Statement of the U.S. Chamber of Commerce

ON: **"E-VERIFY: CHALLENGES AND OPPORTUNITIES"**

TO: **THE HOUSE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

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The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Statement on
"E-Verify: Challenges and Opportunities"
Before
The House Subcommittee on Government Management, Organization, and Procurement
Committee on Oversight and Government Reform

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July 23, 2009

Good Morning Chairwoman Watson, Ranking Member Bilbray, and distinguished members of the Subcommittee. Thank you for inviting me to testify on the subject of E-Verify.[1] My name is Angelo Amador and I am executive director of immigration policy for the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

In April of this year, the Chamber released a study prepared by its Labor, Immigration, and Employee Benefits Division, with cooperation from Dr. Peter A. Creticos, President/Executive Director of the Institute for Work and the Economy. The purpose of the report was to collect and disseminate objective data on the impact on businesses of E-Verify and other proposed electronic employment verification systems (EEVS), while providing ideas on the efficient implementation of such new mandates. By reference herein, I would like to make it part of my testimony in its entirety.

In today's hearing, I will address two main points. First, I will outline the business community's historic support for fair, efficient and workable mandatory employment verification systems that work for businesses both large and small, under real life conditions. Second, I will describe what an E-Verify legislative mandate must have to gain the support of the Chamber and many others in the business community.

The Chamber is encouraged that the Subcommittee is examining the current challenges to the implementation and expansion of the E-Verify program. Particularly, the Chamber supports the Subcommittee's emphasis in researching and addressing the issues related to system usability and the burdens imposed on employers.

The Chamber has taken a leading role in representing businesses that want to work with Congress in drafting a reasonable and workable EEVS, particularly if it will be mandated on all employers. The Chamber is not alone; companies themselves and other

[1] There is no reference in U.S. law to an "E-Verify" program. However, it is accepted that the creation of the program commonly known as "E-Verify" was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. IV, subtit. A, 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note). As amended, the IIRIRA instructs the Secretary of Homeland Security that she is to conduct various "pilot programs of employment eligibility confirmation." IIRIRA § 401(a). E-Verify is one such "pilot program," also known as the "Basic Pilot."

trade associations from across the industry spectrum have been extremely engaged in the subject. The reason is simple; in the U.S. there are close to eight million establishments, employing about 120 million people, and these new requirements will affect all of them, whether or not they hire immigrants.[2]

The stakes are extremely high, and the concerns of the business community of how a new mandate will be constructed cannot be overstated. While much of the debate has concentrated on the issue of undocumented workers, employers view E-Verify and other EEVS proposals much more broadly. After all, E-Verify has an impact in the day-to-day activities, obligations, responsibilities, and exposure to liability of the employer, regardless of whether it even hires immigrants.

Finally, the invitation asking me to come testify states that the Subcommittee is interested in learning more about Secretary Napolitano's July 8 decision to implement regulations mandating the use of a modified version of the E-Verify program on most federal contractors and subcontractors. I can only imagine that a question in the minds of the members of this Subcommittee is how the Secretary can mandate this program on any employer when the law clearly states that "the Secretary of Homeland Security may not require any person or other entity to participate in [the E-Verify] program."[3]

However, as you may know, the Chamber, together with the Associated Builders and Contractors, the Society for Human Resource Management, the American Council on International Personnel, and the HR Policy Association, filed a lawsuit challenging the legality of the regulation in question. This litigation is pending with a hearing scheduled for August 21, 2009, in the US District Court for the District of Maryland, Southern Division. Thus, I am not at liberty to discuss our position in this pending litigation and will allow instead the Plaintiffs' official filings to speak for themselves. As to the Administration's position, its response to our Motion for Summary Judgment is due next week and we will then all be able to read its arguments on the legality of the proposed mandate.

BUSINESS SUPPORT FOR MANDATORY EMPLOYMENT VERIFICATION SYSTEMS

Support for the initial mandate in 1986.

Some have argued that the current "I-9" mandatory employment verification program was supported by business back in 1986 because employers wanted to have a tool to find out who was an unauthorized worker and use that information to force those workers to work longer hours and in poorer conditions. This reason is unlikely given that most undocumented workers were legalized in the same legislation that created the

[2] For the latest statistics on U.S. Businesses, including number of firms, number of establishments, employment, and annual payroll, please go to the U.S. Census Bureau webpage www.census.gov/econ/susb/. Also, the Bureau of Labor Statistics (BLS) reports the level of employment in the civilian labor sector for June 2009 at 140 million. (See http://www.bls.gov/news.release/empsit.nr0.htm.) I use the latest Census data, instead of BLS, because it better divides the data by the number of employees for both establishments and firms.

[3] IIRIRA § 402(a).

current mandatory employment verification system. Still, even now, some are arguing against a new mandatory employer-based program under similar grounds. The truth is that employers are willing to do their part to address this controversial issue as long as the system is fair and workable.

Support for government-based verification.

Nevertheless, if the federal government wishes to take over the duty of verifying employment authorization, employers would probably welcome the idea, as long as no new fees or taxes accompany such an effort. It has been noted that between 1979 and 1981 Labor Department experts designed a work authorization verification system for new hires for the Select Commission on Immigration and Refugee Policies (SCIRP).[4] That proposal made a federal agency responsible for verifying the worker's employment authorization status.[5] Under that plan, employers would only have to verify the identification number the worker received from the federal agency doing the verification.[6]

A similar idea is being proposed now by the AFL-CIO and Change to Win with an added secured identification card with biometrics issued by a federal agency and a distinctive work authorization number issued to the worker for each new job.[7] Once again, employers would only be in charge of verifying the number with the federal agency.[8] Again, the Chamber has never opposed a government-based verification proposal, and has yet to see one introduced as legislation. Instead, the Chamber and other business groups have endorsed various employer-based proposals because they seem to be the ones that gain traction, as the numerous hearings on E-Verify, including this one, attest.

Deciding which E-Verify or similar program to support.

The Chamber and other business groups have supported a new mandated EEVS, under certain circumstances, since at least 2005, because employers do want the tools to ensure that their workforce is in fact authorized to work. However, employers only support approaches that are comprehensive in nature and take into account the divergence in types of establishments and firms in the United States.

An establishment, defined as "a single physical location where business is conducted or where services or industrial operations are performed," include factories, mills, stores,

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[4] Marshall, Ray, Economic Policy Institute Briefing Paper #186: "Getting Immigration Reform Right," Match15, 2007, pp. 2-3.
[5] *Id.*
[6] *Id.*
[7] Parks, James, "Here's How to Fix Nation's Broken Immigration System," (*sic*) April 16, 2009, found at http://blog.aflcio.org/2009/04/16/heres-how-to-fix-nations-broken-immigration-system/, asserting that this approach has been adopted by both the AFL-CIO and Change to Win as their proposal for an EEVS. The complete proposal is found in "Immigration for Shared Prosperity: A Framework for Comprehensive Reform" by Ray Marshall, Economic Policy Institute, April 16, 2009.
[8] Marshall, Ray, Economic Policy Institute, "Immigration for Shared Prosperity: A Framework for Comprehensive Reform," April 16, 2009.

hotels, movie theaters, mines, farms, airline terminals, sales offices, warehouses, and central administrative offices.[9] One cannot expect that the less than 20,000 firms with more than 500 employees, which hire over 50% of all workers in the U.S., will have the same resources and concerns as the four million firms with less than four employees.[10]

Thus, while most trade associations support a mandatory EEVS, each group tends to support the program that more closely reflects the resources and concerns of their constituency. Almost by definition, the core membership of the Society for Human Resource Management, the HR Policy Association, and the National Association of Manufacturers, tends to be firms with a well equipped and trained Human Resources division. These trade associations have formed a coalition, The HR Initiative for a Legal Workforce, that seems to have a preference for a new program that would rely on new technology as well as biometrics.[11]

On the other hand, the core membership of the National Association of Home Builders (NAHB) tends to be firms with a small staff and heavily dependent on the contractor/subcontractor relationship. Thus, it tends to support proposals that safeguard the independence and vitality of that relationship.

While for a home builder with twenty employees reverification of its workforce may not be a big concern, it is a colossal concern for a manufacturer with establishments in all fifty states and over 100,000 employees. In this regard, the Chamber is in the unenviable position of finding a program to support that inevitably will—and has—angered certain sectors of its membership. Currently, 96% of the Chamber's member companies have fewer than 100 employees, 70% of which have 10 or fewer employees, and, thus, small business concerns are clearly a top priority for the Chamber. At the same time, large corporations also play an integral role in the Chamber's policy making process. Thus, the Chamber can only support an E-verify mandate that addresses the concerns of both large and small employers.

Mandatory EEVS proposals supported in the 109th Congress.

During the 109th Congress, there were two competing proposals, one passed by the House and the other passed by the Senate. The House EEVS proposal found in the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) contained some of the key provisions employers support, including safeguards for contractors if the subcontractor hired undocumented aliens without the contractor's knowledge, exemption from civil penalties for an initial good faith violation, and mitigation of civil money penalties for smaller employers.

[9] Definition found in the U.S. Census Bureau webpage at http://www.census.gov/eos/www/naics/faqs/faqs.html#q2.
[10] Data found in U.S. Census Bureau webpage www.census.gov/econ/susb/.
[11] For more information on The HR Initiative for a Legal Workforce, go to www.legal-workforce.org.

However, the Chamber and other business groups supported the Senate version, which was the product of a bipartisan amendment by then Senator Barack Obama and Senators Chuck Grassley and Max Baucus to the Comprehensive Immigration Reform Act of 2006 (S. 2611). Unlike the House version, the Senate proposal did not have a broad reverification requirement, and it had better due process with attorneys fees for employers who substantially prevailed on the merits in an appeal of an agency action. Both chambers failed to go to conference and the proposals expired with the closing of the 109th Congress.

Mandatory EEVS proposals supported in the 110th Congress.

During the 110th Congress, there were two competing proposals; both came to the floor of the Senate. One proposal was being championed by Senator Jon Kyl, with the support of then Department of Homeland Security (DHS) Secretary Michael Chertoff, in a bill to provide for comprehensive immigration reform (S. 1639). Once again, then Senator Obama and Senators Grassley and Baucus introduced a comprehensive amendment in the form of a substitute to the EEVS title found in S. 1639. Some employer concerns were addressed in both versions, but employers split in their support.

Most notably, the NAHB supported Senator Obama's version, understandably because of its stronger safe harbor from vicarious liability for contractors. The Chamber supported Senator Kyl's version in part for procedural reasons to prevent the issue from dying in the Senate through endless debate. In the end, the procedural hurdles could not be overcome and there was never a floor vote on either the version found in the underlying bill or Senator Obama's substitute amendment.

Mandatory EEVS proposals supported in the 111th Congress.

There is not a comprehensive immigration reform package moving in either chamber at this point. However, the business community continues to support expansion of E-Verify and other EEVS alternatives outside comprehensive immigration reform. The Chamber continues to support the reauthorization of E-Verify for longer periods than Congress has been willing to do.

The Chamber has also called for more money to be allocated to address the error rates and deficiencies found in E-Verify. Finally, the Chamber continues to ask for more independent research to look at ways to improve E-Verify as well as the financial impact of the program on small businesses.[12] The HR Initiative for a Legal Workforce supports H.R. 2028, the New Employee Verification Act (NEVA), as a better alternative to E-Verify. The Chamber does not have a preference for E-Verify, NEVA, or a new government-based program, as long as the serious and real concerns of the business community as a whole are addressed.

Because this hearing is about E-Verify, I will concentrate my remaining remarks in outlining the things the Chamber is looking for in a mandatory E-Verify proposal that we

[12] Several letters have been sent to Congress on this issue, copies of which are available upon request.

could support. As a final point, I want to remind you that E-Verify is anything but free. The Chamber testified last year through a current member and user of E-Verify, who explained at length the costs associated with E-Verify.[13]

NEEDS OF EMPLOYERS IN A MANDATORY E-VERIFY

Fair and reasonable roll out of E-Verify.

The Chamber has been calling for a tiered approach to rolling out E-Verify or any new EEVS. Starting out with large federal contractors may not be a bad idea, given that a number of these federal contractors represent part of the less than 20,000 firms who employ over 50% of U.S. workers.

However, the amendment added by the Senate to the DHS FY 2010 Appropriations bill mandating E-Verify on federal contractors takes the wrong approach. The amendment had a blanket mandate on all federal contractors without exception and included a provision mandating employers to reverify the work authorization of current employees.

The Chamber cannot support a mandatory reverification provision in E-Verify, as was included in the Senate version of DHS FY 2010 Appropriations bill. The Chamber urges you to assist in either dropping this provision from the final DHS FY 2010 Appropriations bill or amending it to address the real concerns of the business community. If you are inclined to assist in amending it, instead of deleting it, we urge you to work on eliminating the reverification provision, creating a reasonable applicability threshold standard, clarifying that there should be no subcontractor flowdown, and creating a commercial item exemption. The reasons for some of these requests are explained in more detail below.

Regardless, the best approach for a broad E-Verify mandate would be to move from one phase to the next as the system is being 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, the needs of the different types of firms and establishments need to be considered during the roll out. Many legislative proposals have failed to include even a study on a telephonic option for small businesses.

The Chamber urges that in any mandated roll out of E-Verify, businesses with less than fifty employees be exempted, as Congress studies the impact of such a mandate on small businesses and potential alternatives for compliance, such as a telephonic option. While these smaller businesses do not employ the majority of workers in the U.S., they still create millions of jobs in the U.S. economy. The burdens placed upon these entrepreneurs must be considered. Furthermore, if allowed to grow and prosper without being swamped

[13] Laird, Mitchell, "Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on the Social Security Administration's (SSA'S) Ability to Serve Retirees, People with Disabilities, and Workers," House Subcommittee on Social Security of the Committee on Ways and Means, May 6, 2008.

in government bureaucracy, they may become the next global leaders. Let's remember that Apple, along with many other (now large) businesses, began in someone's garage.

The contractor-subcontractor relationship should be preserved.

It is critical to the employer community that contractors do not bear vicarious liability for subcontractor actions unless the contractor knew of the actions of the subcontractor. In other words, without evidence of direct knowledge by the general contractor, it should not be held liable for undocumented workers hired by a subcontractor, particularly when both would be required to independently verify the work authorization of their own employees. 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.

The House voted overwhelmingly for an amendment to H.R. 4437 in 2005 to ensure that general contractors would not be held liable for the actions of a subcontractor, when the contractor is not aware that the subcontractor was hiring undocumented workers. I found that at least four current members of this Subcommittee voted for this language in 2005.[14] Other members voting in favor of this safe harbor for contractors included Representatives Lamar Smith, James Sensenbrenner, and Pete King, three of the main proponents of H.R. 4437.

To employers, it is also unclear how enforcement would flow down or up from contractors to subcontractors and vice-versa. Would a contractor be liable for a subcontractor's negligence in utilizing E-Verify, e.g., preverifying applicants? Or, is the contractor liable only if the subcontractor is not using E-Verify, after being required to do so? What actions must the contractor have to take to make sure that the subcontractor is complying with an E-Verify mandate without opening itself to liability under other labor laws? Thus, the Chamber urges you to make sure there is a safe harbor for contractors operating in good faith, while a subcontractor is unbeknown to him or her to be abusing the E-Verify, or another EEVS.

Verification should apply to new hires only.

The Chamber does not oppose the strictly voluntary reverification provision added by the Senate to the DHS Appropriations bill. The Chamber objects only to mandatory reverification provisions. While some small size employers would not mind reverifying their workforce, all employers that have contacted the Chamber with a significant number of employees list this item as their number one concern. It is not surprising that when the government has considered a program in which it is in charge of verifying work authorization, it limits the system burdens to only new hires.

[14] Roll Call Vote 657, Representative Westmoreland of Georgia, Amendment to H.R. 4437, Recorded Vote of December 16, 2005, 9:38pm.

Businesses already spend approximately 12 million hours each year documenting the legal status of the nation's 50 to 60 million new hires. As then Senator Obama, together with Senators Grassley and Baucus, explained in a letter to former DHS Secretary Chertoff, requiring current workers to go through E-Verify is duplicative of current procedures and redundant given the large number of employees starting or changing jobs every year.

One of the Chamber's foremost concerns is to ensure that any new E-Verify mandate does not become too costly or burdensome for employers. Existing employees have already been verified under the applicable legal procedures in place when they were hired. Reverifying an entire workforce is an unduly burdensome, costly proposition, and unnecessary given how often workers change jobs in the United States.

Under a mandated E-Verify, employers would already need to train employees to comply with the new requirements and devote a great deal of human resources staff time to verifying work eligibility, resolving data errors, and dealing with wrongful denials of eligibility. The rate of an initial response being something other than "employment authorized" reported by Chamber members large and small according to their own data is closer to 15%. Employers would be more amenable to allow DHS to obtain data from the W-2 process and ask employers to reverify workers flagged by this procedure, as Senator Obama's amendment to S. 1639 in 2007 envisioned.

There should only be one E-Verify law.

The current federal employment verification system is clearly in need of an overhaul. States and localities have responded to the lack of action at the federal level with a patchwork of employment verification laws. This new patchwork of immigration enforcement laws expose employers, who must deal with a broken legal structure, to unfair liability and the burden of numerous state and local laws. These attempts are undermining the ability of the federal government to oversee and enforce our national immigration laws and put an undue burden on businesses attempting to deal with a new patchwork of different state and local laws.

A new E-Verify mandate needs to address specifically these attempts by states and localities to interfere with federal immigration law. Specifically, it should amend the preemption provision that already is contained in federal law, but that states and localities—aided by certain courts—have sought to circumvent.

Employers must know what their responsibilities are under immigration law, and having one federal law will help alleviate any confusion about employers' role under the law.

Enforcement provisions must be fair.

Full and fair enforcement of an E-Verify mandate should take into account transition times for the new system to be fully in place and protect employers acting in good faith. Businesses are overregulated and piling on fines and other penalties for even small

paperwork violations is not the answer. A new broad E-Verify mandate should include language similar to the one found in the House EEVS version of 2005 providing relief from civil penalties for a first time offense, if the employer acted in good faith.

Employers should also be given some time to rectify paperwork violations/errors made in good faith. For example, just last week, I was informed about an employer being fined because some of its I-9 forms did not contain the employer's own address. An opportunity to rectify minor paperwork violations will protect employers that are doing their very best in good faith to comply with the myriad of complicated federal regulations.

DHS, not trial attorneys, should be in charge of enforcing E-Verify provisions.

The Chamber believes that a new E-Verify mandate should not be used to 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. DHS should have primary authority over the enforcement provisions of any E-Verify mandate.

Enforcement of employment verification laws resides properly with the federal government. Accordingly, the Chamber maintains that DHS, as the federal agency tasked with responsibility for immigration enforcement, should have sole enforcement authority over prosecutions for violations of section 274A of the immigration code. A broad E-Verify mandate provides the perfect opportunity to clarify that only DHS has enforcement jurisdiction over these issues.

You may be aware that the federal RICO statute has recently been used by private attorneys seeking to enforce immigration law. Not only does this invade the province of the federal government as sole enforcer of federal immigration policy, it also perverts the federal RICO statute into a use that is contrary to the intent of the statute.

Thus, 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.

Liability standards and penalties should be proportionate.

The Chamber agrees that employers who knowingly employ work unauthorized aliens ought to be prosecuted under the law. This current "knowing" legal standard for liability is fair and objective and gives employers some degree of certainty regarding their responsibilities under the law and should, therefore, be maintained. Lowering this test to a subjective standard would open the process to different judicial interpretations as to what an employer is expected to do. Presumptions of guilt without proof of intent are unwarranted.

The Chamber does not oppose efforts to increase penalties. However, the penalties need to be proportionate to the offense and comparable to other penalties in existence in the employment law arena. If penalties are too high, and too unyielding, employers who are assessed a penalty, but believe that they did not violate the law, will be forced into an unnecessary settlement because they cannot afford to pay both the legal fees necessary to fight the citation, and gamble that they might end up with a penalty that is so high that it devastates their businesses.

Penalties should not be inflexible, and I would urge you to incorporate statutory language that allows enforcement agencies to mitigate penalties, rather than tying them to a specific, non-negotiable, dollar amount. A number of additional penalties and causes of action have been suggested as proper penalties in a broadly mandated E-Verify. 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). Finally, the Chamber objects to expansion of antidiscrimination provisions found in current law. 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.

Role of biometric documents in E-Verify.

One of the main flaws of E-Verify is the uncomplicated manner through which an undocumented alien can fool the system through the use of someone else's documents. The issues of document fraud and identity theft are exacerbated because of the lack of reliable and secure documents acceptable under E-Verify.

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 next year 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.

As the verification system is developed and perfected, it should continue to 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. 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.

An E-Verify check needs to be allowed to start earlier and be finalized sooner.

The employer needs to be able to affirmatively rely on the responses to inquiries into E-Verify. 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. This will help 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.

The government should also be held accountable for E-Verify.

The government must also be held accountable for the proper administration of E-Verify. 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 prevail in an appeal of the determination. Again, a reasonable appeals process with attorneys' fees for employers, if they prevail on the merits, is not a new idea. It was part of Senator Obama's amendment to S. 2611 in 2006 that passed the Senate with overwhelming support in a vote of 59 to 39.

E-Verify should have limited bureaucracy or additional costs.

DHS will need adequate funding to maintain and implement an expansion of E-Verify. The cost should not be passed on to the employer with fees for inquiries or through other mechanisms. Additionally, there should not be overly burdensome document retention requirements. The more copies of official documents are kept in someone's desk drawer, the increased likelihood of identity theft. Under current law, an employer does not need to keep copies of driver licenses, social security cards, birth certificates, or any other document shown to prove work authorization.

The employer must certify under penalty of perjury that those documents were presented. The requirement to copy and store copies of this sensitive documentation in any future E-Verify mandate should be carefully analyzed not only from the cost perspective to employers, but also from the privacy perspective of workers. At the same time, workers should have access to review and request changes to their own records to resolve issues, prior to approaching the employer.

An expansion of E-Verify should not serve as a back door to expand employment laws.

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 an E-Verify mandate. 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.[15] A GAO report titled "Workplace Regulations: Information on Selected

[15] For example, one treatise on employment discrimination law alone stretches over 2,000 pages. Barbara

Employer and Union Experiences" identified concerns regarding workplace regulations that employers continue to have to this very day.[16] 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[17] estimated the total compliance cost of workplace 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,[18] 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.

CONCLUSION

After several years of debate, the issues and solutions outlined here are not new. The Chamber urges you to continue to engage the business community to create a workable E-Verify, or another EEVS, mandate.

It is easy to ignore the drawbacks of E-Verify and simply pass a law mandating it. It is harder to pass a responsible E-Verify mandate that accommodates the different needs of the close to eight million establishments in the U.S., which are extremely different in both size and levels of sophistication. A broad E-Verify mandate should be fast, accurate and reliable under practical real world working conditions, and include:

- A fair and reasonable roll out of a broad mandate;
- No expansion of liability beyond the knowing standard for contractor/subcontractor relationships;
- E-Verify should only apply to new hires;
- Clarification that federal jurisdiction preempts state and local laws;
- An investigative and enforcement system that is fair;
- Provisions to protect first-time good faith "offenders" caught in the web of ever-changing federal regulations;
- DHS, not trial attorneys, should have enforcement authority of E-Verify;
- Penalties should be commensurate to the offense;
- No expansion of antidiscrimination laws or debarment outside the FAR system;

Lindemann and Paul Grossman, "Employment Discrimination Law," ABA Section of Labor and Employment Law, 3rd Edition, 1996.

[16] 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.

[17] Johnson, Joseph. "The Cost of Workplace Regulations", Mercatus Center, George Mason University, Arlington, Virginia, August 2001.

[18] 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.

- A reasonable number of reliable documents with biometric identifiers, when possible, to reduce fraud;
- Verification to begin when a 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;
- Limited bureaucracy and sensible document retention requirements; and,
- No expansion of labor laws within the E-Verify framework.

Under a broad E-Verify mandate, employers will be required to utilize and comply with all its provisions and, therefore, the Chamber should continue to be consulted in shaping the system. Meanwhile, the Chamber stands ready to continue assisting in this process.

Thank you again for this opportunity to share the views of the Chamber, and I look forward to your questions.