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Reply to
WASHINGTON DC OFFICE

August 11, 2008

Federal Acquisitions Regulations Secretariat
Department of Defense
General Services Administration
National Aeronautics and Space Administration
Washington, D.C.

Re: ***Comments on* FAR Docket No. 2008-0001; FAR Case 2007-013, *Regarding "Employment Eligibility Verification"***

Dear Sir or Madam:

The National Immigration Law Center (NILC) submits the following comments in response to the request for public comment by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), on the proposed rule amending the Federal Acquisitions Regulations "*Employment Eligibility Verification*," 73 Fed. Reg., No. 114, pages 33374-33381 (June 12, 2008).

NILC opposes implementation of the proposed rule, or any part of the proposed rule, which will make it mandatory for federal contractors to use an electronic employment verification system designated by the Department of Homeland Security (DHS) to verify all new workers and current employees that are working under the federal contract. DHS has designated the inaccurate and deeply flawed Basic Pilot/E-Verify program as the verification system to be used by federal contractors.

NILC protects and promotes the rights and opportunities of low-income immigrants and their family members. NILC specializes in immigration law and the employment and public benefits rights of immigrants. We conduct policy analysis and impact litigation and provide publications, technical advice, and trainings to a broad constituency of legal aid agencies, community groups, and *pro bono* attorneys.

NILC has extensive experience in dealing with the adverse impact of United States laws, policies, rules and procedures on immigrant communities in the United States. NILC has also developed specialized expertise in electronic employment verification systems (EEVS) and is considered the leading immigrant advocacy organization with expertise on the Basic Pilot/E-Verify program and its effect on the foreign-born including naturalized citizens. NILC has developed expertise in this area over the last eleven years through its own research, work with government agencies, congressional relationships, and working with other advocates at the national, state and local level. NILC is valued by lawmakers, government officials, advocates, immigrant workers and the media for its ability to provide accurate and timely information on the Basic Pilot/E-Verify program. [1]

NILC believes that the proposed rule amending the Federal Acquisition Regulations (FAR) which makes the Basic Pilot/E-Verify program mandatory for federal contractors

[1] For an extensive collection of NILC's publications on this issue see the Basic Pilot/E-Verify & Electronic Employment Eligibility Verification page online at http://www.nilc.org/immsemplymnt/ircaempverif/index.htm .

should not be implemented. The proposed rule mandating use of the Basic Pilot/E-Verify program for federal contractors should not be implemented because: 1) it violates existing laws; 2) the databases upon which the program relies are error-prone and have unacceptably high error rates which misidentify authorized workers; 3) the employer abuse of the program is substantial and results in discrimination, profiling, and illegal employment practices by employers; 4) the privacy and security concerns of the technology have not been addressed; and 5) it jeopardizes the livelihoods of work-authorized immigrant and U.S. citizen workers.

Although the proposed rule only applies to federal contractors, making this program mandatory for anyone is dangerous because of the severe flaws and problems with the program which have not been fixed. The proposed changes to the FAR would vastly expand E-Verify, as they would immediately apply to at least 200,000 employers and approximately 4 million employees. Mandating the use of a system that doesn't work will be disastrous for everyone in the U.S., not just federal contractors and their workers.

Comments to the Proposed Rule:

The proposed rule conflicts with the Basic Pilot/E-Verify program's authorizing statute. The proposed rule requires that Basic Pilot/E-Verify be used to verify the employment authorization of existing employees who are "assigned to the contract." The application of the program to current employees contradicts the unambiguous terms of the program's authorizing statute, which limits its use to a 3-day period after hiring, recruitment or referral,[2] except in strictly limited circumstances.[3] The proposed rule is an *ultra vires* attempt by the agency to amend the statute through rulemaking.

It is a longstanding and basic principle of administrative law that an agency does not have authority to issue regulations that are inconsistent with a statute and beyond the scope of its delegated authority.[4] The proposed rule in this case, re-writes the statute, rather than interpreting it, by requiring use of Basic Pilot/E-Verify for current employees, rather than only newly-hired employees.

Moreover, it is undisputable that Congress intended that the Basic Pilot/E-Verify program be a voluntary -- not mandatory -- program. In fact, the statute expressly forbids the Attorney General from requiring employers to use the program,[5] except as to hiring by the federal government itself, by Congress, and by employers ordered to participate because they have been found to have violated federal employer sanctions laws.[6] The proposed rule's mandate of use of the program beyond these very limited exceptions violates the statute's express restriction.

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 403(a)(3)(A), codified at 8 U.S. C. 1324a note.
[3] The 3-day time period may be extended in cases where an employer attempted to make an inquiry but the confirmation system was unable to receive it. IIRIRA § 403(a)(3)(B).
[4] *Miller v. United States*, 294 U.S. 435 (1935); *Nagahi v. Immigration and Naturalization Service*, 219 F.3d 1166 (10th Cir. 2000).
[5] IIRIRA § 402(a).
[6] IIRIRA § 402(e).

The proposed rule's unlawful reconfiguration of Basic Pilot/E-Verify from a limited, voluntary program into a mandatory program that applies to existing, as well as new, workers constitutes a vast and unlawful expansion of an experimental program that directly conflicts with the program's authorizing statute. .

The effects of such unlawful legislating by an agency are enormous and leave many unanswered questions. The proposed rule leaves unclear what "assigned to the contract" means in practical terms. Uncertainty about the meaning of the term will compel employers to interpret it over-broadly in order to comply with the requirement. The ambiguities in the proposed rule also fail to clarify the application of the rule to subcontractors and the many different kinds of contractual relationships and arrangements in which subcontractors are used. The proposed rule also fails to address the issue of how state and local government contractors should reconcile adherence to the proposed rule with compliance with state and local laws that prohibit of the Basic Pilot/E-Verify program pursuant to the federal law making the program's use voluntary.

The proposed rule will dramatically expand participation in the program by state and local governments and other public entities in an unprecedented way. The proposed rule applies to both private and public federal contractors. It compels public entities (such as schools, hospitals and other public institutions) at the state, county, municipal and local level who have qualifying federal contracts to use the program. In 2007, there were approximately 89,000 combined local governments and public school systems in the U.S. Of these, it is unknown how many of the 39,000 state, county, municipal and township governing bodies have federal contracts.[7] However, a significant portion of these state and local governments and all of their employees would likely be affected. For example, the University of California, a public university system which employs approximately 170,000 faculty and staff, holds multiple contracts with the federal government totaling over $544 million dollars.[8] Under the proposed rule, the University (or any similar university contractor) effectively would be forced to use the program in order to keep and sustain its contracts. The University would be required to verify all newly hired employees regardless of whether they would be working on a federal contract, and verify existing employees working under federal contracts. The requirement would extend to university campuses, medical centers, research laboratories, museums, observatories, marine centers, and other university bodies. The University could potentially be required to verify a majority or perhaps its entire existing workforce. In addition, the lack of specificity in the rule related to subcontractor flowdown could mean that even more employees would be subject to the rule. This is only one example of the rule's impact on public bodies; it is unclear how many colleges, universities and other public institutions could be affected by this rule.

Inaccuracies in Databases

Numerous entities, including those that researched and wrote two independent evaluations commissioned by the former Immigration and Naturalization Service in 2002 and by DHS in 2007, the Government Accountability Office (GAO), and the Social

[7] Local Government and Public School Systems by Type and State: 2007, U.S. Census Bureau.
[8] See www.USAspending.gov Federal Procurement Data System, Contracts to the Regents of the University of California (FY2008); and About Us, University of California website, www.universityofcalifornia.edu/aboutuc

Security Administration's Office of the Inspector General (SSA-OIG), have found that Basic Pilot/E-Verify has significant weaknesses, including (1) its reliance on government databases that have unacceptably high error rates and (2) employer misuse of the program to take adverse action against workers.[9] A 2007 independent evaluation of Basic Pilot/E-Verify program commissioned by the U.S. Department of Homeland Security (DHS) found that "the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification.[10] The findings and problems with the program have also been extensively addressed in numerous and recent Congressional hearings.[11]

The proposed rule mandates federal contractors to use a program which is still in a pilot stage, is largely untested and has serious flaws. Less than 1 percent of all employers in the United States are enrolled in the Basic Pilot/E-Verify program, and only about half of those enrolled employers are active users of the program.[12] The active use of the program by less than 1 percent of employers has already uncovered the program's severe flaws, inaccurate databases, misidentification of workers, and vulnerability to

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[9] *See* FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June, 2002), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; FINDINGS OF THE WEB-BASED BASIC PILOT EVALUATION (Westat, Sept. 2007) (hereafter "WESTAT 2007"), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD; CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm; CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf; CONGRESSIONAL RESPONSE REPORT: MONITORING THE USE OF EMPLOYEE VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Sept. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-36122.pdf; and Richard M. Stana.

[10] WESTAT 2007, at xxi, emphasis added.

[11] Hearing on Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Judiciary Committee, U.S. House of Representatives, June 10, 2008; Hearing on Employment Eligibility Verification Systems and the Potential Impacts on SSA's Ability to Serve Retirees, People with Disabilities, and Workers, Committee on Ways and Means Subcommittee on Social Security U. S. House of Representatives, May 6, 2008; Hearing on Employment Eligibility Verification Systems, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 07, 2007; Hearing on Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, U.S. House of Representatives, April 26, 2007; Oversight Hearing on Problems in the Current Employment Verification and Worksite Enforcement System, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, U.S. House of Representatives, April 24, 2007.

[12] *Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*, (hereinafter "Challenges Exist") GAO-08-895T, Government Accountability Office, June 10, 2008, at 3.

employer abuse and privacy and security weaknesses. These flaws have not been properly addressed or corrected.

Even as enrollment of employers in the program has increased, the active user rate has remained at less than half of enrolled users.[13] In addition, USCIS indicated in March 2008, that temporary staffing agencies were running approximately 50 percent of all the queries on the program even though the temporary staffing agencies did not constitute 50 percent of employers who were enrolled in the program. Mandating a program for hundreds of thousands of federal contractors and the millions of workers they employ, based on a program which has not moved out of the pilot stage, has only a miniscule test rate and a poor success rate is dangerous for employers, employees and the economy.

The proposed rule could deprive federal contractor employees of their livelihoods due to the inaccuracies and database flaws which misidentify workers. The Basic Pilot/E-Verify program relies on Social Security Administration (SSA) and Department of Homeland Security (DHS) databases which are inaccurate and outdated. SSA estimates that at least 17.8 million of its records contain discrepancies related to name, date of birth and citizenship status.[14] The DHS databases also have inaccuracies and are not updated in real-time. The U.S. Citizenship and Immigration Service (USCIS), the agency responsible for managing the program remains a largely paper-based system and has a history of mishandling huge amounts of data.

Mandating Basic Pilot/E-Verify for federal contractors will injure authorized workers by delaying start dates or denying them work opportunities because of data errors. There are multiple reasons for the inaccuracies in the databases upon which the Basic Pilot/E-Verify program relies. First, many of the original data problems can be traced to legacy-Immigration and Naturalization Service (INS) paper files. These files, many of which were produced before current electronic methods became the norm, contained numerous inconsistencies or may have been lost or never updated. Second, the interface capabilities of different agency databases and technology systems have also been problematic; 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 or erroneous data set to evaluate a prospective employee's eligibility to work. Third, women or men who changed their names at marriage, divorce or remarriage may have inconsistent files or may never have informed either SSA or DHS of name changes. 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 same or similar name. Sixth, humans are not infallible; simple key stroke errors by employers or government employees contribute to the volume of erroneous data.

The proposed rule will have a disproportionate negative effect on naturalized citizens because of deficiencies in DHS databases related to naturalization status. As of May 2008, USCIS has made changes to the Basic Pilot/E-Verify program so that when an employee's naturalized citizenship status cannot be confirmed by SSA databases, the employee's information will be checked against DHS databases. Although USCIS has

[13] *Challenges Exist* at 10.
[14] Accuracy of the Social Security Administration's Numident File, *id.*

made minor changes[15] to the Basic Pilot/E-Verify program in order to reduce the number of tentative non-confirmations issued to naturalized citizens, there continue to be significant deficiencies in DHS databases which result in naturalized citizens being misidentified as not authorized to work. This is largely because the legacy Immigration and Naturalization Service did not collect electronic information on persons naturalized prior to 1996.[16] USCIS records often do not reflect the U.S. citizenship status of persons who derived U.S. citizen status as children when one or both parents were naturalized. Furthermore, USCIS naturalization records do not always contain an individual's Social Security Number (SSN) because the SSN was not always a required field on naturalization applications. In the absence of an SSN, DHS would be required to search databases by using an individual's alien number ("A-number") something which becomes obsolete once the person naturalizes to citizen status. Former A-numbers are also not requested from naturalized U.S. citizens on the I-9 Form, which is the basis for the information used to query the Basic Pilot/E-Verify program.[17]

These database errors have a disproportionate impact on foreign-born lawful workers (who are 30 times more likely than native born U.S. Citizens to be incorrectly identified as not authorized to work[18]) and U.S. citizens, with almost 10 percent of naturalized citizens initially being told that they are not authorized to work (versus 0.1 percent for native-born U.S. citizens).[19] Between October 2006 and March 2007, about 3,200 foreign-born U.S. citizens were initially improperly disqualified from working by Basic Pilot/E-Verify.[20]

Selected Examples of U.S. Citizens Misidentified as Eligible to Work

Juan Carlos Ochoa became a citizen in 2000. When he applied for and was offered a job at a car dealership in early 2008, his employer used Basic Pilot/E-Verify to verify his employment eligibility. The employer received a "tentative nonconfirmation" notice due to errors in the Social Security Administration's (SSA's) database;[21] SSA did not have any record of Ochoa's naturalization. Upon receiving the notice, Ochoa's employer fired him, a violation of Basic Pilot/E-Verify rules. Due to being out of work, he was late on his rent and his electricity was shut off. Though Ochoa had a U.S. passport, the local SSA office told him that he would need to bring in his naturalization certificate to prove his U.S. citizenship. Ochoa had lost his naturalization certificate and his only option

[15] Although USCIS and SSA continue to explore options for updating SSA records with naturalization information from DHS records, both agencies are still in the planning stages of this process and implementation of the initiative "may require significant policy and technical considerations." Challenges Exist, Id. at 14.
[16] WESTAT at 99.
[17] *Challenges Exist*, Id.
[18] Westat 2007 at xii-xiii.
[19] Westat at 50.
[20] Nicholas Riccardi, "Arizona Slams Door on Illegal Immigrants: Some Citizens Have Been Bruised, Too, as the State Cracks Down," LOS ANGELES TIMES, Apr. 5, 2008, www.latimes.com/news/nationworld/nation/la-na-arizimmig5apr05,1,6970275,full.story.
[21] Employers receive a "tentative nonconfirmation" notice from either SSA or DHS when the agencies are unable to automatically confirm a worker's employment eligibility. A "tentative nonconfirmation" notice is not an indication of an immigration violation, and workers have the right to contest the finding with the appropriate agency.

for complying with SSA's unreasonable requirement, was to apply for a new naturalization certificate with USCIS which required him to pay close to $400 and wait up to ten months for a replacement certificate.[22]

Abel Pacheco, a naturalized U.S. citizen for eight years, went to look for a new job in Arizona when he lost his job as a truck driver because of the deteriorating economy. He applied with eight different companies, but couldn't figure out why no one called him back with a job offer. When he finally found work, his new employer notified him that it had received a tentative nonconfirmation of employment eligibility notice for him, which turned out to be due to an error in SSA's database.[23] *By the time Pacheco cleared up the problem by presenting his citizenship certificate at his local SSA office, the few weeks without an income had forced his family into financial trouble.*[24]

Ken Nagel, a restaurant owner in Phoenix, Arizona, hired one of his own daughters, a native-born U.S. citizen, and upon feeding her information into the system, received a nonconfirmation of her eligibility to be employed in the U.S.[25]

Fernando Tinoco, a naturalized citizen since 1989, was fired in early 2008 from his job at a Chicago meatpacking plant, approximately two hours after beginning his first shift. His employer had run his name and SSN through the Basic Pilot/E-Verify program and received a tentative nonconfirmation. Even though under the program rules, an employee is allowed to contest a tentative non-confirmation, the employer fired Mr. Tinoco. Even though he was able to resolve the issue with SSA, the employer refused to re-hire him.[26]

In early 2008, a naturalized U.S. Citizen received a tentative non-confirmation, based on an error in SSA databases, because he had changed his name in the naturalization process and SSA had not been notified. When his employer called the DHS 1-800 number for assistance, the employer was told by DHS that the employee's information should be re-queried through the program using the employee's old name, even though the I-9 form the employee had completed

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[22] Veronica Sanchez, "U.S. Citizen Claims He's Victim of Employer Sanctions," 12 News, Mar. 7, 2008, http://img.azcentral.com/12news/news/articles/employersanctions03072008.html.

[23] It's very possible that one or more of the companies that didn't call him back had run his information through Basic Pilot/E-Verify and, upon receiving a tentative nonconfirmation, decided not to take a chance on hiring him. This is an illegal but not uncommon practice.

[24] Christina Boomer, "Some Valley Workers Having Trouble with E-Verify," KPNX-TV, Phoenix, Mar. 24, 2008, www.abc15.com/news/local/story.aspx?content_id=07e5d455-d95b-4fbb-be43-2d1ee7318972.

[25] Ronald J. Hansen, "Economy Serves Up Unhappy Meal: Worst Lull in 2 Decades is Hurting Valley Restaurateurs," ARIZONA REPUBLIC, Mar. 3, 2008, www.azcentral.com/business/articles/0303biz-econrestaurants0303.html.

[26] Alexandra Marks, "With E-Verify, too many errors to expand its use?" The Christian Science Monitor, July 7, 2008, http://www.csmonitor.com/2008/0707/p02s01-usgn.html; Testimony of Christopher J. Williams, Esq., Director of the Working Hands Legal Clinic before the U.S. House of Representatives Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, June 10, 2008.

contained his new name.[27] It is a violation of the Basic Pilot/E-Verify rules to enter employee information that is not contained on the I-9 form.

Selected Examples of Lawfully Present Immigrants Misidentified as Not Eligible to Work

A refugee applied for a job with an oil production company in Texas in 2007. When his employer entered his information into Basic Pilot/E-Verify, the employer received a tentative nonconfirmation notice due to errors in SSA's database. After receiving the notice, the company fired the worker without giving him an opportunity to contest the finding, although doing so is required by law. The refugee went on his own to SSA to correct the matter, but it wasn't until the Office of Special Counsel for Immigration-Related Unfair Employment Practices Division intervened that the company hired him back[28]

An employment-authorized immigrant was hired by a laundry facility in Minneapolis, Minnesota, in 2008. His employer was enrolled in Basic Pilot/E-Verify, but when the employee's name was entered into the system, his employer received a tentative nonconfirmation notice about the worker because of discrepancies in SSA's database. The worker was able to resolve the issue with the local SSA field office; however, when the employer reentered his information into the system, the employer received a "final" nonconfirmation. Although the employer wanted to keep the worker, under Basic Pilot/E-Verify rules, the employer had to fire the worker or risk being found liable for violating immigration laws.[29]

In 2008, a foreign student lawfully present in the U.S. on an F-1 visa, hired by an employer under the CPT program, was issued a tentative nonconfirmation. Upon investigating the TNC, the student learned that his F-1 status had been accidentally terminated in the SEVIS database by his university. The student and employer were forced to spend additional time and resources correcting the problem with the university and DHS. Although the employer was issued a final nonconfirmation, they resolved it (with USCIS) as an invalid query and re-entered the information, as instructed by the E-Verify helpline, to allow more time for SEVIS to be corrected by the student's university so the E-Verify query would be approved.[30]The same employer has reported that it has experienced a steady stream of tentative nonconfirmations, primarily related to foreign-born individuals who have changed their names.

The proposed rule mandates use of a program whose inaccuracies could exponentially increase with such a large scale-up and errors which have not yet been corrected. The inaccuracies in the databases upon which the Basic Pilot/E-Verify

[27] As reported to NILC staff by Dan Maranci at Verrill Dana, LLP, Boston, MA in August 2008.
[28] Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice, TELEPHONIC INTERVENTIONS: OCTOBER 1, 2006 – SEPTEMBER 30, 2007.
[29] Case reported to NILC staff by Bruce Nestor of De León & Nestor, Minneapolis, Minnesota, in April 2008.
[30] Case reported to NILC staff by Dan Maranci at Verrill Dana, LLP, Boston, MA in August 2008.

program relies are well-documented. Although USCIS has made recent adjustments and changes to the program, the rate of individuals who are immediately verified as authorized to work has remained static.[31] As changes to the program continue to be made, and additional government databases are added, the inaccuracies in the program remain and could even be exacerbated with the addition of new databases that contain unknown amounts of erroneous data. Furthermore, the data upon which the Basic Pilot/E-Verify program relies, especially SSA records and databases, have a known non-negligible set of errors.[32] In some analyses the error rate approaches 10%. For example, SSA has estimated that in its Numident file, at least 17.8 million (or 4.1 percent) of records contain discrepancies related to name, date of birth, or citizenship status, with 12.7 million of those records belonging to U.S. citizens.[33] Any system using the SSN Numident data must address the issue of false positive results that could misidentify and prevent authorized workers, including U.S. Citizens, from working.

The proposed rule does not take into account the problems workers will face as they try to correct inaccuracies in federal databases. For workers who receive tentative nonconfirmations, the challenges in correcting federal database errors are significant. All workers misidentified by the Basic Pilot/E-Verify program, regardless of citizenship, who need to prove that they are eligible to work will have to correct their records with either SSA, DHS, or both. This will be extremely difficult for many individuals, especially those living in rural areas or with limited resources. It could also mean termination from their jobs if they are not able to reconcile the problems immediately, or if an employer does not follow the program rules and prematurely terminates them.

For example, a worker in Arizona who receives a tentative non-confirmation based on errors in the system, might be unable to resolve a tentative non-confirmation in a timely way due to state and federal administrative requirements. There are 16 SSA offices throughout Arizona; however, they are open only between 9 a.m. and 4 p.m. and are closed on weekends, so visiting an SSA office often means missing work. In order to correct errors with SSA, workers have to present original documents, e.g., birth certificates[34], marriage licenses, permanent resident cards ("green cards"), or naturalization certificates. Some workers who lack those original documents will have to obtain replacement documents in order to prove their citizenship or immigration status.

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[31] Only 92% of persons queried are immediately verified as work authorized.

[32] Testimony of Eugene H. Spafford, Chair of The U.S. Public Policy Committee of The Association For Computing Machinery (USACM), before the Subcommittee on Social Security, Committee on Ways and Means Hearing, U.S. House of Representatives on "Employment Eligibility Verification Systems and the Potential Impacts on the Social Security Administration's (SSA's) Ability to Serve Retirees, People with Disabilities, and Workers", May 6, 2008, p. 3; Testimony of Peter G. Neumann, Principal Scientist, before the Subcommittee on Social Security, Committee on Ways and Means Hearing, U.S. House of Representatives, June 7, 2007, p.5.

[33] CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006)

[34] Certified copies of Arizona birth certificates for births occurring before 1989 are not available on the same day they are requested, even if the request is in-person. Although requests may be made in-person, through mail, or the Internet, all birth certificates for births occurring before 1990 are not available for in-person pick-up and can only be received through the mail. Requests for birth certificates take approximately 15-20 days for processing. Expedited processing (3-5 business days) is available only through the Internet. See www.azdhs.gov/vitalrcd/birth_index.htm a webpage of the Arizona Dept. of Health Services, Division of Public Health Services.

So in addition to missing work and the time spent traveling to SSA offices, workers will also have to spend time obtaining replacement documents from state or federal agencies, for which they will have to pay often exorbitant fees.[35] Arizona workers who need to obtain replacement documents such as green cards or naturalization certificates will be forced to wait months for these documents due to processing backlogs within U.S. Citizenship and Immigration Services (USCIS). The USCIS California Service Center, which processes applications for Arizona residents, is just now processing applications for replacement green cards that were filed in August 2006. These lawful workers could be forced to go months without being able to earn a living, provide for their families, and pay their bills.

Employer Abuse and Discrimination

The proposed rule mandates federal contractors to use a program that has "substantial" rates of employer abuse. The 2007 evaluation of Basic Pilot/E-Verify found that the rate of employer noncompliance with the program rules is "substantial.[36] Specifically, some employers who use the voluntary program engaged in illegal employment practices,[37] including: pre-employment screening (47 percent);[38] failure to give employees notice of a tentative non-confirmation notice (TNC) (9.4 percent);[39] encouraging employees not to contest TNCs (7 percent);[40] adverse employment action based on issuance of tentative non-confirmation notices such as restricting work assignments (22 percent);[41] delaying job training (16 percent),[42] reducing pay (2 percent),[43] re-verification of existing employees (30 percent);[44] increasing work hours; ignoring poor working conditions; and failure to inform workers of their rights under the program.[45] The proposed rule takes no steps to mitigate or prevent employer abuse.

The proposed rule will result in an increase in employees being unable to resolve any tentative non-confirmations within a reasonable time and make them more susceptible to employer discrimination. Employees who are queried through the Basic Pilot/E-Verify program and are issued tentative non-confirmations have eight (8) federal working days to contest the finding. Once they choose to contest an erroneous finding, the resolution of the issue, depending on the reason for the erroneous TNC, could take an unreasonably long time to resolve. The GAO has reported that the secondary verifications needed to resolve TNCs, often lengthen the time needed to complete the employment verification process.[46] Mandating federal contractors to use the program will result in an increase of the workers issued tentative non-confirmations, and therefore, a predictable increase in the workload for employers, employers, DHS and SSA. Mandating this

[35] Current applications to USCIS for replacement green cards or naturalization certificates require a $370 filing fee.
[36] *See* Westat 2007, at xxii
[37] *See id.* at xxiii.
[38] Westat 2007 at 71.
[39] *Id.* at 76.
[40] *Id.* at 77.
[41] *Id.* at 76.
[42] *Id.* at 77.
[43] *Id.*
[44] *Id.*.
[45] *Challenges Exist*, id. at 17.
[46] *Challenges Exist*, id. at 12.

program without proper upgrades, system changes and employer oversight, will mean that workers would be subjected to unreasonable delays in resolving their TNCs. Government-commissioned studies have already shown that workers who are issued TNCs often experience adverse treatment by employers such as delayed job training, restricted work assignments, and reduced pay. The proposed rule would only increase these incidents.

The proposed rule will lead to increased discrimination and an unwillingness to hire workers who are perceived by the employer to look or sound "foreign." Government-commissioned reports have already shown that some employers who use Basic Pilot/E-Verify engage in illegal employment practices, and evidence suggests that such employers, when hiring, may discriminate against workers who look, sound or dress "foreign," or who have "foreign-sounding" names. Mandating use of the program will pressure federal contractors to give preference in hiring to applicants they believe "look like" U.S. citizens. In addition, mandating federal contractors to use Basic Pilot/E-Verify without addressing the problem of discriminatory practices by employers will have an even greater impact on the number of employees who experience discrimination at the hands of unscrupulous employers.

The proposed rule would apply to public institutions with federal contracts; such institutions could misuse the program for purposes other than immigration status. The various government-commissioned reports on the Basic Pilot/E-Verify program indicate that employer abuse of the program is still "substantial." Many employers use the program in prohibited ways or discriminate against employees. By expanding the program to public institutions with federal contracts, the proposed rule runs the risk of inviting a new type of employer abuse; using the program to query someone who is not an employee.

The proposed rule will increase the rates of employer abuse of the Basic Pilot/E-Verify program because there is little monitoring of employers by USCIS. The Basic Pilot/E-Verify program continues to be extremely vulnerable to employer fraud and/or misuse of the program.[47] USCIS has been unable to adequately monitor and prevent such abuses. Although USCIS has newly established a Monitoring and Compliance division to attempt to oversee employers, its implementation efforts "are in the early stages, and it is too early to tell whether these efforts will fully ensure that all employers are properly using [the program] and following requirements under a mandatory program."[48] In addition, the Monitoring and Compliance unit is currently staffed by 21 employees charged with monitoring approximately 61,000 employers.[49] These staff have not been able to adequately prevent the "substantial" employer abuse of the program as discovered by the Westat 2007 report.[50] A four-fold increase in employers, brought on by the mandatory application to federal contractors, without addressing the problems of employer abuse and the ability to provide appropriate monitoring and compliance will surely lead to an increase in employer abuse which could remain largely unchecked.

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[47] *Challenges Exist*, id. at 5.
[48] *Challenges Exist*, id.
[49] *Challenges Exist*, id. at 11.
[50] *Challenges Exist*, id. at 18.

The proposed rule will increase the rates of employer abuse of the Basic Pilot/E-Verify program because the monitoring and compliance procedures followed by USCIS are virtually untested and in the early stages of development. USCIS currently interacts with employers who it believes to be in non-compliance in four ways: 1) sending the employer letters or emails (45 percent of workload); 2) follow-up phone calls to the employer (45 percent of workload); 3) "desk audits" requiring the employer to send documentation to USCIS (9 percent of workload); and 4) in-person site visits (1 percent of workload).[51] Under the current voluntary program, USCIS is reaching approximately 6 percent of participating employers regarding non-compliance.[52] USCIS estimates that under a mandatory program for all employers, that outreach would decrease to between 1 and 3 percent. The proposed rule as applied to federal contractors would significantly decrease USCIS's ability to properly monitor employers who abuse the program and engage in prohibited and discriminatory behavior against employees. This is especially true considering that USCIS is "still in the early stages of implementing its monitoring and compliance activities. Therefore, it is too early to tell whether these activities will ensure that all employers fully follow program requirements and properly use E-Verify under a mandatory program, especially since such controls cannot be expected to provide absolute assurance."[53]

Selected Examples of Employer Abuse of the Program

A lawfully present immigrant worker applied for and was offered a job by a construction, fabrication and maintenance company in Texas in January 2008. The employer was enrolled in Basic Pilot/E-Verify and received a tentative nonconfirmation notice about the worker. Violating program rules, the employer did not give the worker the opportunity to contest the notice. Despite this, the worker went to the local SSA office and received the appropriate confirmation that he was, in fact, authorized to work. Even with clarification from SSA, the employer refused to take the worker back. The worker even enlisted the help of an attorney, who sent a letter to the employer outlining its obligations under Basic Pilot/E-Verify. The employer failed to respond.[54]

A naturalized U.S. citizen used the services of an employment services company in San Francisco, California, in November 2007 to look for a job. After applying online, she was given an appointment and told that there were a number of employers that would be interested in her based on her extensive work history. The next day, the employment agency told her that she could not be offered a job because the agency could not verify her U.S. citizenship. The employment services company was enrolled in Basic Pilot/E-Verify and received a tentative nonconfirmation notice about the worker because the system, including the federal databases on which it relies, could not make a determination about her work authorization. The employment agency violated Basic Pilot/E-Verify rules by refusing to give her a copy of the notice, though she requested one in order to seek legal advice. The agency demanded that she sign the notice right away so it could destroy copies of her documents. When she refused, the employment

[51] *Challenges Exist*, id. at 19.
[52] *Challenges Exist*, id.
[53] *Challenges Exist*, id.
[54] Information provided to NILC by the Southern Poverty Law Center in January 2008.

agency told her that it could not place her because she was ineligible to work in the U.S.[55]

Photo Identification Requirement

The proposed rule's requirement that existing federal contractor employees be verified through Basic Pilot/E-Verify, and be required to present photo identification to establish identity, may result in lawfully present immigrants and U.S. citizens being terminated from work. It has been estimated that approximately 11 percent of U.S. citizens do not have government-issued photo identification.[56] That translates into roughly 21 million citizens, when compared to the most recent population estimates by the U.S. Census Bureau. Other studies have also estimated that at least 11 million citizens do not possess a U.S. passport or birth certificate[57]; restrictive state and federal laws often prevent individuals from obtaining government-issued photo identification without these types of underlying documents. Not only is it increasingly difficult to obtain photo identification, but it is expensive as well; many citizens cannot afford the fees associated with obtaining certain documents. Studies also indicate that members of minority populations are less likely to have photo identification. In addition, many lawfully present immigrants such as recent refugees and asylees do not always have photo identification. There are also many situations where individuals may have the right to work but have not yet received a physical Employment Authorization Document such as persons with pending adjustment of status applications. The proposed rule also fails to make exceptions for cases where photo identification has been lost or destroyed due to crime, accidents, natural disasters or other causes.

The proposed rule would have a discriminatory impact on vulnerable and minority populations because use of the Basic Pilot/E-Verify program requires employers to accept only photo identification from employees, something which many employees do not have, or can have difficulty obtaining. National studies have shown that there is a correlation between income and possession of a birth certificate or passport, or alternately between income and the possession of a valid form of photo identification.[58] It is estimated that at least 8.1 percent of persons who make less than $25,000 do not have a passport or birth certificate, while only 4.6 percent of individuals making more than $25,000 do not have such documents.[59] One recent study in Indiana determined that as income increased, so did the likelihood that the individual had a valid form of photo identification.[60] It was estimated that 17.5 percent of Indiana residents making less than $40,000 did not have access to a valid form of photo identification. The Indiana study found that "income ha[d] the most robust impact on access to valid forms of identification in Indiana."[61]

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[55] Technical assistance request call received by NILC in December 2007.
[56] *Citizens Without Proof, A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Documentation*, Brennan Center for Justice, New York School of Law, November 2006.
[57] *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens*, Center on Budget and Policy Priorities, September 22, 2006.
[58] *Id*.
[59] *Id*.
[60] *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, Working Paper, Washington Institute for the Study of Ethnicity and Race, November 8, 2007.
[61] *Id.*

Women also tend to be more vulnerable to laws that require providing photo identification. Some studies have shown that women are at least twice as likely as men not to have a driver's license or that one of every five elderly women does not have a driver's license.[62] In addition, for those citizens who do not have any form of identification, over 70 percent are estimated to be women.[63] Another study has showed that African-Americans are half as likely to have driver's licenses when compared to whites.[64] The disparities are even greater for young African-Americans. Studies have shown that only 22 percent of African-American men (age 18-24) have a valid driver's license.[65]

Privacy and Security Concerns

The proposed rule mandates federal contractors to use a program that is vulnerable to security threats and could compromise worker privacy. Although USCIS has invested in internal security improvements, it continues to be open to significant security vulnerabilities or compromise by outsiders seeking to manipulate the immigration system. DHS has failed to detect cyber break-ins to its system, has failed to comply with Federal Information Security and Management Act (FISMA) standards since its inception[66], does not screen entities enrolling in the Basic Pilot/E-Verify program to verify that they are bona fide employers[67], and has other unresolved technological flaws which invite identity theft and could lead to other misuses of workers' and employers' private information.

The proposed rule mandating Basic Pilot/E-Verify for federal contractors will create a new target for electronic identity thieves. The repositories of work-eligible employees' identities –including employers' databases and human resources files and the very government databases used for eligibility screening – will become more inviting targets for identity thieves. No database can be entirely secured from dedicated hackers; companies and the government have demonstrated that they are historically poor protectors of the public's sensitive and private personal data. These new mega-databases will become especially inviting targets for identity thieves because they will contain troves of rich personally identifiable data.

The proposed rule seriously exposes the Basic Pilot/E-Verify Information Technology (IT) system to abuse, theft, and corruption. Distributed, widely accessible databases, such as the type used by the Basic Pilot/E-Verify program, are especially valuable targets for abuse, theft and corruption by outside sources.[68] These types of databases also pose especially difficult problems for protection of security and privacy.

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[62] Survey, *id*.
[63] *Id.*
[64] *The Driver License Status of the Voting Age Population in Wisconsin* by John Pawasarat, Employment and Training Institute, University of Wisconsin-Milwaukee: June 2005, May 10, 2006.
[65] *Id.*
[66] DHS received a "D" in computer security for 2006 (up from an "F" for the previous 3 years). See Seventh Report Card on Computer Security at federal Department and Agencies (Ranking Member Tom Davis, House Oversight and Government Reform Committee, April 12, 2007).
[67] Westat 2007 at xxvi.
[68] *Spafford Testimony*, Id. at 3; Neumann Testimony, *id*. at 2-3.

The Basic Pilot/E-Verify program does not have adequate protections against these types of problems. For example, "authorized users 'phishing' (using electronic means to fraudulently acquire sensitive information) for valid ID information and cyber-stalking would be problems without special protections."[69] The system also needs to have system requirements in place for audit of access, breach notification, independent audit and review, and penalties for unauthorized use or abuse of the system or its data.[70]

The proposed rule mandates use of a program which cannot fully address identity fraud issues by employers or employees. The Basic Pilot/E-Verify program cannot detect when an unauthorized worker presents valid documents that do not belong to the worker.[71] The proposed rule mandates use of a system that rests solely on the presentation of a work-eligible identity document by an employee who arrives at the workplace to work. In addition, government-commissioned reports have shown that many employers use the same valid identity information to verify multiple workers. The June 10, 2008 GAO report states that this issue continues to be a problem and has not yet been addressed. Mandating this program for federal contractors will not prevent the hiring of undocumented workers by unscrupulous employers.[72]

The proposed rule does not address how the data collected through the Basic Pilot/E-Verify program should or should not be used. There is no guarantee that the information collected by both government agencies and employers that is gathered for one purpose will not be used for another purpose without an individual's consent. There are virtually no procedures for workers to access information held about them by DHS and SSA in a timely fashion and without petitioning the government for access. The proposed rule should not mandate a program without being able to assure that private information is protected against unauthorized losses such as data breaches or identity theft.

The proposed rule mandates use of a program with severe problems related to employer misuse of employees' private information and potential abuse of the system by individuals posing as employers. The 2007 Westat report found that employers who used the Basic Pilot/E-Verify program were not appropriately handling their employees' personal information.[73] The report also noted that anyone posing as an employer could access the Basic Pilot/E-Verify program and that USCIS did not have the capability to verify whether an employer was legitimate.[74] Mandating the program for such a large group of employers will surely tempt some individuals to register for the program by falsely representing themselves as employers. Due to the large influx of enrollments, USCIS will be unable to verify that each and every entity or person registering under the federal contractor rule is actually an employer. USCIS has not yet been able to determine whether it will be able to address all privacy concerns related to these and other issues.[75]

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[69] *Id.*
[70] *Spafford Testimony* at 3.
[71] *Challenges Exist*, id. at 5.
[72] *Challenges Exist*, id. at 17.
[73] *Id.*
[74] *Id.*
[75] *Id.*

The proposed rule requires federal contractors to use yet another government program that cannot ensure the safety of worker's information. The government has a poor history of safeguarding the electronic records and information of lawful foreign-born and U.S. citizen workers. For example, the government has been unable to prevent its own employees from improperly accessing personal information of U.S. citizens' passport files. A State Department audit from early 2008 found that there was a widespread lack of control on the personal data of 127 million citizens and that numerous weaknesses existed such as lack of policies and procedures regarding access to personal records.[76]

Technology Concerns

The proposed rule marks a significant shift towards mandating the Basic Pilot/E-Verify program as the only technological mechanism by which to determine whether anyone in this country can work. "Any widespread shift to mandating an [electronic employment verification system] as the sole means of determining employment eligibility has significant social impact as well as technological impact. Historically, someone in this country willing to put in a honest day's work would be employed (or not) on the decision of a person. Requiring that decision to be overruled by technology is a not-insignificant change that would remove or penalize human judgment in exigent or compassionate circumstances, especially in cases of error."[77]

The proposed rule does not address the need for protections for federal contractors and employees against inability to use the system due to unexpected events such as natural disasters or loss of utilities such as electricity or internet access. Availability of the system under these circumstances and potential large-scale losses of personal records (such as Hurricane Katrina) will affect both the employer and the employee and could prevent or unduly delay necessary employment in times of great need. The rule includes no exceptions to compliance with the program by federal contactors under these circumstances. Natural disasters are not the only threat to federal contractors forced to participate in the program, and businesses also could face unforeseen interruptions in internet access that would prevent them from being unable to comply with the program. For example, the Navajo nation recently faced an imminent shutdown of all internet access for a 27,000 square mile area located in the Southwestern part of the U.S.[78] Such unanticipated losses would have serious consequences for business owners and employees.

The proposed rule mandates federal contractors to use a program whose infrastructure cannot support the anticipated increase in use and a four-fold "scale-up." The scalability of Basic Pilot/E-Verify to a mandatory program, even if just for federal contractors, raises serious architectural issues because it will have to handle a vast increase in users, queries, transactions, and communications volumes. Each time a system grows larger, serious new technical issues arise that were not previously significant. The

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[76] Audit: Passport privacy controls absent, UPI, July 4, 2008, online at http://www.upi.com/Top_News/2008/07/04/Audit_Passport_privacy_controls_absent/UPI-75141215185205/

[77] *Spafford Testimony* at 3.

[78] *Navajos Could Lose Net Access: FCC Grant Dispute Threatens Public Safety Communications* by Holly Watt, The Washington Post, August 1, 2008.

proposed rule will scale-up use of the Basic Pilot/E-Verify program by approximately four-fold; an increase that will strain the program and could result in compromise or failure of the program. Scalability is always a concern when scaling-up technology. Experts have found that scaling-up systems too quickly often introduces new unforeseen problems in the technology.[79] This could include stress on budgets, program or prototype design, and other unforeseen consequences that compromise important protections, or cause a program to fail.

The proposed rule will overload the Basic Pilot/E-Verify program with millions of queries which the system is not equipped to handle. In fiscal year 2007, under a voluntary system, the program processed about 3.2. million employer queries by fewer than 61,000 employers.[80] USCIS estimates that the current program, using one server, has been tested to handle approximately 40 million queries per year.[81] However, there has been no evaluation of what a mandatory application to federal contactors would require of the system and whether the test rate of the program could actually process almost a four fold increase in queries if applied solely to federal contractors.[82] In addition, there is no indication that USCIS has started to upgrade its technology or purchase the additional servers such an increase would demand.

Administrative Burdens

The proposed rule has a serious impact on all federal agencies but is especially detrimental to the Department of Homeland Security (DHS) and the Social Security Administration (SSA). SSA is at its lowest staffing levels since the 1970s, and numerous experts on the agency have testified that a mandatory imposition of the Basic Pilot/E-Verify system could "cripple SSA's service capabilities and negate progress in addressing the disability benefits application backlog.[83] DHS has also faced consistent problems with serious backlogs in processing applications filed with USCIS.[84]

The proposed rule will further distract the Social Security Administration (SSA) from its core mission of administering critical benefits programs. SSA estimates that making the program mandatory will result in 3.6 million extra visits or calls to SSA field offices per year, which would result in 2,000 to 3,000 more work years, the necessity of hiring more staff, and hundreds of millions of dollars more in expenses each year.[85] As of January 2008, over 750,000 Social Security cases were awaiting decisions on disability claims, with an average wait time per case of 499 days. Over 50 percent of people who

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[79] Spafford Testimony, *id*. at 3; Neumann Testimony, *id.* at 4
[80] *Challenges Exist*, *id.* at 10.
[81] *Id.*
[82] It has been projected that a mandatory application to federal contractors would initially affect 200,000 contractors and about 4 million employees. We can extrapolate that if the system processed about 3.2 million queries in FY 2007 with an enrollment of less than 61,000 employers, that an enrollment of 200,000 employers could potentially produce about 10.5 million queries; a four-fold increase in queries.
[83] Testimony of Richard Warsinksy, President, National Council of Social Security Management Associations, before the Committee on Finance, U.S. Senate, May 23, 2007.
[84] For example, in March 2007, USCIS had an estimated backlog of 1,275,795 applications. Citizenship and Immigration Services Annual report 2007 (Dept. of Homeland Security, June 11, 2007).
[85] Transcript from Hearing on Employment Eligibility Verification Systems, *supra* note 12.

call a local SSA field office with inquiries receive a busy signal. Since Basic Pilot/E-Verify relies on sometimes outdated or erroneous information in SSA databases, requiring federal contractors to use it could result in a massive overload to SSA systems as workers try to correct their records. Any attempts to make Basic Pilot/E-Verify mandatory, even if only for federal contractors, would spiral the agency further into bureaucratic gridlock.

The proposed rule would require SSA to divert much needed resources away from its true mandate and would impose an enormous financial burden on the agency. SSA has estimated that a mandatory application of the Basic Pilot/E-Verify program for all employers would cost a total of approximately $281 million for fiscal years 2009 through 2013 and would require hiring 700 new employees for a total of 2,325 additional workyears over that same five-year period.[86] Any mandatory application, such as to federal contractors, will have a significant economic impact on SSA. Implementing this rule without allowing SSA to conduct a cost analysis will further jeopardize the ability of SSA to administer its many entitlement and benefits programs.

The proposed rule will have significant additional direct and indirect costs to SSA. Any changes to the current voluntary Basic Pilot/E-Verify program will have a significant impact on SSA. Additional costs the agency will be required to take on will include start-up costs, system upgrades, training for current and new SSA employees, physical workspace and workstations, and other ongoing activities such as field office visits and system maintenance.[87] However, these are only estimates of direct costs and there is no way to predict what will be the actual impact that mandatory use by federal contractors will have on SSA's ability to meet the demands of the Basic Pilot/E-Verify program and it's ability to perform other core functions outside this program. In addition, the cost of any mandatory application of the program would be driven by the increased workload of SSA field office staff due to the need to resolve erroneous tentative non-confirmations.[88]

The proposed rule relies, in part, on DHS efficiency and accuracy of information, something which DHS does not have an established history of providing. DHS is notorious for its inability to resolve existing backlogs in processing applications submitted by immigrants to USCIS, an agency within DHS. USCIS has a consistent history of mishandling the huge volume of data for which it is responsible. Problems have included inaccurate databases, privacy and security lapses,

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[86] *Challenges Exist*, *id.* at 4, 11.
[87] *Challenges Exist*, *id*. at 11.
[88] *Challenges Exist*, *id.* at 12.

and difficulty in fielding and developing information systems. [89]Additionally, the GAO found in a review of 14 USCIS district offices in 2006 that over 110,000 immigrant records were lost.[90] For example, the General Accounting Office and the Justice Department's own Inspector General consistently condemned the legacy-Immigration and Naturalization Service for the quality of its records. In 2003, NILC compiled GAO and OIG reports illustrating the INS data problems. The reports included evidence of mismanagement or misconduct within the INS, the inadequacy of INS data and records systems, and the unreliability and inaccuracy of INS data. Although Congress abolished the INS and moved its operation into the Department of Homeland Security, its records and record management techniques continued to be relied upon. [91]

The proposed rule would overwhelm USCIS , which is currently understaffed and unprepared to handle such a massive increase in use by employers. USCIS will need additional staff to handle a mandatory application to federal contractors, but there has been no undertaking by the agency to properly assess its actual needs under any mandatory program.[92] USCIS currently has only 121 employees nationwide to staff the entire Basic Pilot/E-Verify program[93]; expecting that this staff would be able to efficiently and effectively cope with a four-fold increase in employers is unrealistic.

Implementation of the proposed rule is fiscally hazardous because neither DHS nor USCIS have prepared official cost estimates for implementation of the rule. As of June 2008, DHS had not prepared official cost figures of what resources would be required to implement a mandatory Basic Pilot/E-Verify program.[94] USCIS had only estimated that a mandatory program applied to all employers could cost $765 million for fiscal years 2009 through 2012 if only applied to new-hires and about $838 million if applied to new-hires and existing employees; there is no evidence that USCIS or DHS has performed any estimate of what a mandatory program (requiring federal contractors to verify newly hired and existing employees) could cost the agency.

Due Process

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[89] See, e.g., HOMELAND SECURITY NEEDS TO IMPROVE ENTRY EXIT SYSTEM EXPENDITURE PLANNING (General Accounting Office, June 2003), www.gao.gov/new.items/d03563.pdf ; and CHALLENGES TO IMPLEMENTING THE IMMIGRATION INTERIOR ENFORCEMENT STRATEGY (General Accounting Office, Apr. 10, 2003), www.gao.gov/new.items/d03660t.pdf. More recently, DHS stated that it is indefinitely postponing implementation of the land border exit–tracking element of its U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program because the technology needed to make it cost-effective is not yet available. See Rachel L. Swarns and Eric Lipton, "Administration to Drop Effort to Track if Visitors Leave," N.Y. TIMES, Dec. 15, 2006, at A1; see also US-VISIT PROGRAM FACES STRATEGIC, OPERATIONAL, AND TECHNOLOGICAL CHALLENGES AT LAND PORTS OF ENTRY (Government Accountability Office, Dec. 2006), www.gao.gov/new.items/d07248.pdf.

[90] Immigration Benefits: Additional Efforts Needed to Help Ensure Alien Files Are Located When Needed (Government Accountability Office, Oct. 2006, www.gao.gov/new.items/d0785.pdf at 4.

[91] INS Data: The Track Record, National Immigration Law Center, 2003, online at http://nilc.org/immlawpolicy/misc/INS%20data%20accuracy.pdf

[92] *Challenges Exist* at 4.

[93] *Id.*

[94] *Id.*

The proposed rule lacks 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. However, the Basic Pilot/E-Verify currently lacks sufficient due process protections to aid workers who are wrongly denied the right to start their next job. This creates a new employment blacklist –a "No-Work List" – that will consist of would-be employees who are blocked from working because of data errors and government red tape. True due process requires the availability of open, accessible, efficient and quick administrative procedures so as to enable any aggrieved worker to get back to work and so as not to deprive an employer of its chosen employee.

The current Basic Pilot/E-Verify program does not have legal remedies in place that would allow workers to seek necessary redress through administrative or judicial procedures. The Westat 2007 report found that many employers fail to post the Web Basic Pilot Notice where it can be seen by job applicants and fail to notify employees of tentative nonconfirmation findings and the procedures to contest those findings.[95] The proposed rule's vast expansion in the use of the Basic Pilot/E-Verify would correspondingly increase the number of workers who will not even be informed that they have been prevented from working by the program.

Workers who do learn they have been wrongly prevented from working by the Basic Pilot/E-Verify program could possibly rely on the Federal Tort Claims Act (FTCA). However, the FTCA fails to provide an adequate procedure or remedy for the hundreds of thousands who would surely be negatively affected by the imposition of a mandatory program.[96] The U.S. Court of Claims has reported an extensive backlog of cases and requires a worker to exhaust a six-month long waiting period before filing a lawsuit.[97] During the entire period of an FTCA administrative procedure, and the pendency of any lawsuit, an aggrieved worker would be barred from working.[98]

Economic Effects to Business and the U.S. Economy

The proposed rule would have a devastating effect on the economy. Many businesses rely on federal contracts for a substantial portion of their income. Mandating them to use the Basic Pilot/E-Verify program is a lose-lose situation for America and our economy. Mandating use of an inaccurate system means that 8 percent of all federal contractor employees could potentially be misidentified as not eligible to work. A June 10, 2008, report from the Government Accountability Office (GAO) confirms that only 92 percent of employees are immediately confirmed as eligible to work. This inaccuracy rate means that by implementing the rule, hundreds of thousands of federal contractor employees could be issued a TNC and be at risk for losing their jobs. For example, one employer with a workforce of between 3,000 and 4,000 employees, has reported having a steady stream of tentative nonconfirmations for many of its employees. Due to the volume of TNCs and the time and resources needed to correct the problem, the employer has had to

[95] Westat 2007 at 75-76.
[96] Testimony of Timothy Sparapani, Senior Legislative Counsel, American Civil Liberties Union, before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, June 10, 2008.
[97] *Id.*
[98] *Id.*

institute an informal policy allowing employees four (4) hours of paid time-off in order to resolve the issue.[99]

The proposed rule does not negate the law of supply and demand and will drive undocumented workers further into the underground economy. The idea that any electronic employment eligibility verification system could eliminate our economy's demand for workers is naïve; contractors that need workers will continue to hire them "off the books," if forced to do so. The Congressional Budget Office (CBO) recently estimated that mandatory use of Basic Pilot/E-Verify by all U.S. employers would lead to an increase in undocumented workers being paid outside the tax system, which over a 10-year period would result in a loss of $17.3 billion in federal revenue. Federal contractors comprise a significant percentage of U.S. employers and generate billions of dollars, mandating them to use the Basic Pilot/E-Verify will create a serious loss in revenue. In addition, making Basic Pilot/E-Verify mandatory without providing a path to authorized status for the existing unauthorized work force will force more workers into the underground economy and divert billions of dollars.

Any expansion of the program or effort to mandate it for large segments of the employer population without providing a path to legal status for the 7 million unauthorized workers in this country is an unworkable strategy that will destabilize our entire workforce and the U.S. economy. The proposed rule states that implementation of a mandatory Basic Pilot/E-Verify program for federal contractors will provide a more stable workforce. However, no evidence has been provided that this would be the result of such an implementation. In fact, if anything, the opposite has been demonstrated. Implementation of this rule will result in: the misidentification of lawfully present immigrants and U.S. citizens as not authorized to work; employer abuse of the program and discrimination against employees; and the potential removal of millions of workers from the economy. These results will not be beneficial for the U.S. workforce or our economy. Without meaningful reform of our nation's broken immigration system and the provision of a path to legalized status for unauthorized workers already here, any expansion of the Basic Pilot/E-Verify or any mandate of its use for employers would be doomed to fail even were its problems corrected. The inherent defects and deficiencies of the program cannot be ignored. Expanding the program without providing a path to legal status for the 7 million unauthorized workers in our country is an unworkable strategy that jeopardizes the economy, destabilizes the workforce and continues to force unauthorized workers deeper into the shadows.

The proposed rule imposes costs on federal contractors of at least $100 million in the first year and between $550 to $670 million during the next 10 years will have a disproportionate effect on small businesses and their ability to contribute to the economy. The proposed rule anticipates that every one of the 324,250 small businesses registered to do business with the federal government at the contractor or subcontractor level will be impacted. Small businesses employ approximately half of the entire U.S. workforce and have generated 60 to 80 percent of net new jobs annually over the last decade.[100] These businesses (many of which are immigrant-, minority-, or family-

[99] As reported to NILC staff by Dan Maranci of Verrill Dana, LLP in Boston, MA in August 2008.
[100] For more information about the importance of small businesses to the U.S. economy, *see* FAQS: ADVOCACY SMALL BUSINESS STATISTICS AND RESEARCH (U.S. Small Business Administration), http://app1.sba.gov/faqs/faqIndexAll.cfm?areaid=24.

owned), already struggling in the current economy, will face additional burdens and unanticipated problems if they are required to use Basic Pilot/E-Verify, potentially harming their ability to create new jobs and revenue.

The proposed rule has a disproportionate effect on small businesses and immigrant communities. Many immigrant communities rely on small businesses owned by immigrant- and minority-employers. For example, Asian-Americans own more than 1.1 million small businesses, the majority of which cannot afford additional costs, loss of work hours, or loss of employees under the proposed rule.[101] The burdens for small business owners, such as costs of compliance, lack of human resource personnel, costly upgrades, training, hours spent verifying new employees and existing employees, lost profits, appropriate infrastructure requirements and other operating expenses will be especially difficult to bear considering the limited resources of small business employers. In addition, requiring small business owners to obtain, maintain and secure appropriate computer access methods could also be unduly burdensome.[102] This is especially true for rural and single employers, and employers with disability needs, who may also face accessibility issues including, but not limited to, access to high-speed internet.[103]

Implementation Contradicts the FAR Guiding Principles

The proposed rule contradicts many of the guiding principles that informed the creation of the Federal Acquisition Regulations for contractors including minimizing administrative operating costs, conducting business with integrity, fairness and openness and promoting competition.[104] The FAR places a premium on the minimization of administrative operating costs and improving efficiency for those who are subject to its rules. "In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated *only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement.* This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.[105] In this case, there is ample evidence that mandating the Basic Pilot/E-Verify program for federal contractors is not a benefit to the contractor community nor their employees. Those who perceive the program as providing some kind of benefit, ignore the fact that the program is wrought with multiple problems that have not been solved and which will only contribute to unnecessary costs for federal contractors, their employees, and the government.

The costs are not only the obvious ones such as administrative operating costs including start-up, implementation, training and maintenance costs. They also include other direct and indirect costs to employers who use the Basic Pilot/E-Verify program and their employees; employers may perceive foreign-born workers as more expensive to employ than native-born workers due to the database inaccuracies which create a large disparity between initial verification results for native-born employees and work-authorized

[101] Asian American Justice Center, Impact of the SAVE Act on Asian Americans, 2008.
[102] *Spafford Testimony* at 3.
[103] *Spafford Testimony* at 4.
[104] See 48 C.F.R. 1.102 Statement of guiding principles for the Federal Acquisition System.
[105] 48 C.F.R. 1.102–2(b) [emphasis added].

foreign-born employees.[106] Resolving TNCs and correcting employee records cost time and money for both employer and employee and affect other business resources. They could also seriously affect the services which the contractor is attempting to provide to the government and especially for small businesses (many of which are minority-, immigrant- or family-owned).

The FAR guiding principles also prioritize conducting business with integrity, fairness, and openness.[107] "An essential consideration in every aspect of the [FAR] is maintaining the public's trust." The proposed rule fails to advance these principles and does nothing to maintain the public's trust. Government-commissioned reports, congressional testimony, and other evidence have demonstrated the unreliability of the Basic Pilot/E-Verify program. The recent reauthorization of the voluntary program by the U.S. House of Representatives, specifically acknowledged this fact by requiring further study by the GAO of the erroneous tentative nonconfirmation rate.[108] Despite this, the proposed rule asks approximately 200,000 employers and 4 million employers to place their trust in a program that has been demonstrated to be untrustworthy. Fairness and integrity cannot follow from this result.

Finally, the guiding principles state that "the [FAR] must provide uniformity where it contributes to efficiency or where fairness or predictability is essential."[109] The outcome of a mandatory Basic Pilot/E-Verify program for the federal contractor community will not provide predictability. The Basic Pilot/E-Verify program cannot provide certain or predictable results regarding whether or not a worker is employment-eligible. Mandating the Basic Pilot/E-Verify program for federal contractors goes against the guiding principles of the FAR. The FAR clearly states that "the Government shall exercise discretion, use sound business judgment, *and comply with applicable laws* and regulations in dealing with contractors and prospective contractors."[110] Mandating use of a flawed and substantially abused program is not an exercise of sound business judgment. Also, by mandating use of a program explicitly made voluntary by Congress, and requiring the verification of existing employees through the program, the government in fact mandates behavior which violates federal statutory laws.

Regulatory Flexibility Analysis

For all of the reasons already discussed herein, the proposed rule would impose large and unacceptable costs on the thousands of small businesses that depend on federal contracts or subcontracts. The Councils have wholly failed to take into account the costs that businesses will incur as a result of erroneous nonconfirmations resulting from Basic Pilot/E-Verify database inaccuracies. They have also failed to consider the costs businesses would incur as a result of problems stemming from the overburdening of the Basic Pilot/E-Verify program due to the massive expansion in its use required by the

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[106] Testimony of Mitchell C. Laird, President of MCL Enterprises, before the Social Security Subcommittee of the Ways and Means Committee of the U.S. House of Representatives, May 6, 2008.
[107] 48 C.F.R. 1.102–2(c)
[108] See H.R. 6633, Employee Verification Amendment Act of 2008, 110th Congress, Second Session, online at http://thomas.loc.gov/cgi-bin/query/D?c110:2:./temp/~c110bHxfPR::
[109] *Id.*
[110] *Id.* emphasis added.

proposed rule. In addition, while the Councils apparently believe that they need not consider the cost of the rule on businesses that make a business decision not to do business with the federal government due to the rule, in fact such costs would be a direct consequence of the proposed rule and must be considered. The Councils' estimates of the costs of the proposed rule are vastly understated and must be recalculated.

CONCLUSION

In sum, we strongly oppose the proposed rule amending the Federal Acquisition Regulations to make the Basic Pilot/E-Verify program mandatory for federal contractors. We request that the proposed rule be rejected in its entirety.

Sincerely,

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