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Hearing on Employment Eligibility Verification Systems

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Members of the Committee, thank you for the opportunity to address the critical issue of current and proposed electronic employment verification systems (EEVS). My name is Tyler Moran, and I am the Employment 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 national advocacy groups, policymakers, attorneys and legal aid groups, workers' rights advocates, labor unions, government agencies, and the media.

Overview

My testimony today will focus on (1) the limitations of the current electronic employment verification system — the Basic Pilot program — upon which most proposed EEVS are based; (2) a summary of the impact of a flawed EEVS on the Social Security Administration (SSA) and on foreign-born workers; (3) an explanation of what provisions must be included in any mandatory EEVS; and (4) an analysis of the EEVS proposed in the 2007 House and Senate comprehensive immigration reform bills.

NILC has tracked the Basic Pilot program since it was implemented in 1997 and has extensive experience assisting immigrant advocates, attorneys, unions and other worker advocates in responding to problems with the program, including the way in which it has adversely affected workers. Because of this experience, we do not support expansion of a mandatory EEVS. However, because the concept enjoys almost universal support in Congress, and therefore will almost certainly be incorporated into any comprehensive immigration reform bill, we want to ensure that any proposed system be designed so as to avoid negative consequences for workers — both immigrant and U.S.-born.

While the focus of Basic Pilot has largely been on the Department of Homeland Security (DHS) and its agency that administers the program — the U.S. Citizenship and Immigration Services (USCIS) — the SSA also plays an integral role in ensuring its functionality. In fact, SSA 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 the Basic Pilot. If Basic Pilot were to become mandatory (and apply only to *new* hires), this would mean that SSA would need to process 50-60 million queries per year, versus the 1.8 million queries that the agency processed in 2006.[1]

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[1] According to former Commissioner Barnhart, SSA averaged 150,000 queries per month in 2006. *See* Jo Anne B. Barnhart, TESTIMONY BEFORE THE HOUSE COMMITTEE ON WAYS AND MEANS (Social Security Administration, July 26, 2006), http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=5172.

It is therefore essential that this Committee understand what it will take to create a system that functions with a high level of data accuracy, is properly monitored, and does not unintentionally promote employment discrimination. If implemented using the existing technology, procedures, and databases, the financial costs would be high and the inaccurate results would have a human cost borne by U.S.-born and immigrant workers. In addition, an expanded system would result in dangerous privacy breaches and increased discrimination against individuals who look or sound foreign.

The Social Security Administration's Role in the Basic Pilot Program

The Basic Pilot Program is an Internet-based program that allows employers to electronically verify new workers' employment eligibility by directly checking the records maintained by SSA and DHS. The program is one of the three pilots created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which began operating in six states in 1997. The other two pilot programs were discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate. According to DHS, 16,000 employers are currently enrolled in the program.[2]

How the Verification Process Works at SSA[3]

Before employers can use the Basic Pilot program, they must first sign a memorandum of understanding (MOU), which sets forth the points of agreement between SSA, DHS, and the employer regarding the employer's participation in the program. Employers must also complete an online training and display a notice at the workplace from DHS indicating the employer's participation in the program, and an antidiscrimination notice from the Office of Special Council for Immigration-Related Unfair Employment Practices, Department of Justice.

1. **Step 1: Employer completes I-9 form.**
   Employers participating in the Basic Pilot must still complete an I-9 employment eligibility verification form for each new employee hired as is required of all employers, but with one change to those procedures: Basic Pilot employers can accept a document as proof of a worker's identity only if the document includes a photograph. It is still the employee's choice, however, which documents to present to establish identity and employment eligibility.

2. **Step 2: Employer verifies identity and employment eligibility using the Basic Pilot.**
   For each newly hired worker, the employer must enter the worker's information provided on the I-9 form — such as name, SSN, and citizenship status or alien number — into a form on the Basic Pilot website within three days of the worker's hire date. If a worker has not yet been assigned an SSN (as can be the case with newly-arrived immigrants), however, the employer has to wait to enter that person's information into the Basic Pilot form after the SSN is

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[2] Jock Scharfen, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: PROBLEMS IN THE CURRENT EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM (USCIS, U.S. Dept. of Homeland Security, April 24, 2007), http://judiciary.house.gov/media/pdfs/Scharfen070424.pdf.

[3] For more information on the entire Basic Pilot process, see BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM (National Immigration Law Center, March 2007), www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf.

obtained. This procedure is in conflict with the requirements outlined in the MOU stating that the employer will put the worker's information into the Basic Pilot within three days of hire. There continue to be delays in issuing SSNs at field offices — delays that can last for months. According to the American Immigration Lawyers Association, some of the delays arise from "front desk" errors, where an application is rejected for lack of a document that is not required.[4]

The information that is entered on the Basic Pilot website is first checked against information contained in SSA's database, the Numerical Identification File ("Numident"). SSA verifies that the name, SSN, and date of birth are correct, regardless of the worker's immigration status. SSA also confirms whether, if the employee has stated that he or she is a U.S. citizen, this is in fact the case; if it is, this establishes that the employee is employment-eligible. In the cases of naturalized citizens, however, SSA is sometimes unable to confirm their U.S. citizenship and must forward the inquiry to USCIS.

For any non–U.S. citizen employee, USCIS verifies that the worker currently has employment-authorization. If the information provided by the worker matches the information in the SSA and USCIS records, the employer will receive a "confirmation" and no further action will generally be required, and the worker may continue employment.

If SSA is unable to verify information presented by the worker, the employer will receive an "SSA tentative nonconfirmation" notice. Employers can receive an SSA tentative nonconfirmation notice for a variety of reasons, including lags in data entry in SSA's database, inaccurate entry of information into the form on the Basic Pilot website, or name changes or changes in immigration status that are not reflected in SSA's database. An SSA tentative nonconfirmation is also issued when the person attests to being a U.S. citizen but SSA records indicate that the person is a noncitizen with unknown work-authorization status. For example, a foreign-born U.S. citizen may have naturalized, but if the person does not inform SSA of this fact, SSA records will reflect his or her former immigration status.

3. Step 3: Employee can challenge a "tentative nonconfirmation."

If the individual's information initially does not match SSA's records, the employer must first double-check that the information was entered correctly into the system. If the employer did not make an error, the employer must give the employee written notice of that fact, called a "Notice to Employee of Tentative Nonconfirmation." The worker must then check a box on the notice stating that he/she contests or does not contest the tentative nonconfirmation notice, and both the worker and employer must sign the notice. If the worker chooses to contest the tentative nonconfirmation notice, the employer must print a second notice, called a "Referral Letter," which contains information about resolving the tentative nonconfirmation notice, as well as the contact information for SSA. The worker then has eight federal government work days to visit an SSA office to try to resolve the discrepancy. SSA then has 10 federal government work days after the worker receives the referral notice to resolve the case.

Under the MOU, if the worker contacts SSA (or USCIS) to resolve the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse

[4] MINUTES OF THE SOCIAL SECURITY ADMINISTRATION AND CIS AILA LIAISON MEETING ON SSA RELATED ISSUES (American Immigration Lawyers Association, May 8, 2006).

action against the worker while he/she awaits a final resolution from the government agency — even if it takes more than 10 federal government work days for SSA to resolve the matter. In the case of an SSA tentative nonconfirmation notice, the employer must wait 24 hours after the worker visits SSA to resubmit the inquiry to the Basic Pilot program, and no later than 10 federal government work days after the date that the worker was referred to SSA. If the worker does not contest the tentative nonconfirmation notice, it automatically becomes a "final nonconfirmation" and the employer is required to fire the worker.

Concerns about Expanding the Basic Pilot Program

Numerous entities, including those that researched and wrote an independent report commissioned by the former Immigration and Naturalization Service, the Government Accountability Office, and the Social Security Administration's Office of the Inspector General (SSA-OIG), have found that the Basic Pilot program 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.[5] It is our understanding that the research corporation, Westat, has recently concluded another evaluation of the Basic Pilot for USCIS, though the results of that study have yet to be released to the public. It is critical that Congress review this evaluation before proceeding with any proposal to create a mandatory EEVS.

The significant weaknesses that exist in the current program, which serves approximately 16,000 employers, would be greatly exacerbated if the program were to surge to over 7 million. In Fiscal Year 2005, when the latest evaluation took place, only half as many employers used the program as use it know. While improvements to the Basic Pilot have been made since its inception, they are not sufficient for a mandatory program that, because of inaccurate nonconfirmations, could cause workers and businesses irreparable harm. Additionally, if the current flaws in the Basic Pilot are not addressed before it is made mandatory, it will lead to flawed implementation, frustration, and even noncompliance, which will result in certain businesses and industries moving into the unregulated underground cash economy.

When employers and workers move into the underground economy, the societal and economic costs are enormous. If enough of them abandon the "above-ground" economy, it could result in billion-dollar losses in federal, state, and local tax revenues, unfair competition, and further exploitation and abuse of all workers by unscrupulous employers. The similar situation would result if a mandatory EEVS were to be implemented outside the context of comprehensive immigration reform. In that case,

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[5] *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; IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, Aug. 2005) (hereafter "GAO"), www.gao.gov/new.items/d05813.pdf; and CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), (hereafter "SSA"), 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; and 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.

the new system would start out with the insurmountable handicap of 8 million unauthorized workers and their employers seeking to uncover and exploit the weaknesses inherent in any system.

Database inaccuracies

One of the most significant problems identified in independent evaluations of the Basic Pilot program is that it is seriously hindered by inaccuracies and outdated information in SSA and DHS databases. For example, a sizeable number of workers who are identified as not having work authorization are in fact authorized, but for a variety of reasons the databases do not have up-to-date information on them. The SSA database used for the Basic Pilot program is the Numident file, which contains information on 435 million SSN holders, including name, date of birth, and place of birth, parents' names, citizenship status, date of death (if applicable), and the office where the SSN application was processed and approved.[6] As referenced earlier in this testimony, the Numident file is the first point of verification in the Basic Pilot process.

According to a December 2006 report by SSA-OIG, 17.8 million (or 4.1 percent) of SSA's records in the Numident file contain discrepancies related to name, date of birth, or citizenship status that could result in tentative nonconfirmation notices from Basic Pilot.[7] Any time that SSA's database conflicts with information presented by a worker, that worker must follow up with one of SSA's field offices. According to the Bureau of Labor Statistics, there are 4.9 million new hires per month in the U.S.[8] If 4.1 percent of these new hires received a tentative nonconfirmation notice from SSA, field offices could potentially see 100,900 additional citizens and lawful immigrants per month seeking assistance with these alleged discrepancies.

In 2006 testimony before the Senate Finance Committee, the Inspector General of Social Security expressed concerns about an "increased workload in the field offices and teleservice centers" that would result from workers challenging erroneous database findings.[9] At a recent Senate Finance hearing, the President of the National Council of Social Security Management Associations, Inc., testified that if a mandatory EEVS and hardened SSN card are instituted as part of an immigration reform bill without necessary funding, "it could cripple SSA's service capabilities."[10] This problem is compounded by the fact that the agency is at its lowest staffing level since the early 1970s, and SSA field offices have lost 2,400 positions in the past 19 months.[11] As noted in the December 2006 OIG report, "[I]f use of an employment verification service such as the Basic Pilot becomes mandatory, the workload of SSA and DHS may significantly increase — even if only a portion of these 17.8 million numberholders need to correct their records with one of these agencies."[12] Already, SSA field offices serve 42 million visitors per year. [13]

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[6] SSA, ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE, *supra* note 5.

[7] *Id.*

[8] JOB OPENINGS AND LABOR TURNOVER: FEBRUARY 2007 (U.S. Dept. of Labor, Bureau of Labor Statistics, February 2007), www.bls.gov/news.release/pdf/jolts.pdf.

[9] Patrick P. O'Carroll Jr., TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON FINANCE: ADMINISTRATIVE CHALLENGES FACING THE SOCIAL SECURITY ADMINISTRATION (Office of the Inspector General, Social Security Administration, March 14, 2006), http://finance.senate.gov/hearings/31699.pdf.

[10] 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.

[11] *Id.*

[12] SSA, ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE, *supra* note 5.

[13] Barnhart, *supra* note 1.

The cost and burden of SSA tentative nonconfirmation notices not only affects local SSA offices, but also workers. Although U.S. citizens' records do have discrepancies, a disproportionate number of the database errors affect foreign-born U.S. citizens and work-authorized noncitizens. According to the December 2006 OIG report, approximately 4.8 million noncitizen records and 8 million foreign-born U.S. citizen records contain discrepancies that may result in a tentative nonconfirmation notice from the Basic Pilot.[14] And, 3.3 million of foreign-born U.S. citizen records do not contain updated information on their citizenship status, so when they claim U.S. citizenship on their I-9 employment eligibility verification form, these workers receive a tentative nonconfirmation notice because their information does not match that in the SSA database.

When workers receive a tentative nonconfirmation notice, they often have to take unpaid time off from work to follow up with SSA, which may take more than one trip. Waiting time at field offices are running two to three hours, with some visits lasting over four hours.[15] According to the National Council of Social Security Management Associations, Inc., nearly one-third of the people currently coming into SSA Field Offices to apply for an original or duplicate SSN have to return with additional documentation.[16] Additionally, an unknown number of work-authorized job applicants are not notified of tentative nonconfirmations by their employer or are wrongfully terminated by their employer before they even have the opportunity to prove that they are indeed authorized to work in the U.S. (For more information on this problem, see the section below regarding employer misuse of the program).

Equally concerning is the fact that when workers do go to an SSA field office to correct their records, their information is sometimes not updated in a timely manner. Additionally, Basic Pilot rules instruct employers to wait 24 hours after a worker has updated his or her records to re-query the system; however, many times the employer will re-query the system before the 24-hour period has passed, or check before the employee visits SSA. In these instances, the employer will receive a default *final* nonconfirmation. According to Basic Pilot rules, the employer is then required to fire the worker.

Employer misuse of the program

The independent evaluations of Basic Pilot have also revealed that employers use the Basic Pilot program to engage in prohibited employment practices.[17] According to the SSA-OIG, "We learned that a significant number of the Basic Pilot employers in our sample verified individuals outside the scope of the signed agreement between the employer, SSA and DHS."[18] For example, the law requires that employers first extend a job offer to a worker and then complete the employment eligibility verification process, including the Basic Pilot procedure. In violation of this requirement, many employers put workers through Basic Pilot *before* extending the job offer, to avoid the potential costs of hiring and training employees who are not eligible to work (a practice known as "pre-screening"). This practice is a problem because most workers who receive a tentative nonconfirmation are, in fact, authorized to work. If workers are not hired because of a tentative nonconfirmation and are never informed that there is a problem with their records, they not only are denied a job but also the opportunity to contest database inaccuracies. Moreover, pre-screening increases the likelihood that an

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[14] SSA, ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE, *supra* note 5.

[15] Warsinskey *supra* note 10.

[16] Richard Warsinskey, TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON FINANCE: ADMINISTRATIVE CHALLENGES FACING THE SOCIAL SECURITY ADMINISTRATION (National Council of Social Security Management Associations, Inc., March 14, 2006), http://finance.senate.gov/hearings/31699.pdf.

[17] GAO, SSA , and Temple University Institute for Survey Research and Westat, *supra* note 5.

[18] SSA, EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS, *supra* note 5.

employer may be discriminatorily selecting foreign-looking or foreign-sounding individuals for such screening, resulting in increased discrimination without the person even knowing he or she has been subjected to this unlawful practice.

- In 2002, among employees who received a tentative nonconfirmation from the Basic Pilot, 23 percent said that they were *not* offered a job.[19]
- Four years later, in 2006, 42 percent of employees surveyed reported that employers used the Basic Pilot to verify their employment authorization *before* hire.[20]
- The 2002 evaluation found that 73 percent of employees who should have been informed of work authorization problems were not notified.[21]

Employers also illegally use the Basic Pilot to verify the employment eligibility of their existing workforce. The immigration regulations require employers to reverify workers' employment authorization in very limited circumstances (including when their work authorization expires). This has helped minimize the potential discrimination that may ensue from employers constantly reverifying only noncitizens or from using the reverification system in a retaliatory manner. According to the September 2006 SSA-OIG report, 30 percent of Basic Pilot users admitted they had verified the employment authorization of existing employees.[22]

Employers also take adverse employment action based on tentative nonconfirmation notices, which penalizes workers while they and the appropriate agency (SSA or DHS) work to resolve database errors. For example, the 2002 independent evaluation found that 45 percent of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working.[23] Some employers also compromised the privacy of workers in various ways, such as by failing to safeguard access to the computer used to maintain the pilot system, e.g., leaving passwords and instructions in plain view for other personnel to potentially access the system and employees' private information.

Although employers are prohibited from engaging in these practices under the MOU they sign, USCIS officials have told the GAO that their efforts to review and oversee employers' use of the Basic Pilot program have been limited by lack of staff.[24]

Provisions That Must Accompany Any Nationwide, Mandatory Employment Eligibility Verification System

After nearly a decade of experience with the Basic Pilot Program, it is clear that the existing program has significant flaws that must be addressed if Congress is to pursue the creation of a new EEVS. The creation of such a system without addressing the fundamental flaws in the current program is

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[19] Temple University Institute for Survey Research and Westat, *supra* note 5.

[20] SSA, EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS, *supra* note 5.

[21] Temple University Institute for Survey Research and Westat, *supra* note 5.

[22] SSA, MONITORING THE USE OF EMPLOYEE VERIFICATION PROGRAMS, *supra* note 5.

[23] Temple University Institute for Survey Research and Westat, *supra* note 5.

[24] Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, June 2006), www.gao.gov/new.items/d06895t.pdf.

inadvisable and will result in severe negative consequences for immigrants and U.S. workers on a much larger scale than they currently experience.

The following features would address the flaws in the existing Basic Pilot program.

- **Phase-in with objective benchmarks.**
  The best way to ensure implementation of an EEVS that is accurate and implemented in a nondiscriminatory manner is to set standards and expectations for system performance up front and to hold DHS and SSA accountable for meeting those standards. Experience confirms that federal agencies do not meet expectations if the standards they are given are vague and optional. Therefore, the EEVS should be phased in at a reasonable rate, by size of employer, and provide for certification by the Comptroller General that it meets benchmarks regarding database accuracy, low error rates, privacy, and measurable employer compliance with system requirements before implementation and each phase of expansion.

  The EEVS program is particularly vulnerable to poor planning because of its unprecedented scope and the disconnect between the agency mandate to get something up and running quickly and the requirements that would ultimately determine whether it is successful, such as the need for speed, efficiency, reliability, and information security. It is much easier to make design changes in a system before it goes fully online than afterwards. That is why software manufacturers produce "beta" versions of their programs to be tested in the real world before mass public marketing distribution. Once a system is designed and put in place for all employers and workers in our economy, it will be costly and difficult to implement needed changes.

- **Antidiscrimination protections.**
  Experience has taught us that unscrupulous employers will use the system to unlawfully pre-screen potential employees, reverify work authorization, and engage in other unlawful activities when an employee lodges a complaint or engages in collective organizing. It has also demonstrated that DHS has not prioritized monitoring of employer misuse of the system, since 10 years after it was first implemented there is still no system in place for monitoring it. Thus, stronger enforcement and monitoring efforts and higher penalties for noncompliance are necessary to compel reluctant employers to comply with the law.

  Employers also must be explicitly prohibited from (1) conducting employment eligibility verification before offering employment; (2) unlawfully reverifying workers' employment eligibility; (3) using the system to deny workers' employment benefits or otherwise interfere with their labor rights, or to engage in any other unlawful employment practice; (4) taking adverse action against workers whose status cannot initially be confirmed by the EEVS; or (5) selectively excluding certain people from consideration for employment due to the perceived likelihood that additional employment eligibility verification might be required, beyond what is required for other job applicants.

- **Due process protections against erroneous determinations.**
  For the first time in the history of this country, workers will need to seek approval from the federal government to secure their livelihood. If the database errors are not improved before the EEVS is implemented, it is likely that millions of workers could be wrongly identified as not authorized for employment. It is therefore critical that workers have access to a *meaningful*

administrative and judicial review process that provides for remedies such as back pay and attorney's fees if it is determined that a worker was terminated due to SSA or DHS error. Additionally, the EEVS must allow individuals to view their own records and correct any errors through an expedited process established by SSA and DHS.

- **Privacy and identity theft protections.**
  The EEVS must protect information in the database from unauthorized use or disclosure. It is critical that privacy protections be included so that the information contained in the databases is not used for nonemployment eligibility verification purposes. The 2002 evaluation found several instances where employers or other unauthorized individuals gained access to the Basic Pilot program for uses other than the designated purpose. Civil and criminal penalties for unlawful use of information in the EEVS should also be included.

- **Studies of and reports on EEVS performance.**
  Any EEVS should be independently evaluated to ensure that the program is meeting the needs of both employers and employees. Reports should specifically evaluate the accuracy of DHS and SSA databases, the privacy and confidentiality of information in the databases, EEVS's impact on workers, and whether the program has been implemented in a nondiscriminatory manner.

- **Workable documentation requirements.**
  Proposals to further limit which documents are acceptable to establish employees' identity must be flexible enough to recognize the fact that not all work-authorized individuals have the same documents. Under no circumstances should a REAL ID–compliant driver's license or ID card be required. No state is currently in compliance with REAL ID, and indeed 11 states thus far have decided not to implement the law or have placed significant conditions on their participation.[25] In eleven additional states, legislation opposing REAL ID has passed one or more chambers of the state's legislature.

Employment Eligibility Verification Systems in the Context of Comprehensive Immigration Reform

The two most significant immigration reform bills introduced in the House and Senate in 2007 include the "Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007" (H.R. 1645), introduced by Representatives Gutierrez and Flake, and the "Secure Borders, Economic Opportunity and Immigration Reform Act of 2007" (S. 1348) currently being negotiated in the Senate. Both bills include a mandatory EEVS, but there are *significant* differences between these two proposals. Most notably, the STRIVE Act makes a real attempt to address the shortcomings of the Basic Pilot program by including benchmarks, as well as privacy, antidiscrimination, and due process protections. Although it is unlikely that the STRIVE Act will be the immigration bill taken up by the House Judiciary Committee, it is helpful to analyze its EEVS provisions through the lens of accuracy, workability, and minimizing the harm to *all* workers.

The "Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007"

[25] States include Arkansas, Colorado, Georgia, Hawaii, Idaho, Maine, Missouri, Montana, Nevada, North Dakota, and Washington.

The STRIVE Act represents the best legislative effort to date to address the shortcomings of the Basic Pilot program.[26] Unfortunately, the bill contains a couple of provisions that would limit its workability. First, the STRIVE Act significantly limits the documents that individuals can present to prove their identity when seeking employment. Most concerning is the requirement that workers present documents that do not exist, such as a REAL ID-compliant driver's license and a biometric, machine-readable, tamper-resistant Social Security card. Former Commissioner Barnhart testified in July 2006 that the cost of issuing new cards with enhanced security features could cost approximately $9.5 billion and require 67,000 work years.[27] This means that if U.S. citizens, including foreign-born U.S. citizens, do not have a REAL ID license or hardened SSN, they will have to present either a passport (passports are held by only approximately 20 percent of the U.S. population[28]) or a passport card, which is not yet available. The Brennan Center for Justice estimates that as many as 13 million U.S. citizens do not have ready access to citizenship documents, such as U.S. passports, naturalization papers, or birth certificates.[29]

Second, the STRIVE Act requires SSA to disclose private taxpayer identity information of employers and employees to DHS when DHS requests this information. Use of confidential tax information to enforce immigration law can have a negative affect on tax compliance and has the potential to increase discrimination against foreign-looking or -sounding workers.

Provisions in the STRIVE Act that should be included in any EEVS proposal:

- **Benchmarks for system performance.** Before the EEVS is implemented (and before any subsequent phase-in), the Comptroller General must study and certify that certain standards have been met, including database accuracy, measurable employer compliance with the EEVS requirements, protection of workers' privacy, and adequate agency staffing and funding. In conducting the studies, the Comptroller General must consult with representatives from immigrant communities, among others. The Comptroller General is also required to submit reports to DHS and Congress on the impact of the EEVS on employers and employees.
- **Protections against discrimination.** The STRIVE Act amends section 274B of the Immigration and Nationality Act (INA), relating to unfair immigration-related employment practices, to explicitly apply to employment decisions related to the new EEVS. Additionally, it prohibits employers from misusing the EEVS, increases fines for violations, brings the INA into line with other civil rights laws, such as Title VII of the Civil Rights Act, and provides funding to educate employers and employees about antidiscrimination policies.
- **Privacy protections.** The STRIVE Act requires that information in the EEVS be safeguarded and that only minimum data elements be stored. It creates penalties for unlawfully accessing

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[26] For a summary of the EEVS provisions in the STRIVE Act, *see* EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM IN THE STRIVE ACT OF 2007 (National Immigration Law Center, April 2007), www.nilc.org/immsemplymnt/cir/strive_eevs_2007-04-02.pdf.

[27] Barnhart, *supra* note 1.

[28] Phil Gyford, "How Many Americans Own Passports?," www.gyford.com/phil/writing/2003/01/31/how_many_america.php.

[29] CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (Brennan Center for Justice at NYU School of Law, November 2006), www.brennancenter.org/dynamic/subpages/download_file_39242.pdf.

the EEVS and for using information in the EEVS to commit identity theft for financial gain.

- **Due process provisions.** The STRIVE Act requires that workers can view their own records and correct or update information in the EEVS. DHS also must establish a 24-hour hotline to receive inquiries from workers and employers concerning determinations made by the EEVS. The STRIVE Act also creates an administrative and judicial review process to challenge a finding that a worker is not authorized for employment (a "final nonconfirmation"). If, after the process, the worker is found to be authorized for employment and the error was DHS's, the worker is entitled to back wages (although not during any period that the worker was not authorized for employment). However, attorney's fees and costs are not included — even though employers can recover up to $50,000 in attorney's fees when they challenge a finding that they violated immigrant law. Low-income workers are far less equipped than better-off workers to represent themselves or hire counsel, and the availability of fees is critical to their ability to pursue their rights. STRIVE also prohibits a private right of action, which also would drastically limit workers' ability to correct abuses and errors of the system.
- **Annual study and report.** The STRIVE Act requires the Comptroller General to conduct annual studies to be submitted to Congress that determine whether the EEVS meets the following requirements: demonstrated accuracy of the databases; low error rates and incidences of delays in verification; measurable employer compliance with EEVS requirements; protection of workers' private information; adequate agency staffing and funding for SSA and DHS.

The "Secure Borders, Economic Opportunity and Immigration Reform Act of 2007" (S. 1348)[30]

S. 1348 falls well short of creating a workable system. Its most troubling provision is the requirement that the guest worker and legalization programs for which it provides may not be implemented until the EEVS (including the use of "secure" documentation and digitized photographs that do not currently exist) is implemented. Because of this pressure, the focus will be on getting the EEVS up and running as quickly as possible, rather than on implementing an accurate system that actually works without adversely impacting authorized workers.

It is expected that an amendment will be introduced this week (to amendment 1150; see footnote 30) that will improve the EEVS provisions in S. 1348. Although the amendment will significantly improve the underlying bill, it will not address the database inaccuracies and will fall short on due process protections. Concerns with S. 1348 as introduced include the following:

- **The implementation timeline is unreasonable and unworkable.** All employers must participate in the EEVS within 18 months of enactment, with respect to new hires and those with expiring work authorization documents or immigration status; and within 3 years, all employers must use the EEVS for all new and continuing employees, including those in "Z" status who have not previously presented secure documentation. DHS is also given the sole discretion to require employers to participate at an earlier date than outlined. This rigid timetable must be met regardless of whether the EEVS actually works and whether the technology exists to implement it; nor is the timetable subject to performance benchmarks.

[30] Amendment 1150 to S. 1348 is the actual text of the bill being debated; however, there has not yet been a vote on the amendment, so S. 1348 still stands. This analysis refers to amendment 1150.

- **The antidiscrimination protections are weaker than current law.** Current law regarding "impermissible" uses of the EEVS would be weakened under the Senate bill (existing requirements are outlined in the MOU that employers sign under the Basic Pilot) because the bill specifically prohibits these "impermissible" practices from being covered under the antidiscrimination protections in the INA by giving DHS exclusive enforcement authority and funding. Section 274B of the INA prohibits discrimination based on national origin and citizenship status, and provides a process for complaints, investigations, administrative and judicial review, and remedies. It is unlikely that DHS's policy will include such procedures, since DHS has no expertise in this area.

- **The due process protections are insufficient.** Under the administrative review provisions, a final nonconfirmation is stayed pending the administrative review decision unless SSA or DHS decides that the "petition for review is frivolous, unlikely to succeed on the merits, or filed for purposes of delay." This means that the agency whose administrative decision is being appealed has sole authority to issue or deny a stay of a nonconfirmation notice while an appeal is pending. The employee appealing the decision faces irreparable harm through loss of employment if a stay is denied, and the legislation does not provide a method for recovery of back pay, costs or attorney's fees for those who are wrongfully terminated due to SSA or DHS database errors, including where the agency fails to issue a stay during the appeal process.

  Workers have 30 days from the completion of the administrative appeal to file for judicial review in the U.S. Court of Appeals. However, the court can decide the petition based only on the administrative record, which may be limited. The burden is on the worker to demonstrate that the agency decision was "arbitrary, capricious, not supported by substantial evidence, or otherwise not in accordance with law." Moreover, "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." That deferential review standard for factual findings is unwarranted. As with the administrative review process, the court must stay the final nonconfirmation notice, unless it determines that the "petition for review is frivolous, unlikely to succeed on the merits, or filed for purposes of delay."

- **The documentation requirements are unattainable.** Like the STRIVE Act, the documentation requirements are heavily focused on state compliance with the REAL ID Act and a biometrically-enhanced Social Security card.

- **Employers, state and federal government agencies, and SSA are required to turn over to DHS confidential information about workers.** The bill permits data mining of SSA files, tax records, and other federal, state, and territorial databases covering everyone in the U.S. Multiple provisions requiring information-sharing give DHS expansive access to (a) personal employee information held by employers; (b) birth and death records maintained by states, passport and visa records, and state driver's license or identity card information; and (c) as an exception to tax code confidentiality provisions, SSA records of taxpayers when the taxpayer's SSN or name or address (for whatever reason) does not match SSA records, or when just two taxpayers have the same SSN. It also allows DHS to access "information" from SSA that DHS "may require." The provisions do not require independent review, monitoring of disclosure, privacy protections, notice to workers that their private information or records have been disclosed, or recourse if overbroad information is sought or misused.

Conclusion

As stated in the first part of this testimony, based on our experience, NILC does not support the creation of a mandatory EEVS. However, when the House of Representatives moves forward with its immigration reform bill, which will inevitably include a mandatory EEVS, it is critical that it be guided by the lessons learned from ten years of experience with the Basic Pilot program. Put simply, if the shortcomings of the Basic Pilot are not addressed before it is expanded into a mandatory program, it will be a disaster for workers and employers, and will put an enormous strain on already overburdened SSA field offices. Because so much of the focus of EEVS proposals is on DHS, it will be important for this committee to work closely with the Judiciary Committee on any comprehensive immigration reform bill that creates a mandatory EEVS to ensure that SSA has the necessary funding and resources to carry out its duties. It will also be critical to ensure that the weaknesses of the Basic Pilot are addressed before it is expanded, including correcting SSA's database errors, and implementing a monitoring system so employers do not use the system to take adverse action against workers.