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May 22, 2013

Hearing on "S. 744 and the Immigration Reform and Control Act of 1986: Lessons Learned or Mistakes Repeated?"

Before the House Judiciary Committee

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Chairman Goodlatte, Ranking Member Conyers, Members of the Subcommittee, I appreciate the opportunity to testify before you about current efforts to reform immigration law and avoid past mistakes.

My name is Julie Myers Wood, and I am President of Guidepost Solutions, an investigative and compliance firm. In that position, I work with companies on their internal compliance programs, create web-based solutions to assist businesses with export and immigration compliance challenges, and consult with companies that work with the government. I also serve as an Advisory Committee member of the American Bar Association's Commission on Immigration and as a Member of the Constitution Project's Committee on Immigration. I am testifying today solely in my personal capacity and not as a representative of any group or organization.

Before joining the private sector, I most recently served as the Assistant Secretary of Immigration and Customs Enforcement (ICE) for nearly three years. I also served in a variety of government positions, including Assistant Secretary for Export Enforcement at the Department of Commerce, Chief of Staff for the Criminal Division at the Department of Justice and Deputy Assistant Secretary (Enforcement – Money Laundering and Financial Crimes) at the Department of Treasury.

It is encouraging to see the progress in the Senate and House towards improving our immigration system. But, as an avid supporter of comprehensive immigration reform, I find myself concerned that we're setting ourselves up for failure to truly address one of our nation's greatest challenges. In 1986, we were promised that the Immigration

Reform Control Act (IRCA) would end the limbo status of millions in the country unlawfully and impose sanctions on employers who "knowingly hire" unlawful immigrants. IRCA's two-pronged approach would stop the increasing number of undocumented individuals hiding in the shadows and hold employers accountable for the first time. Unfortunately, these changes in immigration policy and enforcement did not stop the tide of an unlawful workforce or decrease the acts of egregious employers taking advantage of immigrant workers. The failure of IRCA and its implementation is why Congress finds itself struggling to overhaul our immigration laws all over again. Yet without significant amendments, the Senate Bill S. 744 will surely put us in the same situation we are today within a matter of just a few years.

While well intentioned, S. 744:

- Limits, and in some cases, undermines, critical immigration enforcement abilities;
- Weakens existing immigration removal procedures;
- Fails to robustly address the Exit system; and
- Pushes further deputized enforcement onto employers in an inconsistent manner.[1]

As those who seek to reform our system, it is critical that we bring some perspective to potential provisions in S. 744 that could be problematic before the Bill is enacted, at a time when these issues could be addressed. Of course, any bill will not be perfect – either from an enforcement perspective, or an advocacy perspective. If we wait for perfect legislation, we would never have a bill. At the same time, we have an obligation to the American public to seek immigration reform that would improve our system, not just pass our unresolved problems down to the next generation.

[1] My testimony today will not address the "triggers" in S. 744, but rather focus on how the Bill would work if enacted from a law enforcement perspective.

I. Successful Reform Must Support, Not Undermine, Interior Enforcement Efforts, Including National Security Enforcement.

Successful reform efforts must recognize the critical nature of interior enforcement. While direct border efforts are essential, interior enforcement activities are also critical to address those that have gotten through layered enforcement or overstayed their visas.

One issue with IRCA was the failure to fully support and fund our enforcement agencies tasked with ensuring full compliance of our immigration laws going forward. For the last several decades, immigration agencies have been woefully understaffed, given their significant mission. ICE has only 6,500 agents, for example, far less than several city police departments, but the agency has a nationwide mission to combat all immigration and customs violations (including everything from export enforcement, to anti-money laundering, to identifying and prosecuting international child predators). Adding to the agency's normal workload, many individuals will also attempt to fraudulently seek benefits under S.744 or other reform legislation. Congress must consider the necessary enforcement footprint that will be required following reform to avoid the failures of the past.

Beyond funding, strategy issues must be considered. After 9/11 exposed significant security vulnerabilities in the visa and immigration system post-IRCA, ICE moved to a national security strategy that included an emphasis on "routine" enforcement. As part of a layered enforcement strategy, the goal was to ensure that illegal immigrants were mindful of law enforcement vigilance on a constant basis, in order to deter additional illegal entries and make unlawful presence in the United States a less hospitable option.

S. 744 (and the current Administration) have explicitly moved away from this layered approach to focus almost exclusively on enforcing immigration laws against "convicted criminals." The idea that routine immigration, documentation violations, or even just less than three misdemeanor convictions, should be ignored, or considered

insignificant poses a potentially serious threat to our country. It sends a message to those that seek to cause harm, or profit from petty or less obtrusive crime: if they can come in the United States illegally, but not immediately commit any additional crimes, they are likely to be left alone. Left alone to plan, take steps, cause harm. This explicit movement away from the New York policing model of addressing small and large violations – where even the turnstile jumpers were held accountable – should be closely watched as it may have broad implications for the ability of law enforcement to effectively prevent serious abuses in the immigration system.

With the focus only on "convicted criminals," the Bill regrettably lacks some common-sense requirements, even for those individuals who are adjusting their status. This could affect ICE's ability to satisfy its public safety and national security mission. In particular, there are several areas that should be addressed before S. 744 becomes final:

- **Interviews are not required before granting legalization.** S. 744 does not require interviews or even robust background checks. Even IRCA required interviews. In person interviews are necessary to ensure that applicants are who they say they are. Combine this with the lack of electronic filing, and cross-checks against significant lists, etc, and we are simply credentialing people who we don't know and of whose backgrounds we are unsure.

- **Overbroad confidentiality provisions encourage and foster fraud.** Sections 2104 and 2212 have overbroad confidentiality provisions. One of the widespread problems in the 1986 amnesty was widespread knowledge of the confidential "red sheet" and the fraud it festered. While it is understandable that we want to encourage individuals to apply for provisional status, it is important that everyone understand the consequences for not telling the truth. Under current legislative framework, there are no consequences. Combine that with the failure to mandate an interview, and this is a significant vulnerability in the bill.

Addressing this is particularly important given the litigation that occurred after IRCA. The Secretary must have the discretion to release information outside the required disclosures, where it is in the interest of national security or public safety. An example of this would be providing the information to the intelligence community who is examining a potential threat outside of a formal investigation (or determining, with law enforcement, as to whether a formal investigation would be appropriate). It is also necessary to allow the government to review the applications in the context of later applications for naturalization or other adjustment, to ensure that they are consistent and not fraudulent.

- **Range of "permittable" criminal conduct for individuals seeking adjustment is too extensive, potentially undermining public safety.** As drafted, many serious criminals would be eligible for legal status in S. 744 because they have not been convicted of three misdemeanors on separate days or felonies. The focus on "convictions" does not recognize the reality of significant plea bargains and sentence reductions throughout the criminal justice system. For example, many violent felony charges are often pled down or otherwise reduced to misdemeanors. The legislation would also permit individuals with two DUI convictions or three DUI convictions before December 2011 to adjust their status.

- **Gang provision limits ICE's authorities to remove dangerous criminals from the street.** Section 3701(G) relates to the problem of criminal street gangs. ICE has long utilized immigration authorities to remove dangerous gang members from communities across the country. Unfortunately, for all practical purposes section (G) will be unenforceable because it adds substantive requirements that are not often met, and may be hard for ICE to prove. For example, section 3701(G) utilizes a Title 18 interstate commerce requirement for gang activity to serve as a predicate for removability and inadmissibility. This requirement limits the applicability of this provision to certain gangs and adds an additional barrier to ICE enforcement. Also,

section 3701 allows individuals to simply denounce their gang affiliation and potentially become eligible. Although there may be some individuals who change their ways, and for whom relief is appropriate, this simple declaration is not sufficient to ensure law enforcement and public safety equities are protected in this instance.

- **Limitation on "fraud or material misrepresentation" provision protects bad actors and restricts law enforcement.** Section 2314 provides a new, temporal limitation on fraud or misrepresentation provision for a three-year time frame. There is no basis for this limitation in federal law. Oftentimes, fraud or misrepresentation charges or review come up in the context of a broader national security or fraud investigation. Limiting the time period to three years will handcuff law enforcement and provide perverse incentives for individuals to game the system.

- **Bill allows back those who were deported, removed or voluntarily departed without discretion.** S. 744 undermines finality by allowing those individuals to re-enter, get a low-skill blue card, and get their case re-opened automatically. Judges cannot refuse to re-open their case.

- **Bill provides automatic relief to the stateless.** A large number of national security cases historically have involved immigrants from the Palestinian Authority. Under section 3504, they would essentially be given automatic qualifications for relief regardless of the concern, even though in the past ICE has accomplished removals in several of these types of cases. This limitation on law enforcement authorities could be problematic, since in some circumstances the removal of these individuals is a high public safety priority.

- **Inequitable funding and staffing streams will lead to problematic enforcement.** Several places in the Bill provide for funding for CBP or other resources, without acknowledging the need for ICE (HSI or ERO) or EOIR

resources. For example, Section 1102a proposes an increase of 3500 CBP officers without a parallel increase in ICE investigative, and detention and removal resources. Funding one branch of enforcement without funding parallel branches will cause significant disparity in the overall enforcement of this legislation.

- **Bill is missing waivers in favor of enforcement equities.** Much has been said about the high number of waivers for positive discretion in an immigrant's favor. In my view, even more significant, and what is missing from the Bill is similar waivers for law enforcement exigencies or other emergencies. For example, in section 2101 (new section 245B), DHS is required to provide all aliens apprehended before or during the application period a reasonable opportunity to apply for provisional status and may not remove the individual until a final administrative determination is made. There is **no exception** for national security or public safety situations. This section should provide such an exception and permit the individual to be subject to removal immediately.

II. Successful Reform Must Improve The Overall Immigration Court/Removal Process.

As part of the incomplete enforcement post-IRCA, the number of absconder or fugitive aliens – aliens who were ordered removed but failed to do so – had been steadily going up until 2006. The orders of Immigration Judges were routinely ignored, and immigrants built and created substantial financial and personal equities long after being ordered to return to their home country. To address this, after 9/11, the INS and then ICE created fugitive operation teams to identify and arrest those individuals. The teams made some significant progress, first stabilizing and then reducing the numbers of fugitives still residing in the United States by 2008. In the current Administration, the focus has shifted from arresting fugitives to identifying whether they have equities that would warrant cancellation of removal or other relief. Although this makes sense in many cases

given the long history of lax enforcement, it is compounding the problem and continuing to encourage immigrants to abscond.

To avoid the problems of the 1986 Act and more recent enforcement, we must holistically address pending problems with the immigration court and removal process. S. 744 provides some improvements in this area, including the provision mandating counsel for certain vulnerable populations, including minors and those with a serious mental disability. However, and perhaps because the issues surrounding immigration enforcement and legalization are so complicated and layered, the Bill does not address additional and needed fundamental reforms for the removal process and procedures. This absence is unfortunate, as problems with existing mechanisms may portend future problems with enforcement effectiveness.

First, and most significantly, in some cases, S. 744 undermines certain existing protocols or procedures. These provisions should be amended.

- **Bill improperly shifts burden to government in all instances to justify detention.** There are many individuals who do not need to be detained, and under existing law, section 236(c) classified some individuals as needing mandatory detention when less restrictive means might have been sufficient to ensure their attendance at immigration court proceedings. Section 3717 of S. 744 removes the requirements for mandatory detention in all cases, and shifts the burden to the government to prove the need for detention. While the impulse to simply remove all requirements is understandable, a blanket rule requiring government to prove flight risk is too broad and will consume needless judicial and ICE resources.

  Instead, a more tailored model would be to draft a provision similar to the federal criminal system, which sets up a rebuttable presumption in certain circumstances that detention is appropriate. This model could work here as well – for individuals who by their previous history present a risk of flight, such as a significant criminal history, or factors leading to the lowest chance of adjustment. The burden should remain on the immigrant to demonstrate

that he/she will show up for hearings and not be a danger to the community. In all cases, ICE should have the discretion to consider complete criminal histories including police reports when determining whether or not a person poses a threat to the community.

- **Repeals ability to utilize stipulated removals.** Immigrants who do not have an ability to adjust their status sometimes choose to utilize a stipulated removal – effectively, a plea agreement. This reduces the amount of time these individuals spend in detention, and also reduces court resources. In some years, over 20,000 immigrants per year have chosen this option. Section 3717 effectively guts the stipulated removal program by requiring that the stipulations be made at "in person" proceedings. There is no question that it is important that the stipulated removal process be closely monitored to ensure that individuals are not forced into participating in the program, are fully informed about potential claims for relief, and understand the restrictions they are agreeing to in this process. However, for many individuals without valid claims to adjustment, stipulated removals allow them to resolve their situation promptly.

  Requiring that these stipulated removals only occur "in person" will cause significant delays – and in some cases keep immigrants in detention needlessly – while they are awaiting a transfer to a location with an immigration judge. The gutting of the stipulated removal provision is a good example of how S. 744 is not at all balanced between a realistic and humane approach to address the problem of those who are already in the country, and how to effectively avoid future illegal migration.

- **Overburdens immigration courts with unnecessary bail hearings.** The mandatory requirement in Section 3717 for custody hearings by immigration judges every 90 days, even in the absence of cause, is likely to expend significant resources without substantial benefits. DHS is already required to conduct post-order custody reviews and aliens are also able to request those hearings on their own.

Aside from areas where the Bill undermines existing procedures, the Bill also fails to consider streamlining and simplifying procedures to make them more uniform across the board. While I recognize that a Bill cannot solve all problems, there are several areas that should be a part of a comprehensive reform agenda.

- **Mere continuation of SCAAP funding "as is" allows state and local entities to profit while obstructing ICE efforts.** SCAAP is the funding stream for state and local entities who house unauthorized immigrants. This program has long been dysfunctional. It permits local entities to continue to receive SCAAP funding even though the local entities refuse to cooperate with ICE in terms of enforcement efforts. Particularly in the context of a bill that is addressing our overall immigration system, to allow local entities to continue to flout national enforcement is nonsensical and extremely ill advised. DHS/ICE should have the discretion to determine whether a state or local jurisdiction qualifies for SCAAP funding.

- **Failure to reconcile idiosyncratic treatment of similarly situated individuals.** Various immigration laws provide that individuals from different countries are treated differently. For example, if two individuals – one from Japan and one from Argentina – enter the United States on non-immigrant visas for vacation and overstay those visas, ICE can arrest both individuals. The Japanese individual has already waived his right to review before an immigration judge as part of the visa waiver program (as would have individuals from the 26 other visa waiver countries). The Argentinean's visa issuing process did not contain a waiver of the right to review, and he can tie up the immigration courts for years fighting removal. Anomalies like this should not continue. As part of reform, Congress should normalize the system so that all aliens who come into the United States on these types of non-immigrant visas agree to waive any deportation proceedings as part of the visa-issuing process.

- **Bill provides no incentives to utilize the Institutional Removal Program, expand expedited or voluntary removal or adopt other efficient, smart removal measures.** Particularly because of the importance of the Secure Communities program, ICE should increase use of Institutional Removal Program, which places individuals in immigration proceedings while they are serving time in federal or state institutions. By strategically funding courtrooms, judges, and immigration lawyers (including virtual courtrooms) in federal, state and local institutions with a high population of illegal aliens, the government could reduce excess time that criminal aliens spend in immigration custody after release from criminal custody.

  Similarly, failure to mandate potential expansion of expedited removal will consume needless court resources. Expedited removal may be utilized for aliens who lack proper documentation or have committed fraud or willful misrepresentation of facts to gain admission into the United States, unless the aliens indicate either an intention to apply for asylum or a fear of persecution.[2] A reform could smartly expand expedited removal, by, for example, focusing on certain known smuggling routes beyond 100 miles or slightly extending the current time period for eligibility (30 days vs. 14 days, for example). Another alternative would be to apply extended time and range limits for the use of expedited removal for immigrants who are convicted of a crime by state or local law enforcement.

  New legislation could expand qualifications and use of the voluntary departure program. A voluntary departure is a mechanism by which eligible immigrants agree to leave the country and avoid many of the bars associated with stipulated removal or formal removal orders.[3] In the 2010 EOIR Statistical Yearbook, DOJ reported that 17% of all removals in the immigration court system are now voluntary departures, up from 10% only

[2] 8 U.S.C. § 1225. Any extension of expedited removal would have to be managed closely to ensure that the existing credible fear process for asylum seekers continues to be strictly followed and appropriate training is provided for DHS officers.
[3] 8 U.S.C. §1229c.

five years prior to that.[4] With support from Congress, ICE could administratively create mechanisms to more uniformly notify individuals of the option of voluntary removal immediately, so that appropriate candidates might consider this option at the very outset of proceedings (rather than waiting for a master calendar hearing, or afterwards).

III. Successful Reform Must Fully Address the Third Border – Create an Exit System.

One of the most significant problems with current immigration enforcement is the inability of the government to address the problem of visa overstays. It is estimated that approximately 40% of individuals who are in the United States without authorization today initially entered the United States legally. When their visas expired, these "overstays" blended into American society with little concern that they would be held accountable by any federal law enforcement.

A significant reason these individuals are able to blend into society is the fact that we do not have an adequate Exit system, despite seventeen years and six statutes requiring an Exit program. The lack of an adequate Exit program was highlighted by the 9/11 Commission, "DHS, properly supported by the Congress, should complete, as quickly as possible, a biometric entry-exit screening system. As important as it is to know when foreign nationals arrive, it is also important to know when they leave. Full deployment of the biometric exit ... should be a high priority. Such a capability would have assisted law enforcement and intelligence officials in August and September 2001 in conducting a search for two of the 9/11 hijackers that were in the U.S. on expired visas."

Although historically some technological challenges may have been obstacles to the government from implementing a valid program, improvements to biometric technology mean that this is no longer a valid excuse. Rather than shrinking from the requirements in past bills, any new reform should mandate a robust, biometric Exit program, and give the DHS sufficient resources to implement and enforce this program.

[4] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at Q1.

With an effective, biometric Exit program, law enforcement would have the ability to more effectively enforce immigration laws against individuals who overstay their visas. Currently there are approximately 300 dedicated Counter Terrorism Compliance Enforcement Unit agents. They prioritize leads based on threat. Because we do not have an Exit system, many times ICE agents are referred or focus on high priority leads who have already left the country. This is a waste of law enforcement efforts and risks the agency lacking the resources to focus on other high priority targets. Without a biometric component, doing the checking that is involved to guarantee that that individual has actually left (and not an imposter, etc.), many times ICE has to engage and even deploy overseas resources to confirm that the individual has left the country. This is not a simple exercise in paperwork. Often involves agents going out in the field and verifying or validating departure. This waste of resources would be eliminated with mandatory biometric Exit.

An effective biometric Exit program would also be useful to confirm certain types of Voluntary Departures. These departures require the individual to check in with the consulate. Often this is not done, or the individuals do not understand the need to do so. ICE agents are required to investigate and confirm that departures have occurred. This takes ICE and State Department hours. An Exit system would also contribute to US citizenship being granted to those individuals who have truly met the time requirements for physical presence in the United States.

Even more generally, a robust Exit program would provide enhanced value in investigations and criminal cases of all kinds where government is proving travel as part of the conspiracy or in furtherance of the criminal behaviors.

We may need to be realistic about what government can achieve. But ignoring the gap, and simply retreating is not wise, especially given all the technological advances since the first mandate of Exit in 1996.

- **Section 3303 of S. 744 falls short in several respects.** As a threshold matter, the mandatory Exit system prescribed in the Bill is only for air and seaports, not for land departures. Section 3303 does not require the system to be

biometric. Finally, this section does not provide for additional, dedicated law enforcement resources to identity and apprehend visa violators.

IV. Successful Reform Must Provide Effective Tools to Reduce Unlawful Employment.

The 1986 bill failed to provide effective measures to fully address illegal employment. That bill created the Form I-9, but did not add commensurate enforcement resources to enforce the I-9 process. Although the mere requirement of the form caused significant employer cooperation in early years of the requirement, inconsistent enforcement and failure to update tools to address emerging problems of identity theft have caused the requirement to fall short of its goal.

In addressing the problem of unlawful employment, S. 744 does some positive things. For example, it makes electronic employment eligibility for all employers a requirement at some point. It also provides authority for the Secretary to regulate unscrupulous providers in this area. As providers have begun to address to opportunities to automate the compliance requirements, some have provided incomplete or partial systems that have caused their clients to be subject to fines. This Bill acknowledges the new frontier of additional providers and provides a potential regulatory scheme to address this. And, finally, if imperfectly, the Bill recognizes the problem of identity theft and fraud – one of the greatest problems faced by many employers who utilize the E-Verify system.

Despite some positive features, S. 744 misses the mark in terms of effective employer verification:

- **Throws away the imperfect, but very workable E-Verify system and relies on a new, unproven system.**

- **Makes employers subject to greater penalties, but appears to restrict the ability of employers to use tools to prevent identity theft.** One of the most pressing issues for employers is a concern that they will be a subject of government investigation or, worse, penalized, even when acting in good faith.

S. 744 essentially continues the current defense for employers relying on E-Verify confirmations in good faith.

In high-risk industries where there are significant number of individuals who repeatedly try to circumvent the E-Verify system, however, employers face a very real risk that ICE and federal prosecutors will be reluctant to conclude that a company relied in "good faith" on E-Verify confirmations if a number of identity thieves circumvented the employer's E-Verify program. For this reason, many employers do not rely on E-Verify alone, but also use manual and automated tools to try to prevent identity theft. These tools are essential given the current deficiencies in the E-Verify system. Unfortunately, S. 744 appears to prohibit or limit these current anti-identity theft programs, while still making employers subject to significant penalties.

- **Creates "existing employee" loophole with a lengthy lead-in time, causing a large layer of an "uncleared" workforce.** S. 744 provides no mechanism to verify existing employees. Combine that with the 5-year, phase-in timeframe, and this Bill creates a significant "uncleared" underclass of employees. Such an underclass will increase the ability for bad faith actors to take advantage of these employees.

- **Extraneous appellate processes remove finality for employers**. One of the most problematic issues is that an unfavorable system finding doesn't allow the employer to terminate the employee automatically after a final nonconfirmation. Instead, an employee unhappy with the system's determination can file a complaint with an Administrative Law Judge – putting the employer's workforce in limbo and subverting the goal of e-verification ease and finality for employers. If the employee is unhappy with the ALJ determination, he can then appeal to the U.S. Court of Appeals. The employer will need to keep this employee working during what could be very lengthy process, even one that is gaming the system.

S. 744 Will Not Enable More Successful Employer Enforcement.

- **ICE Agents Still Do Not Have Access To Key Information About Egregious Employers.** Section 3102 of the Bill purports to allow DHS access to some information regarding identity theft from the IRS, but the language is extremely restrictive and in some instances, more limiting than current practice (by requiring supervisors to submit requests, for example). The language still does not provide for the Social Security Administration to share information regarding employers in order to target egregious violators or give ICE direct access to the NUMIDENT database. For example, ICE has sought the ability to know the top 50 recipients of Social Security no-match letters, for example, and under this bill that still would not be permitted, absent a specific court order under IRS Code section 6103.

- **Egregious employers, who provide fraudulent records or abuse employee rights, appear to be protected from ICE enforcement.** Section 245E(b) provides protection to employers who provide employment records to individuals who are seeking to adjust to provisional status. The bill provides that information provided by employers to employees for purposes of provisional applicants cannot be used against employers, but states that the protection does not apply if the records are fraudulent. What is not clear is how ICE would ever have access to that information, even as a part of a fraudulent scheme, since the documents would be protected under the confidentiality provisions of 2104, as they would relate in part to a prosecution based on the employee's status. This could encourage rogue employers to take advantage of this legislative inconsistency to avoid prosecution or detection.

  In addition, in some instances the records might show abusive treatment by an employer. These would also be "confidential" under the plain language of the Bill. It is unfortunate that ICE and the Department of Labor would not have access to address clear violations (e.g., payroll records showing pay

stubs of $3.25/hour). The same problems occur with the "blue card" employment protection procedures in Section 2211.

- **Nonsensical "blue card" employer receipt requirement does not seem to serve a purpose and is an additional layer over other employment eligibility processes.**

V. Conclusion

As a former enforcement chief and veteran of the last immigration reform debate, I know that these issues are tough to resolve. I hope that Congress will consider amending S. 744 to address some of these law enforcement concerns. Only by acknowledging and learning from the incomplete enforcement efforts of previous legislation will we be able to avoid a repeat of past problems and ensure a solid immigration system.