Statement of Tyler Moran
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House Committee on Ways and Means
Subcommittee on Social Security
Hearing on the Social Security Administration's Role in Verifying Employment Eligibility
April 14, 2011

Members of the Committee, thank you for the opportunity to address the critical issue of the progress made and challenges created by E-Verify. My name is Tyler Moran, and I am the Policy Director at the National Immigration Law Center (NILC). NILC is a nonpartisan national legal advocacy organization that works to advance and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as policymakers, attorneys, workers' rights advocates, labor unions, government agencies, and the media. NILC has analyzed and advocated for improvements of E-Verify since it was first implemented in 1997 as the Basic Pilot program, and has extensive experience assisting advocates and attorneys in responding to problems with the program as it affects workers—immigrants and U.S.-born alike.

Overview

Since E-Verify was implemented in 1997, it has narrowly been framed as a tool to prevent the employment of undocumented workers. The biggest impact of the program, however, is on U.S. workers, businesses, and the Social Security Administration (SSA). If made mandatory, 6 million employers and their 154 million employees would have to receive permission from the government before continuing the employment relationship. E-Verify has made progress since it was first implemented, but the fact remains that the system simply is not ready for mandatory use: it would cause a minimum of $22 billion in lost tax revenue at a time when policymakers are trying to slash budgets; would cause anywhere from 1.2 million to 3 million workers to stand in line at SSA or lose their jobs at a time of 9 percent unemployment; and is unable to detect 54 percent of unauthorized workers who are run through the system.

Mandatory E-Verify has been part of every immigration reform bill since 2005, and NILC has worked on a bi-partisan basis to craft proposals that ensure due process and privacy protections for all workers. The key starting point to any mandatory E-Verify proposal, however, is a path to legal status for undocumented immigrants in our country. Mandatory E-Verify without creating a legal labor force will set the program up for failure and exacerbate our current economic challenges. Eight million undocumented workers are not going to leave the country because of E-Verify; they and their employers will simply move into the underground economy, resulting in a significant loss of federal, state, and local tax revenues, including a drastic reduction in contributions to the Social Security trust fund.

My testimony today will focus on: (1) the impact of E-Verify on U.S. citizens and lawful immigrants; (2) the costs of implementing E-Verify without a legal workforce; (3) the impact of a mandatory system on SSA; and (4) what it would take to make E-Verify successful.

E-Verify error rates will cause American workers to lose their jobs

While E-Verify error rates have improved since the program was implemented in 1997, there is still significant cause for concern. Currently, 97.4 percent of workers run through E-Verify are immediately

confirmed as work authorized.[1] As a statistic, this may sound successful, but these numbers represent real people— your constituents—and the actual number of workers affected is concerning. Using a statistical model developed by the Westat Corporation for the Department of Homeland Security (DHS), approximately 0.8 percent of tentative nonconfirmations (TNCs)—or 22 percent of all persons run through E-Verify—are issued in error.[2] Of the 16 million E-Verify queries by employers in fiscal year 2010, 128,000 workers had to go to SSA or call DHS to fix a database error or lose their jobs.[3] Of the 0.8 percent of workers who received a TNC in error, 0.3 percent[4] were able to correct the issue and keep their jobs—meaning 0.5 percent of all U.S. citizen and work-authorized immigrant workers receive a *final* nonconfirmation (FNC) in error. A final nonconfirmation obligates the employer to fire the worker or risk being liable for immigration violations.[5] This means that in fiscal year 2010 approximately 80,000 workers likely received erroneous findings from the system and may have lost their jobs as a result.[6]

For example[7] –

- *A U.S. citizen born in Florida was hired for a good-paying telecommunications position in October 2010. After hire, she was run through E-Verify and received a TNC. Her employer did not sit down with her to explain to her what a TNC means, nor to explain any of her rights. The worker went to her local SSA office twice to try and resolve the situation, but despite SSA telling her that her information had been updated, the employer told her that she was still not confirmed. She ultimately received an FNC and was fired. After her termination, she has gone to great lengths to try and correct this error, but has been unable to do so. She was unemployed for over 3 months, including over the Christmas holiday, but recently accepted a new lower-paid position.[8]*

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[1] Richard M. Stana, *Report to the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives: Employment Verification, Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain* (Government Accountability Office, Dec. 2010, GAO-11-146), www.gao.gov/new.items/d11146.pdf,.

[2] Employers receive a "tentative nonconfirmation" notice-or TNC-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 erroneous TNC rate, *see Findings of the Web-Based E-Verify Program Evaluation* (Westat, Dec. 2009), www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf, p. 117.

[3] There were approximately 16 million E-Verify queries in fiscal year 2010. See *E-Verify Gets High Marks from Employers in Customer Satisfaction Survey* (U.S. Citizenship and Immigration Services, Jan. 18, 2011), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6adb46adba9d210Vg nVCM100000082ca60aRCRD&vgnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD. Approximately 0.8 percent of work-authorized individuals receive a TNC in error. See Westat, *supra* note 2. The 128,000 figure was arrived at by multiplying these two numbers.

[4] *Statistics and Reports* (U.S. Citizenship and Immigration Services, Feb. 4, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7c579589cdb76 210VgnVCM100000b92ca60aRCRD&vgnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD.

[5] 8 USC §1324a note.

[6] There were approximately 16 million E-Verify queries in fiscal year 2010. See U.S. Citizenship and Immigration Services *supra* note 4. Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. (0.8 percent receive an *erroneous* TNC, and 0.3 percent are able to correct their TNC. This results in 0.5 percent of individuals receiving an erroneous TNC that could not be corrected and therefore became an erroneous final nonconfirmation.) The 80,000 figure was arrived at by multiplying these two numbers.

[7] For more examples of U.S. citizens and lawful immigrants affected by E-Verify, see *How Errors in E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (NILC, March 2010), www.nilc.org/immsemplymnt/ircaempverif/e-verify-errors-and-USCs-2010-03-03.pdf.

[8] Jessica St. Fleur, *Written Statement for the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement: Hearing on E-Verify – Preserving Jobs for American Workers*, Feb. 10, 2011.

- *A U.S. citizen and former captain in the U.S. Navy with 34 years of service and a history of having maintained high security clearance was flagged by E-Verify as not eligible for employment. It took him and his wife, an attorney, two months to resolve the discrepancy.[9]*

- *A U.S. citizen applied for a position with a temporary agency in California, only to be turned away because E-Verify was unable to confirm her work authorization. The employer did not advise her of her right to contest the finding and violated the law by asking her to show additional documents. She was unemployed for over four months without health insurance and was diagnosed with a serious illness during that time.[10]*

If use of E-Verify were to become mandatory, using Westat's statistical model, about 1.2 million U.S. citizen and work-authorized immigrants would have to contact SSA or DHS or risk losing their jobs[11] and about 770,000 workers would likely lose their jobs.[12] These numbers, however, are likely underestimates as employers who audit their own E-Verify data report higher error rates than federal government estimates. For example, when Los Angeles County audited its use of E-Verify for county workers, it found that 2.0 to 2.7 percent of its TNCs from SSA were erroneous in 2008-09.[13]

Mandatory E-Verify for all workers: estimated error rates

Source of estimate	Erroneous TNC rate	# of workers required to contact SSA or DHS or lose their jobs
Westat report	0.8%	1.2 million
LA County	2.0%-2.7%	3 million – 4.1 million
Intel corporation[14]	12%	18.5 million

The error rates affect all workers, but Westat found that they have a discriminatory impact on lawful foreign-born workers. Westat's 2009 report found the erroneous TNC rate for foreign-born workers was 20 times higher than that of U.S.-born workers.[15]

The challenges U.S. workers face in correcting E-Verify errors

Receipt of an erroneous TNC puts an enormous burden on workers and can result in loss of wages to challenge the error, adverse action by employers, and loss of employment. In fact, GAO called the process of challenging an E-Verify error "formidable."[16]

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[9] Account related at a Jan. 24, 2009, town hall meeting in Ashtabula, OH, sponsored by Building Unity in the Community and billed as "Why We Need Comprehensive Immigration Reform."

[10] Summary of charge filed with the Dept. of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices in 2008.

[11] About 0.8 percent of workers receive an *erroneous* tentative nonconfirmation, or "TNC." Westat, *supra* note 2, p. 117. There are currently about 154,287,000 million workers in the U.S. The 1.2 million figure was arrived at by multiplying these two numbers.

[12] Approximately 0.5 percent of work-authorized individuals receive a final nonconfirmation in error. See note 7, *supra*. There are currently 154,287,000 million workers in the U.S. The 771,435 figure was arrived at by multiplying 154,287,000 million by the 0.5 erroneous final nonconfirmation rate.

[13] Marc Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Migration Policy Institute, Feb. 2011), http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf.

[14] Intel Corporation, "Comments on Proposed Employment Eligibility Regulations Implementing Executive Order 12989 (as amended)," Aug. 8, 2008.

[15] Westat *supra* note 2, p. xxxv.

[16] Stana, *supra* note 1, p. 34.

When workers receive a TNC notice, they often have to take unpaid time off from work to follow up with SSA, which may take more than one trip. In fiscal year 2009, 22 percent of workers spent more than $50 to correct database errors and 13 percent spent more than $100.[17] In 2009, the waiting times for SSA office visits were 61 percent longer than they were in 2002. During the period March 1, 2009 through April 30, 2010, about 3.1 million visitors waited more than 1 hour for service, and of those visitors, over 330,000 waited more than 2 hours. Further, in fiscal year 2009, about 3.3 million visitors left a field office without receiving service.[18] American Council on International Personnel members report that corrections at SSA usually take in excess of 90 days, and that employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected.[19] Though waiting times at SSA offices have improved in the last year, the Commissioner recently testified that a reduction in funding would reverse the progress SSA has made.[20]

Workers aren't always given the opportunity to correct these errors. Although required by law to do so, employers do not always notify workers of a TNC. Workers who do not contest database errors lose their jobs. In fiscal year 2009, 42 percent of workers report that they were not informed by their employer of a TNC.[21] A survey of 376 immigrant workers in Arizona also found that 33.5 percent had been fired, apparently after receiving an E-Verify TNC, but that *none* had been notified by employers that they had received a TNC or given information to appeal the finding.[22]

Employer noncompliance with the program's rules is extremely high, with over 66 percent of employers taking adverse actions against workers receiving a TNC.[23] Actions include prohibiting workers for whom they had received a TNC from working; restricting such workers' work assignments; and delaying job training for such workers.[24] And, at least 57 percent of employers using E-Verify violate the program's rules by using it to prescreen workers.[25] When workers are prescreened and not offered a job, it takes them at least three weeks to find other employment.[26]

Noncompliance with program rules would almost certainly increase if all employers were required to use the system. Current E-Verify users are disproportionately large businesses and federal contractors, and most users that have enrolled in the system have chosen to do so on a voluntary basis — all factors that make them *more likely* than a "typical" U.S. employer to approve of the system and use it successfully. In Arizona, the first state to make E-Verify mandatory, employers are less compliant with E-Verify

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[17] Westat *supra* note 2, pp. 203-204

[18] *Customer Waiting Times in the Social Security Administration's Field Offices* (Social Security Administration Office of the Inspector General, Oct. 2010), http://www.socialsecurity.gov/oig/ADOBEPDF/A-04-10-11034.pdf, p. 3.

[19] American Council on International Personnel, "Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008)," August 11, 2008.

[20] Michael J. Astrue, *Testimony before the U.S. Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies* (Social Security Administration, March 9, 2011), http://www.socialsecurity.gov/legislation/SSA%20BudgetTestimony030911.pdf, p. 18.

[21] Westat *supra* note 2 pp. 154, 199

[22] Caroline Isaacs, *Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law* (Washington, DC: American Friends Service Committee, 2009), www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700.

[23] Westat *supra* note 2, p. 157. Thirty-seven percent of employers self-reported that they took adverse actions against workers receiving a TNC, and workers reported that an additional 29 percent of employers took adverse action against them, with a total of over 66 percent of employers take adverse action.

[24] Westat, *supra* note 2, pp. 157, 204.

[25] *Id.* at 149

[26] *Id.* at 140

procedures than other E-Verify employers.[27] The likely reason is that, unlike most E-Verify users, most Arizona employers did not volunteer to use the program.

Mandatory E-Verify will result in billions of dollars of lost tax revenue, while only detecting half of all undocumented workers.

Undocumented workers are not going to leave the country simply because Congress makes it harder for them to work here. It is clear that undocumented immigrants fill a niche in our economy and are here to stay, despite imposition of a verification system. And because these workers are a central part of our economy, employers will use any means necessary to keep them, including moving into the underground economy, misclassifying workers as independent contractors, and simply not participating in any employment verification system.[28] The implications of undocumented workers moving into the underground economy are grave. In analyzing a 2008 bill that would have made E-Verify mandatory (without also providing a way for unauthorized workers to become work-authorized) the Congressional Budget Office (CBO) found that it would decrease federal revenue by more than $22 billion over ten years—because it would increase the number of employers and workers who resort to the black market, outside of the tax system.[29]

Eight million undocumented workers moving off the books will also threaten the solvency of the Social Security trust fund. Over the next 20 years, the number of senior citizens relative to the number of working-age Americans will increase by 67 percent, which means that they will "transition from being net taxpayers to net recipients" and they will be "supported by a smaller workforce that is struggling to meet its own needs."[30] It is estimated that two-thirds of undocumented immigrants currently pay payroll taxes, which generated $12 billion into the Social Security Trust fund in 2007.[31] In fact, the trust fund had received a net benefit of somewhere between $120 billion and $240 billion from unauthorized immigrants by 2007, which represents 5.4 percent to 10.7 percent of the trust fund's total assets. The chief actuary of SSA has stated that without undocumented immigrants' contributions to the trust fund, there would have been a "shortfall of tax revenue to cover [payouts] starting [in] 2009, or six years earlier than estimated under the 2010 Trustees Report."[32]

Arizona, the first state to make E-Verify mandatory for all employers in 2008, provides a window into the economic consequences of implementing the program with undocumented workers in the labor force. In 2008, the first year the law was in effect, income tax collection dropped 13 percent from the year before. Sales taxes, however, only dropped by 2.5 percent for food and 6.8 percent for clothing. The conclusion was that workers weren't paying income taxes, but were still earning money to spend—meaning that the

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[27] Westat, *supra* note 2, p. 237.

[28] *See* Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," *The Wall Street Journal Classroom Edition*, April 2005, http://wsjclassroom.com/archive/05apr/econ_underground.htm; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation* (Yale Law Journal, 103 Yale L.J. 2179, May 1994), www.wiego.org/papers/FooImmigrantWorkers.pdf.

[29] Letter to Rep. John Conyers, Chair, Committee on the Judiciary, U.S. House of Representatives, from Peter Orszag, Director, Congressional Budget Office, Apr. 4, 2008, www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf.

[30] Dowell Myers, *Thinking Ahead About Our Immigrant Future: New Trends and Mutual Benefits in Our Aging Society* (Immigration Policy Center, Jan. 2008), http://www.immigrationpolicy.org/sites/default/files/docs/Thinking%20Ahead%201-08.pdf.

[31] Edward Schumatcher-Matos, "How illegal immigrants are helping Social Security," *The Washington Post,* Sept. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html.

[32] *Id.*

underground economy was growing.[33] This loss in tax revenue was happening at a time when the state was facing a $3 billion budget gap.   The Public Policy Institute of California echoed this finding in a recently released study that found that although the law did lead to some undocumented immigrants leaving the state, the unintended consequence of the law was that workers were being pushed into underground employment.[34]

Arizona employers who didn't move their workforce into the underground economy simply didn't use E-Verify or learned how to manipulate the system. Though Arizona employers made 1.3 million new hires in the fiscal year that ended in September 2009 and were required by state law to check all of them via E-Verify, they actually checked only 730,000 of them—or slightly more than half.[35] U.S. Immigration and Customs Enforcement (ICE) officials also report that unscrupulous employers in Arizona have learned that E-Verify's photo-matching tool (which is used to confirm workers' identities through a photo comparison) accepts only two documents, and therefore they ask employees whom they suspect are not work-authorized to provide some other identity document that the photo-matching tool does not accept.[36]

In addition to these enormous costs and limitations, E-Verify has come up short in its role of detecting undocumented workers.   Westat researchers found that in 2008, 54 percent of unauthorized workers for whom E-Verify checks were run—or 56,000 workers—were erroneously confirmed as being work-authorized.[37] Migration Policy Institute estimates that 230,000 unauthorized workers were erroneously confirmed in 2009.[38]

The impact of mandatory E-Verify on SSA

While DHS administers E-Verify, SSA plays an integral role in ensuring its functionality. In fact, SSA takes on the bulk of verification responsibilities because it must verify the name, Social Security number (SSN), and date of birth (and citizenship status of U.S. citizens) of *every worker* in the country whose employer participates in E-Verify. If E-Verify were to become mandatory this would mean that SSA would need to process 154 million queries in the initial implementation period and 50-60 million queries each year thereafter. This is at a time when the agency is dealing with "unprecedented workloads combined with declining budgets [that have] damaged [the agency's] service delivery."[39]

Processing queries is just one aspect of SSA's work. Serving customers who must fix database errors puts the greatest demand on SSA resources. A November 2010 SSA Office of the Inspector General report found that in fiscal year 2008, when there were only a total of 7 million E-Verify queries, approximately 88,000 people called the 1-800 number or visited SSA due to E-Verify errors.[40] In a hearing before this subcommittee in 2007, SSA estimated that if E-Verify were made mandatory, 3.6 million citizens and lawful immigrants would either have to go to an SSA office to correct their records or

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[33] Daniel Gonzalez, "Illegal Workers Manage to Skirt Arizona Employer-Sanctions Law: Borrowed Identities, Cash Pay Fuel an Underground Economy," *The Arizona Republic*, Nov. 30, 2008.

[34] Magnus Lofstrom, Sarah Bohn, and Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act* (Public Policy Institute of California, March 2011), http://www.ppic.org/content/pubs/report/R_311MLR.pdf.

[35] Jahna Berry, "Most Arizona Employers Aren't Using E-Verify," *The Arizona Republic,* July 28, 2010, www.azcentral.com/arizonarepublic/news/articles/2010/07/28/20100728arizona-employers-ignoring-e-verify.html.

[36] Stana, *supra* note 1, p. 22.

[37] Westat *supra* note 2, p. 118.

[38] Marc Rosenblum, E-Verify: Strengths, Weaknesses, and Proposals for Reform, Senate staff briefing handout (Migration Policy Institute, Feb. 17, 2011).

[39] Astrue, *supra* note 20, p. 2.

[40] *Field Office Workload Related to Nonconfirmation Responses from the Employment Verification Program* (Office of the Inspector General, Social Security Administration, Nov. 2010 A-03-09-19052), http://www.socialsecurity.gov/oig/ADOBEPDF/A-03-09-19052.pdf, Appendix D.

lose their jobs.[41] Additionally, the President of the National Council of Social Security Management Associations, Inc., has testified in the past that if mandatory E-Verify and hardened SSN card are implemented without necessary funding, "it could cripple SSA's service capabilities."[42] This problem is compounded by the fact that the agency has suffered from "years of underfunding."[43] The Commissioner also recently testified that further funding reductions will threaten SSA's ability to keep its "technology environment operating smoothly," [44] which would include the operation of E-Verify.

Biometric cards and information-sharing do not address E-Verify's limitations, yet create new challenges.

Identity sharing and fraud is a major weakness of E-Verify since the system can only detect if documentation presented by the individual is legitimate—not if the documentation presented matches the individual. Numerous proposals have been introduced to address this limitation, including biometric employment cards and the sharing of taxpayer information with DHS. These proposals, however, only create greater challenges and jeopardize important tax confidentiality law.

Limitations of a biometric employment card
A handful of bills and proposals have been introduced over the last few years that create a biometric employment verification card. The costs, accuracy and mission creep that would result from such a card, however, far outweigh any benefit. As this committee well knows, despite best intentions to keep a card used for one sole purpose, the temptation to use it for other purpose is inevitable. After the SSN card was created in 1936, the first regulation issued by the Social Security Board declared that SSNs were for the exclusive use of the Social Security system.[45] Nevertheless, SSNs have become the universal identifier of choice for government agencies. Like the SSN, a biometric employment card would quickly become the primary identifier used for other purposes, from proving eligibility to vote to establishing identity when buying a gun.

The cost of implementing a biometric system is prohibitively expensive. One existing system that provides insight into what it would cost to implement a national biometric ID, and whether it would be a success, is the Transportation Worker Identification Credential (TWIC), a biometric ID used to access maritime transportation facilities and vessels. DHS estimated that it would need to spend up to $1.9 billion in order to issue biometric IDs to a mere one million workers under TWIC.[46] Applying this cost-per-worker ratio to a national employment eligibility verification system affecting 150 million workers, it is reasonable to assume that the price tag would be $285 billion.

In addition to cost concerns, the accuracy of a biometric, such as a fingerprint, is still inadequate and will likely prevent millions of U.S. citizens from obtaining jobs. The National Maritime Security Advisory Committee (NMSAC) reports that different enrollment sites for the TWIC card have not been able to

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[41] Transcript from Hearing on Employment Eligibility Verification Systems (Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007).

[42] Richard Warsinskey, *Testimony before the U.S. Senate Committee on Finance: Funding Social Security's Administrative Costs: Will the Budget Meet the Mission?* (National Council of Social Security Management Associations, Inc., May 23, 2007), http://finance.senate.gov/hearings/testimony/2007test/052307testrw.pdf.

[43] Astrue, supra note 20, p. 2.

[44] *Id.*, p. 7.

[45] Marc Rotenberg, Executive Director, Electronic Privacy Information Center, Statement at U.S. House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, May 12, 2005, http://commdocs.house.gov/committees/judiciary/hju21141.000/hju21141_0f.htm.

[46] *Transcript from Hearing on Transportation Worker Identification Programs* (Committee on Commerce, Science & Transportation, U.S. Senate, May 16, 2006).

enroll between 3.7 and 8 percent of workers because of fingerprinting failures.[47] And a U.S. Government Accountability Office (GAO) report revealed that thousands of TWIC enrollees experienced delays in receiving their TWIC card for varying reasons.[48] A different GAO report on the Census Bureau's requirement that all temporary employees be fingerprinted for FBI background checks found that, after Census Bureau staff received hours of training in proper fingerprinting techniques, over 20 percent of the prints they took were unusable.[49] Workers who perform manual or farm labor will face particular challenges because the tips of their fingers can become worn or abraded, and prints made from them are difficult to read.[50]

Information sharing between SSA and DHS and the Internal Revenue Service

A handful of bills have also proposed information-sharing among the Internal Revenue Service, SSA and DHS. Proposals differ, but they generally create exceptions to the confidentiality provisions in the tax code by requiring SSA to disclose taxpayer identity information of employers and employees to DHS when the employer has filed Wage and Tax Statements (Forms W-2) that have a certain number of names that do not match SSA records or employees that write "000-00-0000" on their W-2 instead of an SSN.

Disclosure of employers' taxpayer identity information to DHS is problematic. There are numerous reasons why employees' names and SSNs might not match SSA records, including incorrect data entry, name changes due to marriage or divorce, and misspelled names. No-matches are not a proxy for unauthorized immigration status. Rather, they indicate that workers are not receiving proper credit for their earnings, which will affect the level of retirement or disability benefits they may receive in the future. In fact, SSA estimates that 17.8 million (or 4.1 percent) of its records contain discrepancies, and that 12.7 million (about 70 percent) of those records with errors belong to native-born U.S. citizens.[51]

DHS itself recognizes that SSA's database is ineffective as an immigration enforcement tool. For example, SSA already shares with DHS a list of SSNs associated with the "Nonwork Alien File," a database which contains information on noncitizens who have earnings recorded under nonwork SSNs, which DHS could use to track immigrants who are potentially working in the U.S. unlawfully using a nonwork SSN. DHS has stated, however, that the file is not an effective worksite enforcement tool due to "inaccuracies in the data and the absence of some information that would help the department efficiently target its enforcement."[52] These "inaccuracies," however, derive from the same database that results in no-match's on the W-2.

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[47] "National Maritime Security Advisory Committee, TWIC Working Group: Discussion Items" (as amended July 30, 2008), www.maritimedelriv.com/Port_Security/TSA/files/NMSAC_TWG_recommendations_amended.pdf, p.1 and 7.

[48] *Transportation Worker Identification Credential: Progress Made in Enrolling Workers and Activating Credentials but Evaluation Plan Needed to Help Inform the Implementation of Card Readers* (U.S. Government Accountability Office, GAO-10-43, Nov. 2009), www.gao.gov/new.items/d1043.pdf.

[49] Robert Goldenkoff, *2010 Census: Census Bureau Continues to Make Progress in Mitigating Risks to a Successful Enumeration, but Still Faces Various Challenges* (U.S. Government Accountability Office, GAO-10-132T, Oct. 7, 2009), www.gao.gov/new.items/d10132t.pdf.

[50] "What Factors Cause Biometric Systems to Fail?" (International Biometrics Group website), www.biometricgroup.com/reports/public/reports/biometric_failure.html.

[51] *Congressional Response Report: Accuracy of the Social Security Administration's Numident File* (Office of the Inspector General, Social Security Administration, December 2006, A-08-06-26100).

[52] Barbara D. Bovbjerg, *Social Security Numbers: Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work* (Washington, DC: Government Accountability Office, February 16, 2006), www.gao.gov/new.items/d06458t.pdf.

Disclosure of employers' taxpayer identity information when SSA records indicate employees used 000-00-0000 instead of an SSN is also problematic, since the existence of such a situation does not necessarily indicate fraud. Employers are instructed by the IRS to put 000-00-0000 on W-2s when their employees have applied for SSNs but have not received them. Advocates of information-sharing between IRS, SSA, and DHS frequently cite the use of 000-00-000 as justification for the breach of tax confidentiality rules, because they argue that using all zeroes on a W-2 is an indication that a person is not work-authorized. However, employers with high numbers of authorized workers who don't yet have their SSNs would be flagged by SSA for simply following the law.

These information-sharing requirements are an incursion into protections for confidentiality of tax information provided by section 6103 of the tax code, which are designed to increase compliance with the tax law by barring tax information from being used for non-tax purposes. These confidentiality protections would be undermined by wholesale information-sharing for non-tax purposes without prior review by an independent arbiter. Additionally, because DHS would be given access to employer tax identity information, it is likely that employers will become fearful that they are in violation of immigration law when their previously confidential tax information is revealed. The result is that employers will be overly cautious and fire these employees. Already, thousands of workers have been fired due to the mistaken assumption that an SSA no-match letter indicates an immigration violation.[53] There is also no indication that DHS makes good use of earnings information it currently has available to it, nor that it has a clear sense of what its future data needs will be and what information will actually be useful for enforcement purposes.[54] Given these gaps, wholesale information sharing with DHS is unwise.

How can the shortcomings of E-Verify be improved?

As stated in my introduction, E-Verify has made progress since it was implemented in 1997, but it simply isn't ready for mandatory use. If and when Congress decides to make the program mandatory, there are a number of key policies that must accompany any expansion in order to set the program up for success. These recommendations are based on NILC's 14 years of experience with the program.

1. **Only consider making E-Verify mandatory if paired with a legalization program**. If implemented without legalizing the 8 million undocumented workers in our economy, employers will simply move them off the books into the underground economy, causing billions of dollars in lost tax revenue.
2. **Apply E-Verify only to new hires.** Reverification of the entire workforce would place a huge administrative burden on workers and businesses alike. A current turnover/separation rate of 40 percent a year (50-60 million employees hired each year) means that most people's employment eligibility will be verified by the new system in a timely manner without forcing employers to go through old records and reverify existing workers.
3. **Phase in E-Verify with performance evaluations**. Phase-in E-Verify incrementally by size of employer or by industry, with vigorous performance evaluations taking place prior to each expansion. Evaluations should address, at minimum, wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy.

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[53] C. Mehta, N. Theodore, and M. Hincapié, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago; and National Immigration Law Center, Nov. 2003) at 2, available at www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf.

[54] *See Immigration Enforcement: Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work, GAO-06-814R* (Government Accountability Office, July 11, 2006) at 4, available at www.gao.gov/new.items/d06814r.pdf.

Minimum performance criteria should be met within each of these areas before subsequent expansions of the system.

4. **Ensure data accuracy**. Establish data accuracy standards that are subject to annual review to ensure that the data accessed by employers is accurate and continuously updated.

5. **Protect workers from misuse of the system**. Prohibit use of E-Verify to selectively verify only certain workers, pre-screen workers before a job offer, take adverse employment actions based on system determinations, and fail to inform workers of their rights under the program. Establish an oversight and penalty structure to ensure employer compliance with program rules.

6. **Ensure due process for workers subject to database errors**. Provide for administrative and judicial review and allow workers to remain employed while they challenge government errors. Provide compensation from the government, costs, and attorney's fees when an error in the databases results in wrongful termination of employment.

7. **Protect the privacy of workers**. Minimize the amount of data collected and stored and create penalties for collecting, maintaining, or distributing data not authorized in the statute. Create penalties to deter the use E-Verify data to commit identity fraud or for any other unauthorized purpose.

8. **Create oversight of the E-Verify**. In order to ensure that employers are complying with program requirements, authorize random audits of the program that include, but are not limited to, a review of employer compliance with E-Verify requirements, a review of the adequacy of E-Verify rules and procedures to protect authorized workers, and a review of whether the program is being managed in a way that appropriately addresses civil rights and civil liberties concerns.

9. **Fund an outreach program**. Following in the footsteps of the process instituted when the I-9 employment eligibility verification form was first introduced in 1986, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) should be charged with conducting outreach and education to both workers and employers in order to inform them about how the system works, rights and responsibilities under the new system, and avenues for redress in the case of error or unfair employment practices.

10. **Create a term-limited employment verification advisory panel**. The advisory panel would advise SSA and DHS on implementation of E-Verify, including standards of database accuracy, privacy, and compliance, in addition to outreach to workers and employers. The panel would include representatives from appropriate federal agencies, organizations with technological and operational expertise in database accuracy, and other stakeholders that represent the interests of persons and entities affected by database inaccuracies, including business, labor unions, privacy advocates, and immigration organizations.

11. **Clarify that states are preempted from requiring businesses to use E-Verify**. Clarifying the statute's language with respect to this issue would ensure that the federal government controls uniform expansion of the program.

12. **Test new ideas through pilot projects**. DHS's E-Verify program is not the only possible platform for electronic eligibility verification, and alternative verification systems have been proposed. Any new idea should not be implemented on a large scale, however, before being rigorously tested. Pilot programs should measure the effectiveness, accuracy, and usability of new systems, and assess how they compare to E-Verify.

In the meantime, there are a number of steps that can be taken to improve the integrity of the program in its voluntary nature.

1. **Create due process for workers who lose their jobs.** Currently, there is no redress procedure for workers who receive an E-Verify final non-confirmation (FNC) in error. Employers who receive an FNC risk being held liable for immigration violations if they do not terminate the worker's employment, yet the worker has no means to either fix the error or get his or her job

back. As noted in my testimony, at least 80,000 workers lost their jobs in FY10. Workers should also be able to stay on the job while they challenge the erroneous FNC.

2. **Improve employer compliance with E-Verify rules.** Employer noncompliance with the E-Verify Memorandum of Understanding (MOU) has increased since the program was implemented, likely because the number of employers who are required to use the program has increased. There is currently no penalty for an employer who violates the MOU—even though it could result in the loss of employment for the worker. A number of steps can be taken including:
   - Revising the MOU to include penalties for misuse or noncompliance that employers must agree to be subject to as a condition of using E-Verify.
   - Increasing staff charged with ensuring compliance with the MOU (versus compliance with immigration law).
   - Requiring the DHS Office for Civil Rights and Civil Liberties to conduct annual civil liberties impact assessments of the program that include, but are not limited to, a review of employer compliance with E-Verify system requirements; a review of the adequacy of E-Verify rules and procedures to protect authorized workers; a review of whether the program is being managed in a manner that appropriately addresses and anticipates civil rights and civil liberties concerns; and recommendations for additional actions needed to address civil rights and civil liberties concerns.

3. **Establish a complaint and redress process for violations of the E-Verify MOU.** Create a community liaison department within the E-Verify monitoring and compliance unit to assist workers who suffer adverse action because of misuse of the E-Verify program and develop protocols for responding to worker complaints. As noted in my testimony, 66 percent of workers face adverse action from their employer when they receive a TNC.

4. **Increase appropriations for the Department of Justice Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC).** OSC is the agency tasked with working with workers and employers to enforce the anti-discrimination provisions in the Immigration and Nationality Act, including the employment verification process. OSC currently receives the bulk of phone calls from E-Verify users who either have questions about the program or who want to report employer misuse.

5. **Halt further expansion of E-Verify.** Rather than supporting mandates for the rapid growth of the existing program, further expansion should be halted until there is a comprehensive analysis of current and potential problems, and consider a number of modifications to ensure that the program accomplishes its goals.

Conclusion
Making E-Verify mandatory outside of broader reform of our immigration system undermines American jobs and will ultimately impose new burdens on our economy, workers, businesses and SSA. E-Verify has made a number of improvements, but still suffers from significant shortcomings that must be addressed before further expansion. Because so much of the focus of E-Verify is on DHS, it will be important for this committee to continue to play a leadership role in highlighting the impact of the program on SSA and U.S. workers. It would be a major step in our country to require all workers to seek confirmation from the government to keep their job and we need to get it right.