

Basic Pilot / E-Verify NOT A MAGIC BULLET

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BACKGROUND

Basic Pilot, the Dept. of Homeland Security (DHS) program that DHS recently “rebranded” as “E-Verify,”¹ is a voluntary Internet-based program whose purpose is to allow employers to electronically verify workers’ employment eligibility by accessing information in databases maintained by DHS and the Social Security Administration (SSA). Approximately 43,000 employers are currently enrolled in Basic Pilot/E-Verify — fewer than 1 percent of the approximately 6 million employers in the U.S. — and not all of those enrolled are “active” users.² While Basic Pilot/E-Verify often is portrayed as the magic bullet that would curb the hiring of unauthorized workers, the program has been plagued by a multitude of problems since its inception in 1997.

Numerous entities, including those that researched and wrote two independent evaluations commissioned by the former Immigration and Naturalization Service in 2002 and by DHS in 2007, the Government Accountability Office (GAO), and the Social Security Administration’s Office of the Inspector General (SSA-OIG), have found that Basic Pilot/E-Verify has significant weaknesses, including (1) its reliance on government databases that have unacceptably high error rates and (2) employer misuse of the program to take adverse action against workers.³ The most recent independent evaluation commissioned by DHS found that “the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification.”⁴

A number of proposals are pending in Congress that would make Basic Pilot/E-Verify mandatory for some or all employers. However, if the program were to be significantly expanded without its current flaws first being addressed and corrected, workers and employers alike would be impacted adversely. Likewise, if such an expansion were to be implemented outside the context of a comprehensive program to legalize the status of currently unauthorized workers, it would cause certain businesses and industries to move into the unregulated underground cash economy. Any expansion would also face significant challenges if it were not accompanied by increased enforcement of our nation’s labor and employment laws for *all* workers. Without these important protections, unscrupulous employers would continue to have an incentive to evade their legal responsibilities by recruiting and exploiting unauthorized workers.

SPECIFIC WEAKNESSES OF THE BASIC PILOT/E-VERIFY PROGRAM

■ Inaccurate and outdated federal databases can deprive workers of their livelihood.

- SSA estimates that 17.8 million (or 4.1 percent) of its records contain discrepancies related to name, date of birth, or citizenship status, with 12.7 million of those records pertaining to U.S. citizens.⁵
- If Basic Pilot/E-Verify were to become mandatory and the databases were not improved, SSA database errors alone could result in 2.5 million people a year being misidentified as



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not authorized for employment. This figure does not take into account errors in the DHS database.⁶

- Due to database errors, foreign-born lawful workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment.⁷
- Foreign-born U.S. citizens feel the greatest impact, with almost 10 percent initially being told that they are not authorized to work (versus 0.1 percent for native-born U.S. citizens).⁸
- USCIS has a consistent history of mishandling the huge volume of data for which it is responsible. Problems have included inaccurate databases, privacy and security lapses, and difficulty in fielding and developing information systems.⁹ Additionally, the GAO found in a review of 14 USCIS district offices in 2006 that over 110,000 immigrant records were lost.¹⁰

■ **Employers misuse the program to discriminate against workers.**

- The 2007 evaluation of Basic Pilot/E-Verify found that “the rate of employer noncompliance [with the program rules] is still substantial.”¹¹ Specifically, employers engaged in prohibited employment practices, including preemployment screening; adverse employment action based on tentative nonconfirmation notices;¹² and failure to inform workers of their rights under the program.¹³
 - Against program rules, 47 percent of employers put workers through Basic Pilot/E-Verify *before* the employees’ first day at work.¹⁴
 - 9.4 percent of employers did not notify workers of a tentative nonconfirmation notice, and 7 percent who gave workers the notice did not encourage them to contest it because, they said, the process of contesting the notice takes too much time.¹⁵
 - 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay based on tentative nonconfirmation notices.¹⁶
- A December 2006 report issued by SSA-OIG also found that employers did not follow program rules.
 - 47 percent of employees surveyed reported that employers used Basic Pilot/E-Verify to verify their employment eligibility *before* hire.¹⁷
 - 30 percent of employers used Basic Pilot/E-Verify to verify the employment eligibility of the *existing* workforce.¹⁸
- According to the 2007 evaluation, “Employees reported that the supervisors assumed that all employees who received tentative nonconfirmation findings were unauthorized workers and therefore required them to work longer hours and in poorer conditions.”¹⁹

■ **Workers’ privacy could potentially be compromised because DHS databases do not comply with government and industry-based standards for protecting information.**

- Although USCIS has invested in internal security improvements, it continues to be open to significant security vulnerabilities or compromise by outside forces seeking to manipulate the immigration system.²⁰ Most recently, it was reported that the FBI is investigating a technology firm with a \$1.7 billion DHS contact after it failed to detect “cyber break-ins” traced to a Chinese-language website.²¹
- The House Oversight and Government Reform Committee gave a “D” to DHS in computer security for 2006 (up from an “F” for the previous 3 years).²² DHS’s failure to comply with Federal Information Security and Management Act (FISMA) standards since

its inception demonstrates that it cannot be definitively relied upon to make significant improvements in this area, which translates down the road into workers' private information being left vulnerable to hackers and other cyber-threats.

- Anyone posing as an employer can access Basic Pilot/E-Verify and all its data. DHS does not screen those who enroll in the program to verify that they are bona fide employers.²³
- According to The Heritage Foundation, Basic Pilot/E-Verify “would run afoul of legitimate privacy concerns. Both the government and employers would have access to massive databases of information, which would surely tempt some to traffic in identity theft.”²⁴

■ **The current technological infrastructure cannot support mandatory participation by U.S. employers.**

- DHS reports that Basic Pilot/E-Verify can currently handle 25 million queries per year.²⁵ This would imply that if a mandatory participation requirement applied to 6 million employers, the system would be able to handle only an average of about 4 queries per year from each individual employer.
- The scalability of Basic Pilot/E-Verify to a mandatory program is a very “serious architectural issue,” because it will have to handle at least a thousand-fold increase in users, queries, transactions, and communications volumes. Each time a system grows even ten times larger, serious new technical issues arise that were not previously significant.²⁶
- Even requirements mandating that federal contractors use Basic Pilot/E-Verify would represent a huge increase in system utilization. The top 20 federal contractors in 2007 employ a total of almost 2 million employees.²⁷ Depending on how any new requirement is implemented, these federal contractors could be required to run a query on each of their employees — U.S. citizens and immigrants alike. These corporations are only a small sample of the 200,000 businesses that currently do business with the federal government.

■ **Making Basic Pilot/E-Verify mandatory would mire DHS and SSA deeper in bureaucracy and backlogs.**

- SSA estimates that making the program mandatory will result in 3.6 million extra visits or calls to SSA field offices per year, which would result in 2,000 to 3,000 more work years, the necessity of hiring more staff, and hundreds of millions of dollars more in expenses each year.²⁸ In 2007, the president of the National Council of Social Security Management Associations, Inc., testified that if a mandatory employment eligibility verification system is implemented without the necessary funding, “it could cripple SSA’s service capabilities” and negate any progress in addressing the disability backlog.²⁹
- DHS already is notorious for its inability to resolve existing backlogs in processing applications submitted by immigrants and would-be immigrants to USCIS, an agency within DHS.³⁰ Any attempts to make Basic Pilot/E-Verify mandatory would only spiral the agency further into bureaucratic gridlock.

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NOTES

¹ For more information, *see* forthcoming BASIC INFORMATION BRIEF: BASIC PILOT/E-VERIFY PROGRAM (NILC, est. pub. date Jan. 2008). *See also* FACT SHEET: E-VERIFY (Dept. of Homeland Security, Aug. 9, 2007), www.nilc.org/immsemplymnt/ircaempverif/E-Verify_Fact_Sheet_2007-08-09.pdf.

² In June 2007, when only 17,000 employers were enrolled in the program, only half were active users, “active users” being defined as employers who had run at least one query in fiscal year 2007. *See* Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES: EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC VERIFICATION SYSTEM (Government Accountability Office, June 2007, GAO-07-924T), www.gao.gov/new.items/d07924t.pdf, at 8.

³ *See* FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June, 2002), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; FINDINGS OF THE WEB-BASED BASIC PILOT EVALUATION (Westat, Sept. 2007) (hereafter “Westat 2007”), www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89abf90517e15110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD; CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm; CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION’S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf; CONGRESSIONAL RESPONSE REPORT: MONITORING THE USE OF EMPLOYEE VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Sept. 2006), www.ssa.gov/oig/ADOBEPDF/A-03-06-36122.pdf; and Richard M. Stana *supra* note 2.

⁴ *See* Westat 2007, *supra* note 3, at xxi. Section 404g of the Illegal Immigration Reform and Immigrant Responsibility Act states that “The Commissioners of Social Security and the Immigration and Naturalization Service shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process....”

⁵ ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE, *supra* note 3.

⁶ Transcript from Hearing on Employment Eligibility Verification Systems (Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007).

⁷ *Id.* at xii-xiii.

⁸ *See* Westat 2007, *supra* note 3, at 50.

⁹ *See, e.g.*, HOMELAND SECURITY NEEDS TO IMPROVE ENTRY EXIT SYSTEM EXPENDITURE PLANNING (General Accounting Office, June 2003), www.gao.gov/new.items/d03563.pdf; and CHALLENGES TO IMPLEMENTING THE IMMIGRATION INTERIOR ENFORCEMENT STRATEGY (General Accounting Office, Apr. 10, 2003), www.gao.gov/new.items/d03660t.pdf. More recently, DHS stated that it is indefinitely postponing implementation of the land border exit-tracking element of its U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program because the technology needed to make it cost-effective is not yet available. *See* Rachel L. Swarns and Eric Lipton, “Administration to Drop Effort to Track if Visitors Leave,” N.Y. TIMES, Dec. 15, 2006, at A1; *see also* US-VISIT PROGRAM FACES STRATEGIC, OPERATIONAL, AND TECHNOLOGICAL CHALLENGES AT LAND PORTS OF ENTRY (Government Accountability Office, Dec. 2006), www.gao.gov/new.items/d07248.pdf.

¹⁰ IMMIGRATION BENEFITS: ADDITIONAL EFFORTS NEEDED TO HELP ENSURE ALIEN FILES ARE LOCATED WHEN NEEDED (Government Accountability Office, Oct. 2006), www.gao.gov/new.items/d0785.pdf, at 4.

¹¹ *See* Westat 2007, *supra* note 3, at xxii.

¹² Employers receive a “tentative nonconfirmation” notice from either SSA or DHS when the agencies are unable to automatically confirm a worker’s employment eligibility. A “tentative nonconfirmation” notice

is not an indication of an immigration violation, and workers have the right to contest the finding with the appropriate agency.

¹³ See Westat 2007, *supra* note 3, at xxiii.

¹⁴ *Id.* at 71.

¹⁵ *Id.* at 76-77.

¹⁶ *Id.* at 77.

¹⁷ EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS, *supra* note 3, at 6.

¹⁸ *Id.*

¹⁹ Westat 2007, *supra* note 3 at 77, emphasis added.

²⁰ Committee Report 110-181, Department of Homeland Security Appropriations Bill 2008, U.S. House of Representatives, at 116.

²¹ Ellen Nakashima and Brian Krebs, "Contractor Blamed in DHS Data Breaches," WASHINGTON POST, Sept. 24, 2007.

²² SEVENTH REPORT CARD ON COMPUTER SECURITY AT FEDERAL DEPARTMENTS AND AGENCIES (Ranking Member Tom Davis, House Oversight and Government Reform Committee, Apr. 12, 2007), <http://republicans.oversight.house.gov/FISMA/>.

²³ See Westat 2007, *supra* note 3, at xxvi.

²⁴ James Jay Carafano, WORKPLACE ENFORCEMENT TO COMBAT ILLEGAL MIGRATION: SENSIBLE STRATEGY AND PRACTICAL OPTIONS (The Heritage Foundation, Aug. 2006), www.heritage.org/Research/NationalSecurity/hl957.cfm, emphasis added.

²⁵ FACT SHEET: E-VERIFY, *supra* note 1.

²⁶ Peter Neumann, "Security and Privacy in the Employment Eligibility Verification System (EEVS) and Related Systems," Testimony before the Subcommittee on Social Security of the House Committee on Ways and Means, June 7, 2007, <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6099>, emphasis added.

²⁷ "Top 200 Federal Contractors 2007," GOVERNMENT EXECUTIVE MAGAZINE, Aug. 15, 2007.

²⁸ Transcript from Hearing on Employment Eligibility Verification Systems, *supra* note 6.

²⁹ Richard Warsinskey, President, National Council of Social Security Management Associations, Testimony before the U.S. Senate Committee on Finance, May 23, 2007, <http://finance.senate.gov/hearings/testimony/2007test/052307testrw.pdf>, emphasis added.

³⁰ By March 2007, the estimated backlog of applications was 1,275,795. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN ANNUAL REPORT 2007 (Dept. of Homeland Security, June 11, 2007), www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf, at 11.