIVITIES	8,086
CONSTRUCTION OF BUILDINGS	7,959
	Total: 340,063

* Industry categories based upon the North American Industrial Classification System (NAICS code).

NATURALIZED CITIZENS MORE QUICKLY VERIFIED WITH NEW DATA SETS

On March 5, 2009, USCIS announced that passport data is now accessible for work authorization verification. The value added of passport data to E-Verify is that it will reduce incidences of mismatches for naturalized citizens who have not changed their status with the Social Security Administration (SSA). Work eligibility is now seamless for foreign-born citizens who previously would receive a mismatch from the initial E-Verify query with the SSA if they had become citizens but not informed the SSA. The glitch would occur because all new citizens must apply for a new Social Security number. Failing to do so, however, resulted in tentative nonconfirmation from E-Verify, which queries a check with SSA first. That problem is now superseded by USCIS immediately querying State Department passport and visa records prior to issuing a TNC. This resolves a program criticism by independent auditor Westat in a September 2007 evaluation that noted that foreign-born citizens were more likely to receive tentative nonconfirmations than U.S.-born citizens.

Of note is that USCIS was already resolving this issue with a May 2008 enhancement, whereby USCIS could be directly queried by foreign-born citizens if they received a tentative nonconfirmation. That automation had reduced mismatches by 39 percent. However, adding State Department data will further streamline the authorization process, while also reducing the small amount of fraud that the most sophisticated of identity thieves are still able to use to bypass E-Verify and acquire false work authorizations.

Fraud would be further reduced when USCIS is able to access the State Department's original passport and visa application digital photos. Rollout was planned for autumn 2009, but has been postponed. No explanation has been provided.

CONCLUSION

Despite the fact that E-Verify is arguably one of the best government programs in existence, it is still in real trouble. Partly perhaps, because of its success, forces not interested in streamlined work authorization—like the Chamber of Commerce—who have been fighting the program vociferously.

If we undo the policies well on their way to fruition like the fully operational E-Verify, and find measures to discourage employers from using E-Verify or states from proactively seeking to use E-Verify to comply with federal immigration law, we will find that we have undone the progress towards a more transparent, legally authorized work force we have been sounding the alarm about desperately needing for years.

Change in our pockets is what we need. Not change away from solid programs good for Americans.

Prepared Testimony by Lynden D. Melmed
Former Chief Counsel, U.S. Citizenship and Immigration Services

U.S. Senate on the Judiciary
Subcommittee on Immigration, Refugees and Border Security

on

"Ensuring a Legal Workforce: What Changes Should be Made to Our Current Employment Verification System?"

Washington, D.C.
July 21, 2009

Introduction

Chairman Schumer and Ranking Member Cornyn, thank you for the opportunity to appear before this Committee to discuss the challenges that Congress faces in developing and administering an effective employment verification system. Congress has wrestled with this issue for over twenty years, and rightly so - it is the lynchpin of effective immigration enforcement. Comprehensive reform will fail if the next generation of employment verification -- whether it is E-Verify or some other variation - is not accurate and reliable.

For the last two years, I served as Chief Counsel of U.S. Citizenship and Immigration Services (USCIS). I am currently a partner at BAL Corporate Immigration law firm. I work closely with the Global Personnel Alliance, a consortium of internationally active companies interested in global personnel mobility, and ImmigrationWorks, an organization that links 25 state-based business coalitions engaged in comprehensive immigration reform.

I have served as counsel to the agency that administers E-Verify and now advise companies on whether and how to participate in the program. I appear in my personal capacity today to share my thoughts on the next generation of employment verification.

Employers Need and Will Support a Prompt, Accurate, and Reliable System

Conventional wisdom says that employers are reluctant participants in the employment verification process and will only participate in an electronic verification system if forced to do so. The recent increase in enrollment in the voluntary E-Verify system suggests otherwise.

No one will benefit more than employers from an immigration overhaul that restores the rule of the law in the workplace and provides sufficient access to a legal workforce. The overwhelming majority of employers already invest substantial resources in their verification and compliance processes and they want to be on the right side of the law - it makes good business sense. In today's political and economic environment, those same employers don't want to hire – or even be perceived as hiring – unlawful workers.

Employers need and want the federal government to provide them with the means to verify employees' identities and work authorization by comparing workers' identity documents with information in federal databases - either an improved E-Verify system or a similar program that achieves the same end.

E-Verify: Recent Improvements

E-Verify is a strong foundation for a system, and USCIS should be commended for recent improvements to the program. During a period when enrollment has increased by over 1,000 employers a week, USCIS has continued to expand the system's capabilities and improve its accuracy.

In May 2008, E-Verify added the Integrated Border Inspection System (IBIS) real time arrival and departure information for non-citizens to its databases, which has reduced E-Verify mismatches that had resulted from delays in data entry into the system. Most recently, in February 2009, the agency incorporated Department of State passport data in the E-Verify process to reduce mismatches among foreign-born citizens. Each improvement reduces the number of false-negatives: work-authorized individuals who must contact and/or visit USCIS or the Social Security Administration to correct government records.

E-Verify is not without its flaws, including one fundamental problem: its inability to detect identity theft. Unlawful workers can beat E-Verify by using another individual's valid identification. USCIS has been creative in responding to that weakness, and the "photo-tool" biometric technology now allows an employer to compare identical photos the individual's photograph on a USCIS-issued employment authorization document or green card against the image stored in USCIS' databases. The tool is designed to help an employer determine whether the document presented relates to the individual presenting it and contains a valid photo.

Unfortunately, only a small percentage of documents used by workers during verification are included in photo-tool, so its overall effect is currently very limited. The full incorporation of U.S. citizen passport, foreign national visa photos, and drivers license photos into the biometric photo-tool would go a long way to reducing identify theft.

Congress should therefore give consideration to using E-Verify as a platform and expanding photo-tool for currently issued documents and/or incorporating a new, biometric identification document.

Recommendations

Irrespective of whether Congress makes improvements to E-Verify and/or pursues an alternative approach, the following elements should be included in any future employment verification scheme:

Simple procedures that eliminate subjective decisions by employers

If we have learned anything from the 1986 law, it is the following: the verification system will fail if employers are required to make subjective decisions regarding the identity of an individual and/or whether that person is authorized to work in the United States.

Under current law, a new employee can present a combination of 26 different documents. Some combinations work, others don't. Some documents require re-verification, some don't. The USCIS employer handbook is 55 pages long. Any employer who hires a number of employees must become familiar with different immigration statuses and whether each one allows the individual to work.

Employers say that the requirement that they determine the legitimacy of a document forces them into a Hobson's choice: accept the document and risk the Department of Homeland Security (DHS) showing up after the fact to detain the employee, or reject the document and risk a lawsuit alleging discrimination.

Congress, and in turn DHS, must reduce the number of acceptable documents and establish simple, bright line rules that every employer must follow. A single swipe card would certainly be easiest, but that model raises questions about cost of equipment for employers and the time and resources it would take to issue new documents to all employees who change jobs.

Because any database will have errors (due to government or worker error), any electronic verification must incorporate a grace period in which the employee can obtain redress. But that grace period injects uncertainty into the hiring process and can disrupt an employer's operations. Congress must therefore balance the time it takes for the employee, DHS and SSA to resolve the discrepancy with the need for the employer to know whether it will be able to employ the worker going forwards. A default confirmation on a set date may be an inelegant solution until the number of false-negatives is further decreased.

A single set of laws and rules for all employers nationwide

In the vacuum of Congressional inaction on immigration reform, multiple states have stepped in and passed laws related to employment verification. At last count, twelve states have passed laws requiring some or all employers to participate in E-Verify. The result has been a complex web of laws and regulations. At one point, an employer faced

the prospect of being required to enroll in E-Verify in Arizona and being prohibited from doing so in Illinois.

While the 1986 Immigration Reform and Control Act (IRCA) included preemption language, it was not airtight and creative lawyers have found ways for states to wade into the federal issue.

For employers, however, especially those that operate across the country, complying with varying requirements in different states is complicated, burdensome and introduces ambiguity into the hiring process. Congress should therefore clarify that any new verification system preempts any current or future state law that attempts to build upon, or weaken, the federal scheme.

Clear standards of liability for employers

Many employers today feel the government is engaged in a game of "gotcha." Employers may scrupulously follow the Form I-9 verification process, or even go further and utilize the best available technology (E-Verify) to screen new hires, yet still end up with unauthorized workers. As a result, even the most compliant employer could face the prospect of a DHS audit or raid and resulting workforce disruption.

In 2006, the House Subcommittee heard testimony from the Vice President of Swift & Co., a $9 billion beef and pork processor headquartered in Colorado. He testified to the fact that Swift & Co. had participated in E-Verify since 1997, yet DHS raided the company and over 1200 employees were detained. The Vice President stated that "[i]t is particularly galling to us that an employer who played by all the rules and used the only available government tool to screen employee eligibility would be subjected to adversarial treatment by our government."

As Congress moves to the next stage of employment verification - confirming identity and work eligibility through biometrics – the government and employers will have greater confidence in the accuracy and reliability of the verification system. But until that system is in place, enforcement priorities should be focused on employers that don't follow the procedures. For employers who do comply with the rules in good faith and nevertheless end up with workers who are not lawful, there should be clear standards for when liability would attach.

Reasonable and proportional costs for employers

Employers already shoulder much of the cost of administering the paper-based federal employee verification process. After all, it is the employer – not the federal government -- that completes, stores and maintains I-9 documents.

As Congress considers expansion of E-Verify and/or creation of a new system, careful consideration must be given to any additional costs that will be borne by employers. The Government Accountability Office (GAO) recently estimated "that a mandatory dial-up

version of [E-Verify] for all employers would cost the federal government, employers and employees about $11.7 billion total per year, with employers bearing most of the costs."

Employers would need to train employees to comply with any new law's requirements and devote a great deal of human resources staff time to verifying (and re-verifying when documents expire) work eligibility, resolving data errors, and dealing with wrongful denials of eligibility.

Our experience with E-Verify provides evidence that many employers may be underestimating the amount of time and training it takes to comply with a complex verification system. In its 2007 evaluation, Westat found substantial noncompliance by employers with E-Verify's rules of use. The fact that so many *voluntary* users of the system are not complying with the program requirements should give anyone pause about expanding the system too quickly.

Conclusion

If Congress is successful in designing and implementing an employment verification that is fast, accurate and addresses identify theft, it will be much easier to find common ground on how to phase-in such a system. But that will only be true if employers have access to a legal workforce – an open question when the economy recovers and current immigration quotas limit the availability of legal workers. Congress should therefore carefully coordinate expansion of E-Verify, or any alternative system, with broader reforms that provides employers with a legal supply of workers they need to sustain and grow their businesses.

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Written Testimony
of
John Niotti-Soltesz
Chairman & Chief Executive Officer
Zerco Systems International, Inc.

For Hearing on
"Ensuring a Legal Workforce:
What Changes Should be Made to Our
Current Employment Verification System?"

Before
The Senate Judiciary Committee
Subcommittee on Immigration, Refugees and Border Security
Chairman Charles E. Schumer

Submitted for consideration
July 27, 2009
To Subcommittee at
224 Dirksen Senate Office Building
Washington, DC 20510

On behalf of Zerco Systems International Inc., I thank Chairman Schumer and Ranking Member Cornyn and the distinguished members of the Subcommittee on Immigration, Refugees and Border Security for addressing an area that has great potential and I am pleased to present our contribution to the ongoing discussion of immigration reform, as it relates to my area of expertise: biometrics in employee verification and authentication.

My name is John A. Niotti-Soltesz. I am founder and chairman of Zerco Systems International, Inc. an Ohio-based company formed 19 years ago. Our vision then was to help prevent theft of credit card information and fraud. Over the years, Zerco has evolved to specialize in applications that utilize biometric technology in the areas of security, healthcare and employee identification solutions, which is pertinent to this subcommittee's hearings on ensuring a legal workforce.

Zerco's expertise in this area is being offered to the Subcommittee and by extension to the American people, in hope of helping to form a workable, effective and efficient employer-employee ID system, based on biometric technology.

Zerco Perspective

Reflecting our capabilities and expertise, we are proud to inform the Chairman that recently the Federal Bureau of Investigation has nationally certified Zerco Systems to provide Live Scan fingerprint technology to verify identities with Zerco's software. We are among a small number of companies with such FBI designation.

Further, Zerco is Technology Advisor to The Latino Coalition, a non-profit non-partisan organization striving to research and develop policies that are relevant to Latinos' overall economic, cultural and social development in America. As such, we have a unique perspective on this issue and Zerco is fully aware of the need for widespread use of reliable, cost-effective, efficient and accurate biometric components of the identity verification process at companies.

Employers across America, especially in Border States to Mexico, need a better system than is currently available to verify the legality of their workers. The E-Verify system now in place is a good start in that direction. Employers have learned that solving the verification issue alone does not make them immune from liability. Rather, employers are still challenged to devise an employment process that satisfies many and sometimes contradictory requirements of Federal, state and local authorities and laws that require the hiring of only legal workers, while not discriminating against any workers. Employers also need to authenticate, verify and monitor employees on an ongoing basis.

Developing technologies to meet this challenge is not the problem this time, because contrary to general opinion, the technology already exists. For example, Zerco's employee ID solution is simple and has the ease of use to meet compliance, mitigate risk, collect documentation and run it through a system such as E-Verify and also utilize the latest applicant live scan technology to match biometric fingerprint and biographical data stored in the FBI database. If necessary, employers can share data with State or Federal authorities, while meeting compliance with all State and Federal standards and requirements.

Zerco's software along with our hardware, biometrically verifies fingerprints, voiceprints, iris scans, facial recognition and signatures. Verification systems utilizing biometrics are extremely tamper resistant and the safest available, protecting employers and employees and benefiting the U.S. in total, as fraud and deceptive use of documents becomes infinitely more difficult to impossible to stop.

Our nation has the technological ability and the professional expertise to effectively implement biometric-based identity verification solutions. This ability has been in place for years. The political process and the slow activity of regulatory agencies has, at times, been more of a hindrance to progress than a catalyst of progressive activity in this area.

Chairman Schumer said, "the American people will never accept immigration reform unless they truly believe their government is committed to ending future illegal immigration. Advocates understand the need to embrace this principle during the current debate." We feel his leadership and advice is vital.

Confusion in Market

Today, prospective employees must provide documentation supporting their identity and their legal right to work. But, employers can only ask for the "minimum" documentation and must equally apply the "reasonable prudent person" test to such documentation being provided. Further complicating the employer's human resource procedures are often conflicting laws. For example, in Colorado it is illegal to pay an individual who is determined after being hired to be an illegal worker; but Federal law requires that any individual who works must get paid. Also, certain city and local laws conflict with state and Federal laws, and even Federal Agencies such as Immigration and Customs Enforcement (ICE) and the Department of Labor issue conflicting requirements.

Zereo offers a stand-alone on-site Worker ID management solution, using advanced biometric technology to qualify workers and better protect companies from regulatory actions that might result in shutdowns, lawsuits, penalties, loss of company reputation and a lessening in the brand values that build success. Our system mitigates the risk of a company not being in compliance with Federal laws while working in conjunction with programs such as E-Verify. In addition, the use of biometric identification can further help companies mitigate risk and create a safe harbor for employers.

This committee and Congress, along with regulatory agencies working in tandem, can provide leadership and bring clarity and calm to the market with concise, effective and practical requirements that can help a company avoid shutdowns costing millions in lost production, legal expenses and penalties, including criminal action. It is my opinion that employers will need to integrate technology solutions that will help them take steps to avoid problems and are waiting for the Government to address the technology recommendations.

Among problems companies face in worker ID matters are business interruption if employee records or employees are detained or examined; short or long-term closure; civil fines; criminal penalties; discrimination lawsuits; enforcement actions; unfair labor practice lawsuits; loss of federal contracts and goodwill loss through reputation and brand image damage.

The Immigration Control and Enforcement (ICE) agency has conducted raids that have closed production facilities. Most notably, Swift & Company in a well publicized ICE raid, experienced days of downtime and millions in lost revenue as its employees were checked for legal status.

Call to Action

A biometric system of identity such as E-Verify would alleviate such traumatic interruptions to work, and make for more smooth operations. ICE officials could be provided with biometric data that could be used to verify workers identities in a way that is conducive to good business operations and consistent with good business practices. E-Verify can become an increasing valuable tool for employers to demonstrate and verify the hard working taxpaying members of their legal workforces.

Verifying workers is only part of the challenge since it is vital to authenticate that the person hired is actually the person working. Swift and Smithfield Packing were two companies in E-Verify's predecessor program, Basic Pilot, that were raided and experienced huge economic loses when it

was determined that they had workers who had engaged in identity theft or were different than the person hired. We feel that a machine-readable biometric identifier for each worker is needed.

Zereo has the ability to implement such a process now.

This Subcommittee has the ability to take a bold step in that direction. The distinguished panel has heard from experts in a variety of government agencies and from organizations, typically referred to as "think tanks," with experts espousing the virtues and faults of the current system.

Solution at Hand

Zereo brings the perspective of a company that is in the marketplace of ideas and software solutions.

With respect to employer-employee identity issues; thousands of companies have signed on to the E-Verify procedures now offered. This is not a perfect system, but it is the one at-hand. This response by American companies is a clear indication of the desire on the part of businesses to try to settle identity problems of workers and move on with the everyday activities of their operations.

Years ago, Zereo saw a need in the market and anticipated a move toward technology to help companies identify workers who are legal. We developed the Zereo Biometric Worker ID solution that companies employing immigrants, who are legal workers in America can use to demonstrate to U.S. federal authorities that they have taken reasonable and technologically advanced steps to qualify their workforce as legal and avoid costly shutdowns and production losses.

Zereo envisions the biometric ID management system being incorporated into the hiring employment process such that all workers will be issued an Employee Worker Identity Card. New employees will still be subject to appropriate I-9 processes and procedures. The worker's biometric fingerprint would be stored on the ID card and also maintained on the employer's data management system. On-going verification and monitoring would be conducted to the extent determined by the employer. I.E. Periodic authentication where the worker's fingerprint, or ten fingerprints, can be scanned, then matched to the card and then to a company's data base, but which otherwise relies on daily "verification" through radio-frequency identification (RFID) sensors reading and matching the card only.

The system can be self-contained by the employer. Interfacing with the Government could be accomplished at the employer's discretion or if require by the nature of the business contract or governing law. Capturing, storing and transmitting of such information as the "ten-fingerprint" image is anticipated and Zereo recommends that requirements be incorporated within the employer's hiring processes. Also the system would be capable of expanding to address other business issues such as physical/perimeter access ID controls, IT sign-on controls (password substitute and single sign-on capabilities) and replacing the employer's health benefit and time reporting cards.

To satisfy the requirements for a "machine-readable biometric identifier" and the "tamper resistant identification card" three critical components already exist:

- A biometric identifier: we carry them in fingerprints, eyes, voice, signature or DNA;

- Machine biometric readers: They are available. Some can read fingerprints, perform iris scans, implement voice recognition or match DNA.
- Tamper proof ID cards: None are tamper proof, but they are tamper resistant without technology to alter. Millions of people in the USA carrying "tamper" resistant Permanent Resident "Green cards" and Laser Visa Border Crossing (BCC) cards that are "tamper" resistant and use optical memory and "smart chip" technology and are referred to as laser or optical card.

Since each of the components exists, we need to focus on what employers need to consider. First they need a process centered on a biometric identifier; then they need to be able to store that identifier on a "tamper resistant" card; and they need to read the card with a machine. Ideally, the identifier, storage system and machine will all be capable of interfacing with the employer's technology data processing system to allow for ongoing authentication and verification monitoring of employees. Additionally, the system's versatility would be greatly enhanced if it allows for the incorporation of other legacy technologies and wireless and RFID capabilities. This is what we at Zerco identify as a "turn-key" integrated solution that is scalable and flexible. We offer such a system.

Common Sense Approach

Zerco recommends a common sense approach that combines practicality with technology to solve a pressing problem. We suggest biometric ID management systems can be incorporated into the hiring-employment process to issue an Employee Worker Identity Card either for immigrant workers or for all workers. This would level the playing field. New employees will still be subject to appropriate Federal I-9 processes and procedures and the worker's biometric fingerprint would be stored on the ID card and also maintained on the employer's data management system. Ongoing verification and monitoring can be conducted as could periodic authentication with the worker's fingerprint scanned, matched to the card and then to the company's data base, but which otherwise relies on daily verification through RFID sensors reading and matching the card only.

The Zerco Secure Card Credentialing System includes software, which is the glue that holds the system together, and hardware, which are the information accumulation and access points, to implement secure identification and meet the latest in Government standards with ID card technology, biometrics and pre-employment screening.

True security begins with the credentialing process. Zerco's Credential Manager includes an electronic Form I-9 employment eligibility verification process that conforms to U.S. Citizenship and Immigration Services, Department of Homeland Security and Social Security Administration specifications. The system stores scanned images, demographics and other data captured from documents that can be used to complete an electronic version of the Federal Form I-9 including required digital signatures.

Biometric ID solutions such as Zerco's solution can help companies mitigate risk with versatile tamper resistant ID cards for all workers. For example, Zerco has the technology solution to address the dilemma that employers face since the stand-alone on-site biometric Employee Worker Identity Card solution system does not require linking to a central computer system to verify worker ID information. Implementation of a unified, thoughtful and progressive Federal system is needed.

Furthermore, using best practices, Zereo's solution presents an employer with the ability to create the strongest level deterrent to any person considering presenting false documentation or another person's identity or to hide a criminal background.

Leadership Vital

Leadership is the vital factor in the need for a pressing solution. As far as technology goes, Zereo's ID solution is simple and has the ease of use to meet compliance, mitigate risk, collect and verify documentation and match and verify data with State or Federal authorities, if necessary, while helping to ensure compliance with all Federal standards and requirements.

In summary, Mr. Chairman, Corporate America is waiting for the solution to be implemented. The solution is available.

As an immigrant and U.S. citizen who arrived on the shores of America as a young child, I want my country to excel in this area and to utilize state-of-the-art biometrics to identify legal immigrant workers on behalf of all employers and employees. Please note that technology exists to meet the problems we face. What is needed is defining leadership, such as your colleagues and you are showing through these hearings.

Thank you.

STATEMENT OF

JAMES W. ZIGLAR

BEFORE THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER SECURITY

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

JULY 21, 2009

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO BE APPEARING AT YOUR REQUEST TO DISCUSS THE E-VERIFY PROGRAM THAT IS BEING DEVELOPED, IMPLEMENTED AND ADMINISTERED BY THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES. IT HAS BEEN A NUMBER OF YEARS SINCE I LAST APPEARED BEFORE THIS SUBCOMMITTEE AND IT IS AN HONOR TO BE HERE AGAIN. I AM APPEARING HERE IN MY PERSONAL CAPACITY AND NOT AS A REPRESENTATIVE OF MY LAW FIRM, VAN NESS FELDMAN, OR ANY OF ITS CLIENTS.

THIRTEEN YEARS AGO, IN 1996, CONGRESS RECOGNIZED THE NEED TO DEVELOP AN ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM (EEVS) AS A NECESSARY ELEMENT IN THE IMPLEMENTATION OF AN EFFECTIVE IMMIGRATION CONTROL SYSTEM. AT THAT TIME, AS IS STILL THE CASE, DOCUMENT FRAUD WAS UNDERMINING THE EFFORT TO ENFORCE OUR IMMIGRATION LAWS IN THE WORKPLACE. AS PART OF THE ILLEGAL IMMIGRATION AND IMMIGRANT RESPONSIBILITY ACT OF 1996, THE CONGRESS AUTHORIZED THREE ELECTRONIC EMPLOYMENT VERIFICATION PILOT PROGRAMS. IN 2003, ONE OF THOSE PILOTS, THE "BASIC PILOT," BECAME A NATIONAL VOLUNTARY PROGRAM. THE NAME OF THE PILOT WAS LATER CHANGED TO "E-VERIFY," THE SUBJECT OF TODAY'S HEARING.

I WANT TO MAKE IT CLEAR THAT, IN MY OPINION, MY FORMER COLLEAGUES AT THE DEPARTMENT OF HOMELAND SECURITY WHO HAVE BEEN RESPONSIBLE FOR THE IMPLEMENTATION OF E-VERIFY HAVE DONE

AN EXTRAORDINARY JOB ON BEHALF OF THE AMERICAN PEOPLE. ANY COMMENTS THAT I MAKE TODAY ARE NOT INTENDED TO BE A CRITICISM OF THEIR EFFORTS AND ONLY REFLECT MY PERSONAL THOUGHTS WITH RESPECT TO MATTERS ON WHICH THE SUBCOMMITTEE HAS REQUESTED THAT I PROVIDE COMMENTARY.

IN THE INTEREST OF FULL DISCLOSURE, I WANT THE RECORD TO SHOW THAT IN ADDITION TO HAVING SERVED AS COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE WHEN THE BASIC PILOT WAS BEING TESTED, I SUBSEQUENTLY SERVED AS PRESIDENT AND CEO OF CROSS MATCH TECHNOLOGIES, INC. UNTIL I RETIRED ONE YEAR AGO NEXT WEEK. SEVERAL MONTHS AGO, I LEFT THE BOARD OF DIRECTORS OF CROSS MATCH, BUT I STILL HOLD AN EQUITY POSITION IN THE COMPANY. CROSS MATCH IS A PRIVATELY-HELD BIOMETRICS COMPANY LOCATED IN FLORIDA. I ALSO WOULD LIKE TO DISCLOSE FOR THE RECORD THAT I OWN SMALL AMOUNTS OF STOCK IN TWO OTHER PUBLICLY TRADED COMPANIES THAT ARE IN THE BIOMETRICS BUSINESS.

MUCH HAS BEEN WRITTEN ABOUT E-VERIFY AND THERE HAS BEEN NO LACK OF IDEAS ON WAYS TO IMPROVE THE SYSTEM. INDEED, ONLY YESTERDAY, THE MIGRATION POLICY INSTITUTE RELEASED AN IMPORTANT STUDY ON E-VERIFY IN WHICH IT SUGGESTS SEVERAL POSSIBLE WAYS TO IMPROVE THE SYSTEM. I WILL REFER TO THIS STUDY LATER IN MY TESTIMONY AND I WOULD REQUEST THAT THE STUDY BE INCLUDED IN THE RECORD OF THIS HEARING. ONCE AGAIN, AS A MATTER OF FULL DISCLOSURE, I WANT TO NOTE THAT I AM AN UNPAID SENIOR FELLOW AND ADVISOR TO THE BOARD OF THE MIGRATION POLICY INSTITUTE. HOWEVER, I AM NOT HERE AS A REPRESENTATIVE OF THE MIGRATION POLICY INSTITUTE.

MY REMARKS TODAY ARE FOCUSED ON ONE ELEMENT OF E-VERIFY THAT HAS BEEN THE SUBJECT OF MUCH DISCUSSION, INCLUDING SPECIFIC MENTION BY THE CHAIRMAN OF THIS SUBCOMMITTEE. E-VERIFY HAS A SIGNIFICANT WEAKNESS IN ITS INABILITY TO DETECT AND PREVENT IDENTITY FRAUD. IT HAS HAD GOOD SUCCESS IN DEALING WITH CERTAIN TYPES OF FRAUDULENT DOCUMENTS THAT ARE PRESENTED AS PART OF THE I-9 PROCESS. BUT IF SOMEONE HAS STOLEN AN IDENTITY AND PRESENTS LEGITIMATE DOCUMENTS CONNECTED TO THAT IDENTITY, OR PRESENTS FRAUDULENT DOCUMENTS WHICH MAKE USE OF STOLEN IDENTITY DATA, THE PURPOSE OF THE EMPLOYMENT ELIGIBILITY VERIFICATION EXERCISE CAN BE DEFEATED. IN APRIL 2007, FORMER COMMISSIONER OF THE INS, DORIS MEISSNER, AND I PUBLISHED AN OP-ED PIECE IN THE NEW YORK TIMES DISCUSSING THIS ISSUE AND ADVOCATING THE USE OF A BIOMETRICALLY- ENABLED SOCIAL SECURITY CARD TO DEFEAT IDENTITY FRAUD. I AM SUBMITTING A COPY OF THAT OP-ED WITH MY WRITTEN TESTIMONY.

ALTHOUGH THE ADDITION OF PHOTOGRAPHS IN E-VERIFY RECORDS, WHERE AVAILABLE, HAS NO DOUBT HAD SOME POSITIVE IMPACT IN PREVENING IDENTITY FRAUD, THE ABILITY TO BE ABLE TO DEFINITIVELY PROVE THAT THE PERSONS IN FRONT OF YOU ARE WHO THEY SAY THEY ARE IS CRITICAL TO THE EFFECTIVENESS OF A PROGRAM TO PREVENT UNAUTHORIZED WORKERS FROM BEING HIRED. THE PHOTO SCREENING TOOL IS USEFUL, BUT IT IS LIMITED IN ITS APPLICATION AND RELIABILITY, AND SHOULD WE HAVE A MANDATORY VERIFICATION REQUIREMENT IN THE FUTURE, AS WELL AS ENHANCED PENALTIES FOR HIRING UNAUTHORZED WORKERS, IT WILL IMPOSE A BURDEN ON EMPLOYERS THAT IS FUNDAMENTALLY UNFAIR. ANY EEVS SHOULD GIVE EMPLOYERS UNAMBIGUOUS DIRECTIONS ABOUT WORKERS' AUTHORIZATION WHILE MINIMIZING THE REQUIREMENT THAT EMPLOYERS EXERCISE DISCRETION DURING THE VERIFICATION PROCESS.

THE EMPLOYMENT OF BIOMETRICS TO IDENTIFY INDIVIDUALS HAS BEEN USED IN THE LAW ENFORCEMENT ARENA FOR MANY YEARS. IN THE MID-TO-LATE 1990'S, THE POTENTIAL FOR USING BIOMETRICS IN NON-LAW ENFORCEMENT ENVIRONMENTS CAPTURED THE ATTENTION OF THE MARKET. TODAY, BIOMETRIC TECHNOLOGIES ARE DEPLOYED ACROSS THE GLOBE TO PROVIDE ACCESS TO OFFICES, HOMES, CARS, MEDICAL RECORDS, SECURITY VAULTS, VOTING BOOTHS AND A HOST OF OTHER CIVILIAN APPLICATIONS. IN THE UNITED STATES, A NUMBER OF INDUSTRIES REQUIRE THAT BIOMETRIC AND BIOGRAPHIC INFORMATION BE COLLECTED AND BACKGROUND CHECKS UNDERTAKEN IN ORDER TO BE EMPLOYED IN THAT INDUSTRY. EXAMPLES INCLUDE THE FINANCIAL SERVICES INDUSTRY, THE TRANSPORTATION INDUSTRY, THE EDUCATION INDUSTRY AND THE HEALTH CARE INDUSTRY. THE USE OF BIOMETRICS TO AUTHENTICATE AND VERIFY THE IDENTITY OF INDIVIDUALS IS NOT A NOVEL CONCEPT IN TODAY'S SOCIETY. I WOULD BE REMISS IF I DID NOT MENTION THAT ONE OF THE MOST VISIBLE AND SUCCESSFUL APPLICATIONS OF BIOMETRICS HAS BEEN IN THE DEPARTMENT OF HOMELAND SECURITY'S US VISIT PROGRAM.

EVERY INDIVIDUAL HAS CERTAIN PHYSIOLOGICAL CHARACTERISTICS THAT ARE UNIQUE AND CAN BE MEASURED TO DEFINITIVELY IDENTIFY THAT PERSON (A BIOMETRIC). THE MOST WELL-KNOWN BIOMETRIC IS THE FINGERPRINT AND ITS USE IS UBIQUITOUS. THE IRIS AND A PERSON'S DNA ARE ALSO UNIQUE PHYSIOLOGICAL CHARACTERISTIC, AS WELL AS FACIAL STRUCTURE (CAPTURED THROUGH A PHOTOGRAPH), HANDWRITING AND VOICE PATTERNS. IN TERMS OF RELIABILITY (i.e., THE ABILITY TO CAPTURE AND ACCURATELY MEASURE, AND THEN MATCH THIS PHYSIOLOGICAL CHARACTERISTIC TO AN ESTABLISHED RECORD), THE IRIS, FINGERPRINT AND DNA ARE CONSIDERED THE MOST RELIABLE BY EXPERTS IN THE FIELD.

THE USE OF BIOMETRICS FOR IDENTIFICATION AND VERIFICATION PURPOSES, IN LAW ENFORCEMENT AND NON-LAW ENFORCEMENT SETTINGS, CONTINUES TO EXPAND RAPIDLY AND THE TECHNOLOGY ALSO CONTINUES TO IMPROVE REGULARLY. HOWEVER, ALTHOUGH THE TECHNOLOGY WILL CONTINUE TO IMPROVE, THE STATE OF THE TECHNOLOGY TODAY, IN MY OPINION, IS SUCH THAT ITS USE IN THE CONTEXT OF E-VERIFY IS NOT ONLY FEASIBLE, BUT QUITE ATTRACTIVE. IN MY OPINION, IT WOULD BORDER ON IRRESPONSIBLE NOT TO SERIOUSLY ANALYZE THE POSSIBILITY OF INCORPORATING A BIOMETRIC IDENTIFICATION AND VERIFICATION MODULE INTO THE E-VERIFY SYSTEM.

IN A REPORT RELEASED ON JULY 8, 2009, AN INDEPENDENT TASK FORCE OF THE COUNCIL ON FOREIGN RELATIONS, CO-CHAIRED BY JEB BUSH AND THOMAS F. (MAC) McLARTY III, RECOMMENDED THAT A "WORKABLE AND RELIABLE BIOMETRIC ELECTRONIC VERIFICATION SYSTEM" BE DEPLOYED. AS I MENTIONED EARLIER IN MY TESTIMONY, ONLY YESTERDAY, JULY 20, 2009, THE MIGRATION POLICY INSTITUTE RELEASED A COMPREHENSIVE REPORT ON THE E-VERIFY SYSTEM RECOMMENDING THAT THREE PILOTS BE UNDERTAKEN BY USCIS TO ENHANCE THE RELIABILITY AND ACCURACY OF THE E-VERIFY SYSTEM. TWO OF THOSE PILOTS WOULD EMPLOY BIOMETRICS—ONE WOULD USE A SECURE BIOMETRICALLY-ENABLED IDENTIFICATION CARD AND THE OTHER WOULD TEST A BIOMETRIC SCANNING SYSTEM THAT WOULD ALLOW OR REQUIRE EMPLOYERS TO CAPTURE BIOMETRICS DURING THE VERIFICATION PROCESS AND COMPARE THE COLLECTED BIOMETRIC DATA AGAINST A CENTRAL DATABASE OR A BIOMETRIC CARD.

IT IS MY BELIEF THAT A BIOMETRIC COMPONENT COULD BE EFFECTIVELY INCLUDED IN THE E-VERIFY PROGRAM. I DO NOT BELIEVE THAT THIS WOULD REQUIRE SCRAPPING THE PRESENT SYSTEM AND ALL OF THE HARD WORK THAT HAS BEEN DONE TO DATE. INSTEAD, CONGRESS HAS THE OPPORTUNITY TO ESTABLISH A STATUTORY FRAMEWORK WITHIN WHICH USCIS CAN BUILD ON E-VERIFY TO INCORPORATE BIOMETRICS. IT WILL REQUIRE MORE HARD WORK AND THERE WILL BE MANY DEBATES AND ISSUES ALONG THE PATH TO BUILDING AN EFFECTIVE EEVS. THOSE ISSUES INCLUDE CONCERNS ABOUT PRIVACY, THE FEAR THAT THE UNITED STATES IS ESTABLISHING A NATIONAL ID CARD, TECHNOLOGICAL GLITCHES THAT WILL HAVE TO BE ADDRESSED AND, OF COURSE, COST.

I DO NOT WANT TO SEEM POLYANNISH ABOUT THE CHALLENGES THAT WOULD BE FACED IN IMPLEMENTING AN EFFECTIVE ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM THAT CAN PROVIDE FOR AUTHENTICATION OF THE IDENTITY OF INDIVIDUALS. ALTHOUGH THERE ARE MILLIONS OF EXISTING RECORDS THAT CONTAIN BIOMETRICS OF

INDIVIDUALS AND CAN BE USED TO VERIFY IDENTITY. THE ENROLLMENT PROCESS THAT WOULD BE REQUIRED TO HAVE ALL WORKERS IN THE DATABASE, WOULD BE FINANCIALLY SIGNIFICANT AND POLITICALLY VOLATILE. THE LARGEST SHARE OF THIS BURDEN WOULD FALL ON U.S CITIZENS. THE SHEER MAGNITUDE OF THIS EFFORT WOULD SUGGEST THAT THE ONLY PRACTICAL WAY TO MANAGE THE DEVELOPMENT OF SUCH A SYSTEM WOULD BE THROUGH A PHASED PROCESS THAT INCLUDES SIGNIFICANT PUBLIC EDUCATION.

NOTWITHSTANDING ALL OF THE CHALLENGES I HAVE JUST MENTIONED, IT IS MY VIEW THAT IF WE DO NOT ADDRESS THE ISSUE OF THE USE OF BIOMETRICS NOW, WE WILL HAVE TO REVISIT IT IN THE FUTURE AND THE COST INVOLVED WILL BE ORDERS OF MAGNITUDE HIGHER THAN THEY ARE TODAY.

MR. CHAIRMAN, THANK YOU AGAIN FOR THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE AND I LOOK FORWARD TO YOUR QUESTIONS.

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