



# Statement of the U.S. Chamber of Commerce

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**ON:** PROPOSALS FOR IMPROVING THE ELECTRONIC  
EMPLOYMENT VERIFICATION AND WORKSITE  
ENFORCEMENT SYSTEM

**TO:** HOUSE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,  
REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW  
OF THE COMMITTEE ON THE JUDICIARY

**BY:** RANDEL K. JOHNSON

**DATE:** APRIL 26, 2007

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

**Statement on**  
**“Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System”**

**Before**

**The House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary**

**Randel K. Johnson**

**Vice President, Labor, Immigration, and Employee Benefits**

**U.S. Chamber of Commerce**

**April 26, 2007**

Good Morning Chairman Lofgren, Ranking Member King, and distinguished members of the Subcommittee. Thank you for inviting me to testify on a new employment eligibility verification system. My name is Randy Johnson, and I am vice president of labor, immigration and employee benefits, and today I am testifying on behalf of the U.S. Chamber of Commerce. I am encouraged that the Subcommittee is examining this critical issue of how our workforce could be better verified, because a new system will have an impact on every single employer and employee.

The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, sector, and region. I also serve as a co-chair of the Essential Worker Immigration Coalition (EWIC), a coalition of businesses, trade associations, and other organizations from across the industry spectrum that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

The Chamber is also co-chair of the Employment Eligibility Verification System Working Group, or EEVS Working Group. This group was formed to serve as the voice of business exclusively on the issue of a new employment verification system and it is now made up of companies and trade associations from across the industry spectrum. The reason is simple: there are over seven million employers and this will affect all of them, whether or not they hire immigrants.<sup>1</sup> The stakes are extremely high, and the concerns of the business community of how this new system will be constructed can not be overstated. While much of the press has been focused on the issues of the undocumented and new worker programs, we certainly view the employer verification system provisions as equally important.

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<sup>1</sup> U.S. Census Bureau “Number of Firms, Number of Establishments, Employment, and Annual Payroll”  
<http://www.census.gov/csd/subs/ussf04.xls>.

## **I. Overview**

The Chamber supports a new employment eligibility verification system within the context of comprehensive immigration reform because employers want the tools to ensure that their workforce is in fact authorized to work. The labor force in the United States is 146.3 million strong.<sup>2</sup> Furthermore, due to turnover, demographics of the workforce, and the growth of our vibrant and changing economy, every year employers hire about 50 to 60 million people in the United States.<sup>3</sup> Each new employee must be verified as eligible to work under the current paper-based I-9 system and we expect that new employees would have to be verified under any future electronic employment verification system.

There are common concerns across the business, labor, and ethnic groups' advocates because of the broad reach of any new program, as it will affect every employer and employee. We are willing to be part of the solution, but a verification system needs to be fast, accurate, and reliable. Any new system cannot be too costly or burdensome for either employees or employers. It should also not open the door to a barrage of new causes of action unrelated to the hiring or firing of employees based on their work authorization status. Also, as I will explain in detail, this issue should not be combined with the enforcement of labor laws. Before concentrating on the specifics of a future system, I will briefly address why this issue should be dealt with only within the context of comprehensive immigration reform.

## **II. New Electronic Employment Verification System Within the Context of Comprehensive Immigration Reform**

Current immigration laws, including the worksite enforcement provisions, are severely flawed and have failed to curb the flow of undocumented workers into the U.S. It has been more than 20 years since the passage of the Immigration Reform and Control Act of 1986 (IRCA), and we are still experiencing the entry of undocumented workers into the U.S. at a rate of about 500,000 per year.<sup>4</sup> IRCA's goal was to address the undocumented in the country and create a worksite enforcement regime that deterred the employment of the undocumented. This clearly has not happened.

IRCA did not address the future need for workers in the U.S. economy, which has contributed in part to our current dysfunctional system. There was no provision for the flow of lesser skilled or semi-skilled ("essential") workers when there was a shortage of U.S. workers. Additionally, IRCA provided for a paper-based employment eligibility verification system that has failed to deter undocumented workers from entering the U.S. workforce. This combination of flawed policies has resulted in a significant portion of the U.S. workforce, approximately five percent, working in our businesses in an undocumented status.

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<sup>2</sup> Bureau of Labor Statistics, "Employment Situation Summary March 2007" April 8, 2007. <http://www.bls.gov/news.release/empsit.nr0.htm>.

<sup>3</sup> Bureau of Labor Statistics "Job Openings and Labor Turnover February 2007" <http://www.bls.gov/news.release/pdf/jolts.pdf>

<sup>4</sup> Passel, Jeffrey, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S." *Pew Hispanic Center Report*, March 2006. <http://pewhispanic.org/files/reports/61.pdf>

Studies have shown that the principal cause in the reduction of undocumented immigrants in the last decade is due to a decrease in demand for unauthorized workers because of recessions and other economic indicators, while increased enforcement has had only a “small” effect.<sup>5</sup> “The single macroeconomic/demographic variable most highly correlated with the annual flows is the U.S. unemployment rate.”<sup>6</sup> Therefore, any new worksite enforcement regime must be promulgated with a new worker program, and a program to address and correct the undocumented status of workers already employed in the U.S. It must also be created in coordination with a new worker program that responds with flexibility to the needs of our vibrant and diverse economy.

There have been attempts to revamp the worksite enforcement regimen at the federal legislative level and through the administrative process. Although the goal of fixing the worksite enforcement program is admirable, such attempts, outside comprehensive reform, could be severely detrimental to the economic security of the country. Noted national security experts have also reinforced that enforcement alone at any level is not the solution.<sup>7</sup>

### **III. The Current Employment Verification System**

IRCA created the current paper-based employment verification system in the United States. An employer must wait for a newly hired employee to start work before attempting to verify work eligibility in the United States. Within the first three days, the employee shows the employer a document or combination of documents to prove identity and eligibility to work from a list of 27 possible options. The employer must fill out the Form I-9 and retain it. The process is susceptible to fraudulent documents, as well as identity fraud. Employers are not document experts. If a document looks valid on its face, an employer may not legally ask questions without the risk of violating anti-discrimination laws.

The current system has made it impossible for employers to really know who is actually authorized to work and who is not. It is important to note that often, when the Department of Homeland Security (DHS) conducts an audit or raid of an employer, the employer is generally not found at fault because it has followed the law, filled out the proper forms and documents, and could not have known that its employees were not authorized to work. While the company might not suffer any legal action or fines, losing valuable members of the workforce and possibly closing down for even a short amount of time can often add up to significant financial losses, not including the less quantifiable harm such as negative publicity.

In 1998, DHS rolled out an electronic employment eligibility system, the Basic Pilot Program. The Basic Pilot Program is a strictly voluntary, internet based, automated system where an employer checks a new hire’s name and social security number against a government-run database to make sure the name and number matches those on record. As numerous studies and

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<sup>5</sup> Passel, Jeffrey, “U.S. Immigration: Numbers, Trends, and Outlook.” *Pew Hispanic Center Report*, March 26, 2007, pages 12-13.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> Coalition for Immigration Security, composed of numerous former DHS officials, stated in their April 2006 letter that there is a relationship between adequate legal channels of immigration and enhanced border security. See also Stuart Anderson “Making the Transition from Illegal to Legal Migration” *National Foundation for American Policy*, November 2003.

reports have shown, the databases maintained at DHS and the Social Security Administration are not always up-to-date, there is a high error rate in determining work authorization, and the program is incapable of capturing identity fraud.<sup>8</sup> Although this Subcommittee has previously examined the Basic Pilot Program, it is worth noting that in its current form, it would be problematic to expand it to all existing employers and employees. A future employment eligibility verification system will need to take into account the failures and successes of the Basic Pilot Program to ensure that it is workable.

#### **IV. Principles for a New Employment Eligibility Verification System**

Businesses want a reliable, streamlined, and easy to use method to verify the employment eligibility of their workforce. To start, it is imperative that adequate funds and resources be allocated to develop and implement the program to accommodate the over seven million employers in the United States.<sup>9</sup> This will be a significant expansion of the less than one percent of the employer community that currently uses the Basic Pilot Program on a voluntary basis.<sup>10</sup> The Chamber has testified many times during the immigration reform debate and has consistently called for the development of an employment eligibility verification system that carefully addresses: who is to be verified; what documents will be accepted; how the system will be phased in; how the system will function and who will certify functionality; how the system will be enforced; and, how DHS will protect good faith actors.

The Chamber's foremost concern is to ensure that any new system does not become too costly or burdensome for employers. Businesses already spend approximately 12 million hours each year documenting the legal status of the nation's 50 to 60 million new hires.<sup>11</sup> This new system will not only be used by companies with large Human Resources departments and in-house legal counsel, but also by employers operating in the field out of the back of a pickup truck. These small employers create millions of jobs in the U.S. economy, and the burdens placed upon these entrepreneurs must be considered.

##### **A. Employee Population to be Covered**

Pursuant to IRCA, each new employee hired after November 6, 1986 must be verified as eligible to work under the current paper-based I-9 system. IRCA grandfathered employees hired prior to November 6, 1986 so as not to cause undue disruption of businesses. It is critical that any new process only mandate that new hires need to be

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<sup>8</sup> Government Accountability Office, "Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," June 19, 2006, <http://www.gao.gov/new.items/d06895t.pdf>. Even an error rate of one percent of applicants would put at risk over a million workers in losing their job or perspective employment. The stakes could not be higher. For more detail on error rates see testimony from Angelo I. Amador, U.S. Chamber of Commerce before the House Subcommittee on Workforce, Empowerment, and Government Programs of the Committee on Small Business, June 27, 2006, [http://www.uschamber.com/issues/testimony/2006/060627\\_testimony\\_immigrant\\_employment.htm](http://www.uschamber.com/issues/testimony/2006/060627_testimony_immigrant_employment.htm).

<sup>9</sup> Census Bureau. See footnote 1.

<sup>10</sup> As of December 2006, over 12,000 employers were registered with the Basic Pilot Program, approximately 0.2 percent of all employers, [http://www.uscis.gov/files/nativedocuments/EEV\\_FS.pdf](http://www.uscis.gov/files/nativedocuments/EEV_FS.pdf).

<sup>11</sup> Jacoby, Tamar. "An Idea Whose Time Has Finally Come? The Case for Employment Verification." *Migration Policy Institute*, 2005, [www.migrationpolicy.org](http://www.migrationpolicy.org).

verified under any future electronic employment verification system. Employers should only be required to verify new employees, as existing employees have already been verified under the applicable legal procedures in place when they were hired. Re-verifying an entire workforce is an unduly burdensome, costly proposition, and unnecessary given how often workers change jobs in the United States.

## **B. Acceptable Documents for Proof of Identity and Employment Authorization**

The issues of document fraud and identity theft have been exacerbated under the current paper-based I-9 system because of the lack of reliable and secure documents. Documents should be re-tooled and limited so as to provide employers with a clear and functional way to verify that they are accurate and relate to the prospective employee. There are two ways by which this can be done, either by issuing a new tamper and counterfeit resistant work authorization card or by limiting the number of acceptable work authorization documents to, for example, social security cards, driver's licenses, passports, and alien registration cards (green cards). All of these documents could be made more tamper and counterfeit resistant. In fact, in 1998, the federal government began issuing green cards with a hologram, a digital photograph and fingerprint images and by 2010 all green cards currently in existence should have these features.

With fewer acceptable work authorization documents, the issue of identity theft can more readily be addressed. The new verification process will need to require a certain degree of inter-agency information sharing. When an employer sends a telephonic or internet based inquiry, the government must not only be able to respond as to whether an employee's name and social security number matches, but also whether they are being used in multiple places of employment by persons who may have assumed the identity of other legitimate workers. In the long run, as the verification system is developed and perfected, it should move closer towards the use of biometric technology that can detect whether the person presenting the document relates to the actual person to whom the card relates.<sup>12</sup>

## **C. Fair and Reasonable Roll Out of New System**

The Government Accountability Office (GAO) reported last year that there are still some unresolved issues with the Basic Pilot Program, including delays in updating immigration records, false-negatives, and program software that is not user friendly.<sup>13</sup> Specifically, GAO has reported additional problems and emphasizes, "the capacity constraints of the system [and] its inability to detect identity fraud."<sup>14</sup> Given these and other concerns, the new system should be phased in and tested at each stage, and expanded to the next phase only when identified problems have been resolved. The best approach would be for the

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<sup>12</sup> Obviously, as biometric technology is rolled out, it is important to address who would actually pay for the readers and the implementation of the technology. Further, there will be legitimate issues of practicality in implementing biometrics in many workplaces.

<sup>13</sup> Bovbjerg, Barbara D., Director, Education, Workforce, and Income Security Issues at GAO, Testimony before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006.

<sup>14</sup> Id.

program to move from one phase to the next only when the system has been improved to take care of inaccuracies and other inefficiencies ascertained through the earlier phase. This would also allow DHS to properly prepare for the new influx of participants. In addition, if industry sectors are carved out, these need to be delineated and defined. For example, there needs to be clear guidelines of what exactly falls within the broad term of “critical infrastructure” if that is used as one benchmark.

#### **D. Response Times**

The employer needs to be able to affirmatively rely on the responses to inquiries into the system. Either a response informs the employer that the employee is authorized and can be retained, or that the employee is not and must be discharged. Employers would like to have the tools to determine in real time, or near real time, the legal status of a prospective employee or applicant to work. DHS and the Social Security Administration must be given the resources to ensure that work authorization status changes are current to avoid the costs and disruption that stems from employers having to employ, train, and pay an applicant prior to receiving final confirmation regarding the applicant’s legal status.

The Chamber understands that due process concerns must allow the employee to know of an inquiry and to then have the ability to challenge a government determination. Thus, at the very least, employers should be able to submit an initial inquiry into the system after an offer of employment has been made and accepted. Presumably this could be done two weeks before the first day of employment so the clock starts running earlier. The start date should not be affected by an initial tentative nonconfirmation. Of course, for employers that need someone immediately, the option of submitting the initial inquiry shortly after the new employee shows up for his or her first day at work should continue to be available. In the case of staffing agencies, current law allowing for submission of the inquiry when the original contract with the agency is signed should be kept in future laws. A maximum of 30 days, regardless of when or how the inquiry is made, and taking into consideration time to submit additional information and manual review, should be the outer limit that the system should take from the date of initial inquiry until a final determination is issued by the government.

#### **E. Government Accountability**

The government must also be held accountable for the proper administration of the new system. There must be an administrative and judicial review process that would allow employers and workers to contest findings. Through the review process, workers could seek compensation for lost wages due to a DHS agency error. Meanwhile, if an employer is fined by the government due to unfounded allegations, the employer should be able to recover some attorneys’ fees and costs—capped at perhaps \$50,000—if they substantially prevailed in an appeal of the determination. Additionally, workers should have access to review and request changes to their own records to avoid issues when changing jobs.

## **F. Enforcement and Liability/Penalties**

The Chamber believes that full and fair enforcement of a new, functional verification system coupled with comprehensive immigration reform will be more feasible and more likely to focus on the true egregious violators than is currently the case. We believe that enforcement should take into account transition times for the new system and should protect the employers acting in good faith. Furthermore, we believe that DHS should have primary authority over the enforcement provisions of any new system. There should be language prohibiting private rights of action against employers for matters that should be enforced by DHS. Furthermore, the power to investigate any labor or employment violations should be kept out of a system created exclusively for the purpose of verifying employment eligibility. The Chamber continues to call for a simple and reliable system, which includes reasonable penalties for bad actor violators.

With respect to employer liability, the current “knowing” standard should be maintained. The government should punish intentional violators, however, those employers whose only error was a simple oversight or mistake should be given an opportunity to rectify such error. Presumptions of guilt without proof of intent are unwarranted. It is also critical to the employer community that it does not bear direct liability for subcontractor actions unless the contractor knew of the actions of the subcontractor. In other words, the contractor should not be held liable for undocumented workers hired by a subcontractor without evidence of direct knowledge of the general contractor. Without such protection, an employer could be open to liability even for the violations of its peripheral contractors – e.g. a water delivery company or landscaping contractor.

A number of additional penalties and causes of action have been suggested as proper penalties in a new verification system. These range from debarring employers from federal government contracts to expansion of the current antidiscrimination protections. Penalties must be tailored to the offense and the system must be fair. Automatic debarment from federal contracts is not an authority that should be given to DHS. Indeed a working process already exists in current law under the Federal Acquisition Regulations (FAR).

Additionally, the Chamber objects to expansion of antidiscrimination provisions found in current law. As stated above, a new, functional system coupled with comprehensive immigration reform should provide adequate assurances that it will not be used to discriminate against workers. Employers should not be put in a “catch-22” position in which attempting to abide by one law would lead to liability under another one.

## **G. Preemption of State Laws and Local Ordinances**

It is also important to note that several states and local governments are attempting to either force employers/retailers to bear the cost of helping shield undocumented workers or are attempting to impose additional worksite enforcement provisions. These attempts run the risk of undermining the ability of the federal government to oversee and enforce national immigration laws and also put undue burden on businesses attempting to deal

with the current broken system. A new worksite enforcement regime needs to address specifically these attempts to preempt jurisdiction of federal immigration law.<sup>15</sup>

## **H. Limited Bureaucracy, Cost, and Expansion of Employment Law**

It is imperative that the new system be workable, simple, easy to use, and not be costly or burdensome to employers. DHS will need adequate funding to create, maintain and implement the new system. This cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, DHS should not promulgate overly burdensome document retention requirements. The transition from the paper-based system to a new electronic system must be handled in a smooth and methodical way that verifies the functionality of the systems and also takes into account the vast differences in the employer community. Small employers should not bear the burden disproportionate to medium-sized and larger employers.

The new system needs to be implemented with full acknowledgment that employers already have to comply with a variety of employment laws. Thus, verifying employment authorization, not expansion of employment protections, should be the sole emphasis of a new employment verification system.

In this regard, it should be emphasized that there are already existing laws that govern wage requirements, pensions, health benefits, the interactions between employers and unions, safety and health requirements, hiring and firing practices, and discrimination statutes. The Code of Federal Regulations relating to employment laws alone covers over 5,000 pages of fine print. And of course, formal regulations, often unintelligible to the small business employer, are just the tip of the iceberg. Thousands of court cases provide an interpretive overlay to the statutory and regulatory law, and complex treatises provide their own nuances.<sup>16</sup> A GAO report titled “Workplace Regulations: Information on Selected Employer and Union Experiences” identified concerns regarding workplace regulations that employers continue to have to this very day.<sup>17</sup> The report noted that enforcement of such regulations is inconsistent, and that paperwork requirements could be quite onerous. Most importantly, the report concluded that employers are overburdened by regulatory requirements imposed upon their businesses and many are fearful of being sued for inadequate compliance.

The cost of compliance continues to grow at an alarming pace. A 2005 study by Joseph Johnson of the Mercatus Center<sup>18</sup> estimated the total compliance cost of workplace

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<sup>15</sup> A record number of immigration-related bills are under consideration, or have been enacted, in all 50 states. Nationwide, 1,169 immigration bills are in the works, and at least 57 bills in 18 states have been enacted, according to the National Conference of State Legislatures, <http://www.ncsl.org/>.

<sup>16</sup> For example, one treatise on employment discrimination law alone stretches over 2,000 pages. Barbara Lindemann and Paul Grossman, “Employment Discrimination Law,” *ABA Section of Labor and Employment Law*, 3<sup>rd</sup> Edition, 1996.

<sup>17</sup> U.S. Government Accountability Office Report, “Workplace Regulation: Information on Selected Employer and Union Experiences,” GAO-HEHS-94-138, Washington DC, pages, June 30, 1994, pages 25-53.

<sup>18</sup> Johnson, Joseph. “The Cost of Workplace Regulations”, *Mercatus Center*, George Mason University, Arlington, Virginia, August 2001.

regulations at \$91 billion (in 2000 dollars) and a follow up study by W. Mark Crain for The Office of Advocacy, U.S. Small Business Administration,<sup>19</sup> estimated the total compliance cost of workplace regulations at \$106 billion (in 2004 dollars). Within a four year span, the cost grew at a rate of 15 billion, or 3.75 billion per year.

## V. Conclusion

The Chamber urges you to continue to engage the business community to create a workable electronic employment verification system within the context of comprehensive immigration reform. This requires an overall system that is fast, accurate and reliable under practical real world working conditions, and includes:

- A new verification system that only applies to new hires;
- A reasonable number of reliable documents to reduce fraud;
- A telephone based alternative to accommodate all employers;
- A phase-in with independent certification as to accuracy and workability;
- Congressional oversight authority with independent studies;
- Verification to begin when firm offer of employment is made and accepted, followed by reasonable system response times—at the most 30 days;
- Accountability structures for all involved—including our government;
- An investigative and enforcement system that is fair, with penalties commensurate to the offense;
- Provisions to protect first-time good faith “offenders” caught in the web of ever-changing federal regulations;
- No expansion of liability beyond the knowing standard for contractor/subcontractor relationships;
- No expansion of antidiscrimination laws or debarment outside the FAR system;
- Clarification that federal jurisdiction preempts state and local laws;
- No artificially created incentives favoring automatic fines or frivolous litigation; and,
- No expansion of labor laws within the electronic employment verification system.

Employers will be required to utilize and comply with the new electronic employment eligibility verification system, and therefore, we should continue to be consulted in shaping such a system. We at the Chamber, EWIC, and the EEVS Working Group, stand by to continue to assist in this process. Thank you again for this opportunity to share the views of the Chamber, and I look forward to your questions.

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<sup>19</sup> Crain, Mark W. “The Impact of Regulatory Costs on Small Firms,” Report RFP No. SBHQ-03-M-0522, Lafayette College, for the Office of Advocacy, *U.S. Small Business Administration*, September 2005.

United States House of Representatives  
Committee on the Judiciary  
John Conyers, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: <u>"Proposals for Improving the Electronic Employment Verification + Worksite Enforcement System"</u>	
Date: <u>April 26, 2007</u>	
1. Name: <u>Randel K. Johnson</u>	2. Entity(ies) you are representing: <u>US Chamber of Commerce</u>
3. Business Address and Telephone Number: <u>U.S. Chamber of Commerce Washington, DC 20062</u> <u>1615 H St., NW 202-463-5448</u>	
4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	5. Have any of the <u>entities that you are representing</u> received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. (Please use additional sheets if necessary.)	
7. Signature: 	Date: <u>4/23/07</u>

Jud-5/2003