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Mary Ellen Callahan
Chief Privacy Officer
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Department of Homeland Security
Washington, DC 20528

***Re: Comments on the DHS Docket Numbers 2009-0013 & 2009-0015;
Regarding USCIS 009 Compliance Tracking and Monitoring System***

Dear Chief Callahan:

The American Immigration Lawyers Association (AILA) submits the following in response to the requests for public comment by the Department of Homeland Security (DHS), on the proposed rulemaking amending the Privacy, Freedom of information regulations (DHS Docket No. DHS-2009-0013), and notice of Privacy Act system of records (DHS Docket No. DHS-2009-0015), 74 Fed. Reg., No. 98, pages 23957-23958 and 24022-24027 (May 22, 2009).

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality, and the facilitation of justice in the field. AILA appreciates the opportunity to comment on the proposed rulemaking and notice of Privacy Act system of records. Our members' collective expertise and experience makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States, and in complying with U.S. immigration laws and regulations. Additionally, AILA members have worked closely with E-Verify employers and have advised them on evaluation of the system, implementation, management and oversight of accounts. AILA members also have experience with E-Verify employers that have been the subject of government investigations utilizing E-Verify data.

AILA wishes to express its concern that the public has only been given thirty days to comment on two Department of Homeland Security regulations of utmost importance to our government, to the Nation and more specifically to the business community. Implementation of these regulations might have the unintended consequence of frustrating the Administration's goal of gaining voluntary employer participation in E-verify, thereby thwarting efforts to

achieve enhanced immigration compliance. Further, we question if DHS really intends to meaningfully review the public's views on these regulations and address its concerns since it has published one of these regulations (DHS – 2009-0015) with an effective date that coincides with the submission date for comments, June 22, 2009.

Without warning, DHS is unexpectedly announcing to the business community that it intends to establish a system of records, DHS/USCIS – 009 Compliance and Tracing and Monitoring System (CTMS), in order to mine the E-verify data to support monitoring and compliance activities. To accomplish this goal, the Verification Division of DHS has created the Monitoring and Compliance Branch (M&C) which is charged with both monitoring and compliance activities. After monitoring analysts identify perceived “non-compliant behaviors,” the data will be entered into CTMS to conduct follow up compliance activities. Through a concurrently issued DHS regulation (DHS—2009-0013), “DHS proposes to exempt portions of the Compliance and Tracing and Monitoring System (CTMS) from one or more of the provisions of the Privacy Act because of criminal, civil and administrative enforcement requirements.” As explained in this regulation, if such an exemption is claimed, an agency must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed. The reasons are clear – the data will be used for law enforcement activities.

AILA supports governmental efforts to provide employers with effective means to verify that newly hired employees are authorized to work in the United States. AILA likewise concurs with the DHS's overall policy goal that tools to verify employment authorization, such as E-Verify, should not be misused, abused, utilized to discriminate, breach privacy or facilitate fraudulent use of USCIS Verification Division information.

Despite AILA support for DHS's intended goals, we feel quite strongly that these proposed regulations will have the unintended consequence of discouraging employer participation in the program. AILA believes that it is both unwise and premature to build a data mining and enforcement mechanism into this system now. Westat is embarking on a \$3.9 million study that will provide much needed information about the continued roll-out of E-Verify to the employer community.¹

More formal compliance monitoring and reporting should come only after DHS reviews and revises E-Verify in response to the upcoming Westat report, and Congress has re-authorized the program more broadly, rather than in the months right before its scheduled September 30, 2009 expiration.

Equally importantly, AILA takes strong issue with E-Verify's plans, as outlined in the proposed regulations, to refer suspect information from E-Verify to Immigration and Customs Enforcement (ICE) for investigation and enforcement. Turning E-Verify into an enforcement tool against employers is contrary to Congressional intent. Such a plan will predictably have a chilling effect upon employers' participation in E-Verify to assist them with verifying employment authorization.

Despite concerns regarding the reliability of the E-Verify databases, up until now, employers have voluntarily agreed to join E-Verify and partner with the government to deter the employment of unauthorized employment by better screening new hire documentation. Earlier this year, Intel

¹ OMB No. 1615 NEW "E-Verify Non-User and Employee-Employer Survey in Arizona" Supporting Statement A. (April 2009).

Corporation reported that E-Verify flagged thirteen percent of all its work-authorized new workers as tentative non-confirmations, requiring a “significant investment of time and money” to resolve data base discrepancies.² Nevertheless, companies such as Intel and many others have trusted that E-Verify is not an enforcement tool of ICE but is intended by the government solely to assist employers in complying with its immigration responsibilities. These proposed regulations result in the classic “bait and switch.” E-Verify is not what it purports to be; the government has described its use and purpose in a manner that is now contradicted with the introduction of these new data mining systems to be used by ICE and other governmental entities.

AILA recommends that DHS withdraw these regulations and engage in extensive outreach, education and informal review of how employers are using the system. In addition, should DHS unfortunately proceed with implementing these regulations now, we urge that the monitoring and compliance protocols be modified so that where DHS data mining algorithms suggest the usage of valid documents that might not belong to the employee (i.e. Identity theft), the system issue a tentative non-confirmation that will focus attention on the user of the documentation, the employee, to facilitate the resolution of a possible ‘non-compliant’ activity.

I. Background on E-Verify

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), created three pilot systems: E-Verify (originally designated in the statute as the “basic pilot program”), a citizenship attestation pilot program, and a machine-readable-document pilot program.³ Of the three programs, only E-Verify was extended and its statutory authority is currently designated to terminate on September 30, 2009.⁴

For most employers, participation in E-Verify is optional under federal law; only select government entities, the federal government and the legislative branch are required to use E-Verify.⁵ As of April 2009, approximately 117,000 of the estimated 9.1 million U.S. employers are registered to use E-Verify, or 1.29% of U.S. employers.⁶ Although some state laws require E-Verify use to transact business within a state or to receive state or local contracts or tax credits, an employer not otherwise required to use E-Verify can choose not to operate in the jurisdiction or seek contracts or other financial incentives.

The current E-Verify program arose from the legislative intent behind the Immigration in the National Interest Act of 1995. The Report of the Judiciary Committee correctly identified that, “[w]hile most employers try to comply with the law, it is impossible for honest employers

² Intel Corporation, “Comments on Proposed Employment Eligibility Regulations Implementing Executive Order 12989 (as amended),” (Aug. 8, 2008).

³ Section 401 of IIRAIRA.

⁴ Pub. L. 111-8, Div. J, §101, Mar. 11, 2009.

⁵ Section 402(a) and (e). As of June 12, 2009, the FAR regulation requiring E-Verify use by federal contractors has not yet been implemented.

⁶ http://www.dhs.gov/ynews/testimony/testimony_1238765913599.shtm Aytes testimony and <http://www.bls.gov/opub/mlr/2008/12/mlr200812.pdf> DOL publication, page 4.

to distinguish genuine documents from high-quality (but inexpensive) counterfeit ones.”⁷ Accordingly, it was the purpose of the INIA to assist employers to root out document fraud, and nothing more. Specifically, the bill explicitly states that the system could not require a “national I.D. card” and could not be used except to verify eligibility to work or to receive certain government benefits, or to enforce criminal statutes related to document fraud.

The proposed regulations vitiate the legislative restriction by establishing an enforcement component in E-Verify.

II. Documented History of E-Verify Compliance and Monitoring Efforts

In 2002 in its *INS Basic Pilot Evaluation, Summary Report*⁸, Westat informed the government that employers did not always follow the correct procedures and that some engaged in practices such as pre-employment screening, acting adversely against employees not immediately clearing the system, missing deadlines, failing to inform employees of their rights, and failing to terminate employees who did not clear the system. Similar information was again reported by Westat in its September 2007 report entitled *Findings of the Web Basic Pilot Evaluation*. In response to these continuing problems, Westat reported that USCIS had established monitoring and compliance units in 2007.⁹

The U.S. Government Accountability Office (GAO) reported, as of April 2008, the USCIS Monitoring and Compliance branch had 21 staff and planned to hire 32 additional staff in fiscal years 2008 and 2009.¹⁰ Additionally, the GAO stated that by January 2009 USCIS had plans to establish a regional verification office with 135 staff members to conduct status verification and monitoring and compliance activities. The USCIS, Monitoring and Compliance branch’s stated mission was to: (1) prevent fraud, discrimination, or illegal use of E-Verify; (2) educate employers and provide assistance with compliance procedures; (3) follow up with employers on misuse of the system; and (4) monitor E-Verify system usage and refer identified instances of fraud, discrimination, or illegal use of the system to enforcement authorities such as ICE or the Department of Justice’s Office of Special Counsel.¹¹

The GAO noted that the Monitoring and Compliance branch could help Immigration and Customs Enforcement (ICE) better target its worksite enforcement efforts.¹² In fact, ICE officials noted that, in a few cases, they had requested and received E-Verify data from USCIS on specific employers who participate in the program and are under ICE investigation.¹³ USCIS also reported that by

⁷ Immigration in the National Interest Act of 1995, H.R. REP. 104-469(I), H.R. Rep. No. 469(I), 104TH Cong., 2ND Sess. 1996, 1996 WL 168955 (Report from Mr. Hyde, member of the Committee on the Judiciary).

⁸ http://www.uscis.gov/files/nativedocuments/INSBASICpilot_summ_jan292002.pdf, pages v-vi

⁹ Available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>. See pages 157-159.

¹⁰ Statement for the Record of Richard M. Stana, Dir. Homeland Security and Justice Issues, To the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Committee on the Judiciary, House of Representatives, *Employment Verification, Challenges Exist in Implementing a Mandatory Electronic Employment Verification System*. June 10, 2008 (GAO-08-895T). See page 18.

¹¹ *Id.*

¹² *Id.* at 19.

¹³ *Id.*

monitoring the use of the E-Verify program prior to June 2008, USCIS staff was able to identify instances of fraudulent use of Social Security Numbers and referred such examples of fraud to ICE.¹⁴

In June 2008, the GAO also reported that USCIS and ICE were negotiating a Memorandum of Agreement (MOA). This agreement was finalized in December 2008.¹⁵ Pursuant to this agreement, the USCIS Verification Division is charged with the following duties:

- Identification and pursuit of suspected employer and employee misuse, abuse, and fraudulent use of E-Verify, and the tracking and management of all such cases.
- Referral of suspected employer and employee misuse, abuse, and fraudulent use of E-Verify to ICE for investigative consideration, in particular cases of a specific incident or pattern or practice of:
 - Misuse, abuse, and/or fraudulent use of E-Verify occurring at critical infrastructure sites;
 - Violations regarding employment of unauthorized aliens;
 - Criminal activity (harboring offenses);
 - Failure to use E-Verify for all employees; or
 - Retaining employees after an E-Verify Final Nonconfirmation.

According to the MOA, both USCIS and ICE may conduct concurrent compliance activities, but ICE retains the right to suspend USCIS activities.

In May 2009, in the proposed regulation, the USCIS Verification Division stated that the Monitoring & Compliance (M&C) Branch was created.¹⁶

III. Proposed Monitoring and Compliance Activities in DHS Docket No. DHS-2009-0015

Monitoring – Under the Notice of Systems and Records Monitoring and Compliance personnel will utilize electronic “data mining” tools to research records created by E-Verify users and document suspected instances of the following:

- Fraudulent use of Alien-Numbers and Social Security Numbers, by identifying multiple uses of the same data.
- Termination of an individual’s employment based on an initial, “tentative nonconfirmation” result, as indicated by a large number of uncontested tentative nonconfirmations.
- Failure to notify the government when an employee is retained after receipt of a “final nonconfirmation,” based upon unclosed cases or delayed closures of cases with a final nonconfirmation result.
- Use of E-Verify on existing employees, based upon verification and hire dates, multiple verifications of an employee, or a high number of verifications resulting in blank or invalid closure codes.

¹⁴ *Id.* at 19-20.

¹⁵ Available at <http://www.uscis.gov/files/nativedocuments/USCIS-ICE-E-Verify%20MOA.pdf>.

¹⁶ 74 Fed. Reg., No. 98, pages 24022-24027, 24023 (May 22, 2009).

- Pre-screening of applicants, based on a higher than expected number of queries.
- Selective use of E-Verify based upon either too few verifications or a high number of foreign country codes in a user's E-Verify account.

Compliance – Under the System of Records notice Monitoring and Compliance personnel will also conduct compliance activities on these suspected activities as follows:

- Fraudulent use of Alien-Numbers and Social Security Numbers – Review and collection of documents showing the source of the information.
- Termination of an individual's employment based on an initial, "tentative non-confirmation" result – Review and collection of documents that show an employee was actually terminated (Form I-9, supporting documents, and offer and termination letters).
- Failure to notify the government when an employee is retained after receipt of a "final nonconfirmation" – Review and collection of documents that show an employee was terminated (copies of termination letters and E-Verify generated documentation).
- Use of E-Verify on existing employees – Review and collection of documentation of hire dates (Form I-9, offer letter, and E-Verify generated documentation).
- Pre-screening of applicants – Review and collection of documents that demonstrate actual hires of individuals (Form I-9, offer letter, and E-Verify generated documentation).
- Selective use of E-Verify - Review and collection of documents that demonstrate actual hires of individuals (Form I-9, offer letter, and E-Verify generated documentation).

1. DHS Has Failed to Consult with Employer Representatives

DHS did not consult with employer representatives before proposing these regulations. The plain text of IIRAIRA mandates close consultation with representatives of employers in the development and implementation of the pilot program.¹⁷ What could be more important for close consultation with employers than a plan to data mine E-Verify information and refer suspected "non-compliant activities" to enforcement agencies? Had there been such consultations, it is quite likely that DHS would have received significant input from the business community.

2. DHS Should Study the Recommendations of the Pending New Westat Study

It is imprudent and wasteful for DHS to devote resources to CTMS before publication of the next in-depth Westat survey of E-Verify utilization. Just underway is a \$3.9 million study focusing on two important constituencies--Arizona employers, compelled by state statute to enroll in E-Verify, and users outside Arizona, South Carolina and Mississippi (other mandatory states) not enrolled in E-Verify. As detailed below in these Comments, the previous Westat study of E-Verify revealed significant issues with the E-Verify system, and Westat recommendations led to notable improvements in the operations of E-Verify that made the system more reliable and user friendly. Why would E-Verify build and introduce sophisticated tracking tools designed to get at what E-Verify believes are "abuses" of the system before Westat reports on what is actually happening on the ground with users? Critical employer reaction to these new regulatory developments would have been garnered had the Westat survey

¹⁷ IIRAIRA Section 402(d)(1).

included questions for both users and non-users about how they would react to a system that provides an "employment authorized" response to employers, but sub rosa may refer that employee and employer information to ICE for follow-up investigation.

3. E-Verify Has Not Been Congressionally Authorized for Permanent Use

Although not well understood by the public, E-Verify is a temporary and experimental program, whose long-term fate may well depend upon passage of comprehensive immigration reform. Again, isn't it wasteful to develop technology systems and staff devoted to the interim status quo, when the system could be repealed or changed in the short run? Far better instead to continue to focus on gathering the type of data highlighted in the Westat survey prospectus and provide that research to Congress in connection with its design of a longer term electronic verification system.

In this regard, AILA applauds E-Verify's motivation to use technology to ferret out circumstances where employers may not be using E-Verify correctly, particularly where E-Verify data suggests that pre-screening, selective use or termination of TNC responses may be occurring. But that research, during the pilot program, should be used only for educational and outreach purposes, and not as a short-cut to targeted enforcement action against employers. Contrary to its advertising campaigns, E-Verify is not user-friendly for unsophisticated employers. It is process-laden and based on multiple legalese-ridden documents. The system does not include "outside the system" prompts and reminders that would enhance employer compliance. It includes a mandatory photo tool that even some experienced immigration and employment practitioners do not understand. Now is not the time to turn volunteers, who signed up for the pilot to help the government get the next verification system right, into scofflaws.

4. DHS Can Implement More Effective Methods to Reduce Identity Theft

AILA believes that the continued inability of the E-Verify system to detect improper, multiple uses of identity information that "clear" the system remains one of the greatest flaws of the system. This flaw persists despite seven years of repeated notice about this problem to the INS/DHS. Under the proposed regulations, DHS's solution is to monitor multiple uses of identity information after employment commences, and then either send USCIS compliance personnel to conduct an investigation, or turn the matter over to ICE. This plan is simply untenable if the purpose of the agency is to encourage use of the system. It is also manifestly unfair to the thousands of employers who enrolled in E-Verify with the expectation that they could rely on the bona fides of the data in the hiring process. A rebuttable presumption is established by §402(b) of IIRAIRA that the employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify.¹⁸

¹⁸ See also *United States v. Walden Station, Inc.*, 8 OCAHO 1053, OCAHO Case No. 99A00040 (Apr. 21, 2000); INA §274A(b)(6)(A) (Completion of the I-9 form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized alien, but the government may rebut the presumption by offering proof that the documents did not appear genuine on their face, the verification was pretextual, or that the employer

DHS's purported solution to this problem is not the most effective method to reduce improper uses of identity data. DHS's solution would, in many instances, permit an employee to begin employment and work for a period of time, perhaps even an extended period of time, before DHS would take action to investigate the situation. In the event an ICE investigation revealed that the E-Verify authorized worker was not in fact work authorized, the employer would be required to terminate the employment relationship and absorb the costs entailed in needlessly hiring and training the employee.

To minimize instances of improper uses of identity data, AILA recommends that DHS modify its monitoring software to identify instances of a multiple use of a Social Security or Alien Number, and to generate a DHS tentative non-confirmation requiring the individual to report to DHS. If the individual failed to report to DHS, a final non-confirmation result in the termination of the employment relationship and prevent additional investment of resources in the employee. In these special situations, post Final Nonconfirmation (FNC), DHS could then request by e-mail that an employer provide it with a copy of the Form I-9, supporting documentation, and E-Verify generated documents. Most importantly, this solution would prevent the potentially unauthorized worker from continuing his or her employment beyond the TNC period. It would also provide DHS relevant data, post FNC, to investigate potential document fraud without unnecessarily burdening the employer.

AILA would also welcome the opportunity to work with DHS to discuss the development of workable solutions to address the issue of existing improper uses of identity data in a manner that is consistent with the legal rights of employers and employees alike.

5. The Proposed Regulations Might Result in Increased Immigration-related Discrimination

Rather than subject oneself to heightened scrutiny and the potential of law enforcement activities a diligent employer, faced with the prospect of covert government monitoring while potentially waiving its Fourth Amendment protections, may focus its efforts on identifying prospective employees from a "safer" pool of job applicants. Such actions, induced by the used of E-verify as a law enforcement tool could result in increased immigration related discrimination in violation of the verification procedures' statutory mandate. This precarious prospect was identified by the Court in *Collins Foods International, Inc. v. U.S. INS*:

[IRCA] is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. . . . [the] ultimate danger [is that many employers] faced with conflicting demands of the EEOC and the INS would simply avoid interviewing any applicant whose appearance suggests alienage.¹⁹

This conflict was also identified in the comments of a group of minority-led opponents to the IIRIRA E-Verify amendments urging the opposition to H.R. 2202:

colluded with the employee in falsifying the documents).

¹⁹ 948 F.2d 459 (9th Cir. 1991).

The 'verification system' is no answer to the problem of discrimination. In order to avoid the disruptions resulting from government errors and discrepancies, employers would most likely continue to avoid including individuals whose appearance, name, accent or family background make their profile appear 'foreign'.²⁰

6. DHS Can Adopt Better Solutions to Reduce the Potential for Discrimination

Section 404(d) of IIRAIRA mandates that E-Verify have "reasonable safeguards" to prevent unlawful discriminatory practices based on national origin or citizenship status, including:

- Selective or unauthorized use of the system to verify eligibility;
- Use of the system prior to an offer of employment; or
- Exclusion from employment consideration based on the perceived likelihood that an individual will require additional verification.

AILA members fully understand citizenship discrimination issues. We work closely with foreign nationals to obtain the right to work in the United States and are familiar with the challenges that the foreign-born encounter in the workplace. We also work closely with employers to familiarize them with the requirements of the citizenship discrimination statutes. AILA strongly supports measures that effectively reduce unlawful discrimination.

AILA does not believe that DHS's Monitoring and Compliance solution directly addresses the practical problems encountered by E-Verify employers, nor does the DHS solution provide efficient measures to reduce discrimination in the workplace.

DHS's solution depends on an E-Verify employer having either too many or too few E-Verify queries, or too high of a percentage of foreign country codes in the employer's E-Verify account records. DHS should not initiate investigations based primarily on these factors when there may be valid justification for these results. For example, some employers may have a low rate of turnover, resulting in few new hires relative to the industry, or it may only use E-Verify in a small portion of its company. Similarly, some employers may uniformly complete the I-9 process and initiate an E-Verify query for all newly hired employees, but an employee may decide not to begin work after being notified of a TNC, resulting in a higher number of queries. An employer may also have a higher percentage of foreign born workers, depending upon its location, resulting in the appearance of "non-compliant" behavior. The bottom line is that there may be a variety of factors that impact existing data.

The DHS should instead take steps to work with employer representatives and the U.S. Department of Justice, Office of Special Counsel (OSC) to enhance two main elements of the program to reduce discrimination in the workplace.

- A. **AILA recommends that DHS and OSC streamline the mandatory poster requirement and provide for specific, alternative means to notify applicants and employees of their rights under the law.**

²⁰ *Additional Views Concerning Employment Verification System*, 1996 In Crowd Comments to the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

Currently, an employer is required to post a total of four (4), 8.5” x 11” posters, each with large graphics and very small text, in a location conspicuous to applicants to notify them of their rights. Given the large volume of space these four posters take up, it is difficult to allocate this much space in conjunction with other required employment law posters. Some employers do post notices, but they may not have room for all four posters. Others have attempted to post notices in conjunction with online applications, or by an alternate form of signed statement.

Given the small amount of text on each poster, AILA recommends copying the text of each poster and placing it on a one-page notice. This one-page notice could be posted in the workplace or provided in connection with the application form, either paper or online.

By making the poster size more manageable, DHS could increase compliance by making this information more readily available without sacrificing notice content. DHS could also authorize alternate methods for distribution of this notice to better inform applicants of their legal rights.

B. AILA recommends that the OSC become more directly involved in the creation of educational and testing materials for E-Verify users, and that OSC provide these materials through the E-Verify website.

Currently, the training materials related to OSC obligations for all E-Verify roles are minimal. If OSC were given the opportunity to create its own online tutorial and test, E-Verify users would be more aware of the anti-discrimination laws and be more effective in avoiding potentially discriminatory behavior.

The templates and technology for OSC to create training and testing materials exists within the E-Verify framework. They could be quickly and efficiently implemented based upon OSC’s established resources. Additionally, existing E-Verify users should be required to attend mandatory OSC anti-discrimination training and testing as a continuing education requirement in order to continue participating in E-verify. The E-Verify system could prompt users to retake the OSC testing portion, perhaps on an annual basis.

The combination of a more streamlined notice and enhanced OSC training and testing would benefit employers and increase employer awareness of important anti-discrimination protections. More importantly, DHS would satisfy the statutory mandates of Section 404(d) of IIRAIRA that E-Verify have reasonable safeguards against the system participation resulting in unlawful discriminatory practices based on national origin or citizenship status.

7. Other Remedial Steps Can be Taken By DHS to Prevent E-Verify Abuses

DHS can equip the employer with better E-verify compliance tools by 1) modifying case resolution functionality; 2) creating better reporting tools; and 3) providing enhanced training for corporate and program administrators.

Section 404(d) of IIRAIRA mandates that DHS maximize E-Verify's reliability and ease of use to users. The following recommendations would make E-Verify easier to use and could provide better "real world" data for DHS review.

A. **Modification of Case Resolution Functionality**

1. **Modify Case Closure Code System**

E-Verify presently permits five (5) different Case Resolution Codes: Resolved Authorized, Resolved Unauthorized/Terminated, Self-Terminated, Invalid Query, or Employee not Terminated.

The meaning of these codes is listed below:

Resolved Authorized – Used when an Employment Authorization response is received.

Resolved Unauthorized/Terminated – Used when SSA or DHS Final Nonconfirmation or No Show response is received.

Self-Terminated – Used when employee quit or has been terminated for reasons unrelated to employment eligibility status while the verification query is in process.

Invalid Query – Used for duplicate queries or incorrect data input.

Employee Not Terminated – Used when employee is not terminated after receipt of SSA or DHS Final Nonconfirmation or No Show.

Note, one must physically review the Glossary of the E-Verify manual for these descriptions.

In September 2007, Westat highlighted the need to modify the case closure codes. Specifically, Westat stated: "...the case closure codes are unclear and not sufficiently comprehensive to describe adequately what happened after the tentative nonconfirmation was issued, especially if the case was not contested. This information would be useful for monitoring and evaluation purposes *and may help remind employers of what should be happening after a tentative nonconfirmation is received.*" (emphasis added).

Westat suggested that the following referral codes be utilized:

- The employee quit before the tentative nonconfirmation code finding was issued.
- The employee was fired before the tentative nonconfirmation was issued.
- The employee was notified of the tentative nonconfirmation and quit without saying whether he or she wished to contest.
- The employee was notified of the tentative nonconfirmation and said that he or she did not want to contest.
- Other (explain).

Based upon our experience with E-Verify employers, there is a significant amount of confusion about how to properly close out a case. In fact, some E-Verify users fail to immediately close out many records until they receive further guidance on the appropriate use of the codes. The Westat-suggested codes (in full text) would provide employers with the ability to more accurately code case resolution information in a more comprehensive manner.

2. **Creation of Post Closing Update and Communication System**

In 2007, Westat also recommended to USCIS that its database should allow an employer to easily modify or update a record after the case is resolved. Specifically, Westat stated: "...there is currently no way to update the database to indicate that the outcome [resolution of a case post Final Nonconfirmation] has been changed, resulting in discrepancies that could create problems for work-authorized employees or their employers *if monitoring or enforcement actions indicate that employment should have been terminated.*" (emphasis added)

Just as employers are able to correct and update I-9 forms, employers should have some means to easily review and communicate corrections to USCIS. Examples include when an FNC case later becomes work authorized; or when E-Verify users close out cases with the wrong code. It would benefit the government and employers if DHS would create an additional screen for the E-Verify record to indicate either of these instances.

In light of the proposed Monitoring and Compliance effort, E-Verify employers should receive further education regarding suspected "non-compliant activities" and be given a window of time (e.g. six months) to audit its E-Verify records and take corrective action, thereby avoiding a referral of "non-compliant behavior" from the Monitoring Analyst to the Compliance unit.

B. **E-Verify Reporting Tools Should Be Enhanced and Improved**

At present, the E-Verify system only provides Program Administrators with three (3) reports:

- Corporate Overview of Pilot Usage – Displays the number of cases initiated by the employer within a fiscal year,
- User Report – Lists an employer's E-Verify Users, and
- User Audit Report – Provides summary level case data.

Of the three reports, the User Audit Report provides the most useful information for a Program Administrator to review trends and identify potential problem areas, but one must possess a relatively advanced level of working knowledge to isolate key data points. The reports available to Corporate Administrators provide similar information, but also do not readily indicate potential problem areas. It would be very beneficial if DHS could provide additional reports that would isolate potential problem areas, such as failure to resolve cases indicating either TNC or FNC.

C. **Provide Better Training for Corporate and Program Administrators**

AILA members regularly work with employers to assist in establishing accounts, designate in-house responsibilities, provide enhanced training in advance of the E-verify required tutorials and testing. Some AILA attorneys even serve as Corporate and Program Administrators of their law firm's E-Verify account. Based upon these experiences, we've observed that the present E-verify training primarily focuses on account set up, user set up, and basic case query tasks. There is minimal focus on how an employer can evaluate current usage in order to identify potential problem areas. The E-Verify program should endeavor to educate Corporate and Program Administrators with the ability to identify potential problem areas on their own.

The statute clearly tasks DHS with responsibilities that have not been adequately addressed over the last seven years. Section 404(d) of IIRAIRA mandates that DHS maximize E-Verify's reliability and ease of use to users. Additionally, Section 402(d)(1) of IIRAIRA mandates that that the Secretary of Homeland Security closely consult with representatives of employers in the development and implementation of education of employers about such programs.

The recommended actions listed above have been highlighted in Westat reports over the last seven years and clearly fall within DHS's statutory mandates. DHS should fulfill its end of the bargain and work with employer representatives to further develop the system in a positive manner. As a result, E-Verify would become easier to use and would result in better overall compliance by E-Verify employers.

CONCLUSION

Ultimately, the discussion turns back to a core structural defect resulting from the dismantling of the legacy INS and creation of DHS: the most important objectives of ICE and USCIS are in fundamental conflict. ICE wants to investigate and apprehend perceived wrongdoers. To succeed, it requires critical information; yet governmental privacy limitations preclude it from routine access to a potential treasure trove of data, such as the information in the E-Verify data banks and compliance audit reports and access to the Social Security Administration's "no-match" records. On the other hand, the primary purpose of the Basic Pilot program of USCIS is to encourage employers to augment the I-9 system by engaging in the E-Verify experiment, so that Congress can ultimately design improvements to the I-9 system and so that employers have an enhanced tool to determine the legitimacy of work authorization documents.

USCIS requires the cooperation of its clientele. If USCIS cannot assure a level of confidentiality to employers, it will not get the kind of cooperation and openness from them that it desires. In the current climate of stepped-up worksite enforcement efforts in the United States, it seems unlikely that ICE will relinquish its efforts to gain access to information deemed necessary for its enforcement efforts. However, the investigative initiative to route out misuse of the E-verify system is an ICE function, and USCIS should not be a participant or it will lose credibility with its customers.

AILA takes strong issue with E-Verify's plans, as outlined in the proposed regulations, to refer suspect information from E-Verify to Immigration and Customs Enforcement (ICE) for investigation and enforcement. Turning E-Verify into an enforcement tool against employers is contrary to Congressional intent. Such a plan will predictably have a chilling effect upon employers' participation in E-Verify to assist them with verifying employment authorization.

As stated earlier, these proposed regulations result in the classic “bait and switch.” E-Verify is not what it purports to be; the government has described its use and purpose in a manner that is now contradicted with the introduction of these new data mining systems to be used by ICE and other governmental entities.

AILA recommends that DHS withdraw these regulations and engage in extensive outreach, education and close review of how employers are using the system.

In addition to the many recommendations made above, if DHS goes forward in implementing these regulations, AILA recommends that E-Verify employers receive further education regarding suspected “non-compliant activities” and be given a window of time (e.g. minimum six months) to audit its E-Verify records and take corrective action, thereby avoiding a referral of “non-compliant behavior” from the Monitoring Analyst to the Compliance unit.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION