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TESTIMONY OF AUSTIN T. FRAGOMEN
BEFORE THE
HOUSE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SOCIAL SECURITY
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Mr. Chairman, Ranking Member Becerra, members of the subcommittee, thank you for your kind invitation to share my thoughts and experience on the topic of employment eligibility verification, and the problems U.S. employers face concerning identity fraud.

I appear today in my capacity as chairman of the board of the American Council on International Personnel (ACIP). ACIP has been a leading voice on corporate immigration compliance for almost 40 years. Our membership consists of over 220 of the nation's largest employers across all industries, including financial services, technology, health care, manufacturing, entertainment, higher education, and non-profit research.

Since 2007, ACIP and the Society for Human Resource Management (SHRM) have co-chaired the Human Resource Initiative for a Legal Workforce. SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

The HRI supports a federal electronic employment verification system to improve the existing system. Our objective is to promote a secure, efficient and reliable system that will ensure a legal workforce and help prevent unauthorized employment.

In addition to my experience with ACIP and HRI, my remarks are based to a great extent on my experience as chairman of Fragomen, Del Rey, Bernsen & Loewy, LLP, a global business immigration law firm with 35 offices that advises some of the largest corporations on employment eligibility verification worldwide.

Background:

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). It introduced, for the first time, civil and criminal penalties against *employers* who hire unauthorized workers. IRCA requires employers to verify the employment eligibility of each of their employees in the United States. This is commonly called the Form I-9 process, referring to a form that the employer and employee both have to complete as part of the verification process. Furthermore, IRCA contains a prohibition against employment discrimination based on an employee's national origin and citizenship status.

In sum, the I-9 process requires the employee, on the first day of employment, to complete the first section of the form indicating name, address, and citizenship or

immigration status. Within three days of employment, the employee must present a document or combination of documents enumerated on the form to demonstrate identity and eligibility to work in this country.

The employer's representative, typically a human resources professional in the organization, attests on the same form that he or she has examined the document or documents and that the document or documents appear genuine and that they reasonably relate to the employee.

In essence, IRCA's worksite enforcement requirements utilize the employer, as a partner of the government, to verify each employee. Failure to follow the proper I-9 procedure carries a penalty. At the same time, IRCA prohibits the employer from asking for more or different documents due to its perception of the employee's national origin or immigration status. Employees who believe they have experienced such discrimination may file a complaint with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

It should not be surprising that the process has been vulnerable to fraud from the beginning. Soon after implementation, it became clear that employees can present completely false documents; they can look genuine on their face, and employers have no way to discern if they are actually fraudulent documents. Moreover, unscrupulous employers can deliberately overlook the fact that employees are presenting documents that appear suspicious.

The solution, many thought, was in the creation of an electronic verification system that would allow the employer to use government databases to verify the information presented. In 1996, through enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress authorized the "Basic Pilot" program. The former Immigration and Naturalization Service (INS) administered the pilot program, which verified employment eligibility by cross-checking information with the Social Security Administration (SSA) or INS databases. Basic Pilot eventually became "E-Verify." Participation was voluntary, though as discussed below, various federal and state mandates make participation effectively mandatory for many employers today.

E-Verify is a web-based system that requires an employer to enter into it identity information on the employee (name, Social Security or work authorization number, and date of birth). The E-verify program then compares this information against the Department of Homeland Security database for work-authorized foreign nationals or against the Social Security database for U.S. citizens.

After entering the data, the employer receives a response—either confirming that the data entered by the employer matches a government database, or it does not (known as a tentative non-confirmation). If the data is confirmed, the employee is allowed to begin work. If the employer receives a tentative non-confirmation, the employee is directed to contact the appropriate federal agency to resolve the discrepancy. The employer is required to allow the employee to work while this discrepancy is being resolved.

The E-Verify program is scheduled to expire in September 2012. It has undergone tremendous growth under INS's successor agency, U.S. Citizenship and Immigration Services (USCIS). Last December, the GAO reported that USCIS has reduced tentative non-confirmations (TNC) from 8 percent during the period from 2004 through 2007, to about 2.6 percent in fiscal year 2009. Moreover, only 0.3 percent of the employees who receive an initial TNC are later found to be work-authorized.

According to USCIS's own website, in FY 2010 the percentage of queries resulting in automatic confirmation improved to 98.3 percent, or 1.7 percent TNCs. The total number of employers enrolled in E-Verify rose from 2,300 (2005 GAO report) to nearly 217,000 (2010 GAO report). USCIS informed me this week that the actual enrollment is now up to 254,000 employers.

The growth in participation is due, in part, to new federal laws. In September 2009, after a lengthy review, the Obama administration implemented an amendment to the Federal Acquisition Regulation (FAR) that was promulgated by the Bush administration. It would require most federal contractors and their subcontractors to use E-Verify.

Unlike the Form I-9 process, which applies only to new hires, this regulation requires reverification of all existing workers who will be working on the contract. Employers may choose to re-verify their entire workforce, as well. Moreover, the White House has continued another Bush-era regulation that permits only employers who use E-Verify to extend the work authorization of certain foreign graduates of U.S. universities. In addition to regulatory mandates, U.S. Immigration and Customs Enforcement (ICE) often incorporates E-Verify participation as part of a settlement agreement with an employer found to be in violation of IRCA's provisions.

The federal government is not the only entity expanding the mandate to participate in what Congress intended in 1996 to be a voluntary program. A fast-growing number of states and even some municipalities are requiring E-Verify enrollment and/or state-mandated verification procedures, either as a condition to government contracts, or as a condition for doing business at all.

According to the latest figures, more than half of the states currently have some kind of requirement to use E-Verify or other laws related to eligibility verification, with several additional states considering similar legislation. A vast array of state and local laws creates a great deal of confusion and uncertainty for employers with operations in multiple jurisdictions. On December 8, 2011, the Supreme Court heard arguments on the issue of whether states have the authority to impose these requirements, or if federal law preempts the states. The decision of the court should dictate whether state and local governments may continue to impose E-Verify and other immigration-related laws and ordinances.

Notwithstanding the remarkable surge in participation and improvement in the confirmation rate provided by E-Verify, overall participation still is only about 3 percent of the total employer population. The most common disincentive to participation is the

fact that E-Verify does not eliminate the need for the so-called I-9 process. Some services are available to electronically streamline the I-9 and E-Verify processes, but both still represent an additional administrative burden.

Within industries that do not have a high occurrence of unauthorized employment, employers don't perceive a significant benefit in using E-Verify, compared to the required investment of time and money. Finally, because E-Verify remains, in effect, a "paper-based" system because of its reliance on a subjective review of documents, it is unable to detect many forms of document fraud and identity theft. This is because E-Verify does not authenticate the identity of the *person* presenting the documents. It only verifies that the data on the documents matches information in the federal databases.

While E-Verify continues to expand, so has ICE enforcement against employers. During the Bush administration, enforcement officials used criminal identity theft statutes to prosecute unauthorized workers. However, on April 30, 2009, Homeland Security Secretary Janet Napolitano announced that ICE would redirect enforcement of immigration law away from the unauthorized workers and toward *employers*—for both unauthorized hiring and I-9 paperwork violations, even where there is no unauthorized worker present.

In the months following that announcement, ICE implemented this new policy by increasing the number of audits against employers. For example, just before the July 4th weekend in 2009, ICE issued I-9 audit notices to 652 employers nationwide, 149 more than the total for the Bush administration's final year. Just before the Thanksgiving weekend in 2009, ICE issued another 1,000 audit notices.

According to a recent announcement from Secretary Napolitano, from January 2009 through the end of fiscal year 2010, which ended on September 30, 2010, "ICE has audited more than 3,200 employers suspected of hiring illegal labor, debarred 225 companies and individuals, and imposed approximately \$50 million in financial sanctions—more than the total amount of audits and debarments than during the entire previous administration." Most of the penalties have been assessed against employers for paperwork violations.

The Problem:

One continuing criticism against E-Verify is that the system is susceptible to identity fraud. Indeed, while E-Verify's capability and accuracy have improved immensely in matching a name with a Social Security number, it cannot confirm that the person presenting the document is who he or she claims to be. According to a December 2009 report by Westat, 54 percent of the unauthorized workers who are checked through E-Verify are confirmed as work-authorized. The December 2010 GAO report reiterated this assessment.

Identity fraud, including the inability of employers to be certain about employees' employment eligibility, poses substantial problems for not only employers, but also for government and legal U.S. workers.

First, it is a problem for law enforcement. Rather than focusing scarce resources on employers who intentionally violate the law, immigration officers have a tendency to look with suspicion at all employers. Ironically, IRCA made employers partners of law enforcement in the law's implementation, yet employers have become the suspects. Consequently, law enforcement resources are spread thin across the entire employer community, instead of focusing just on the bad actors.

Second, the uncertainty over eligibility poses legal and financial risks for employers. While it is true that employers who use E-Verify enjoy a presumption of compliance, employers remain vulnerable when they do not know with certainty that they have a legal workforce. This has already presented a problem for many U.S. employers.

Time and again, we hear of yet another E-Verify-participating employer who has to shut down business operations because its workers are determined to be unauthorized after an ICE raid or audit. In most of these cases, the employers are found not liable for any violations and, in fact, have followed the I-9 and E-Verify regulations strictly. Nonetheless, the financial loss and reputation damage can be more severe than any civil fine.

My point is not that the government should not conduct raids or audits. Rather, it should explore why an employer that completes all of its I-9s and uses E-Verify can still have unauthorized workers on staff. What more could the employer do?

Third, while I again acknowledge the tremendous improvement that E-Verify has made in data accuracy, mistakes still occur. False non-confirmations are not created by the E-Verify system itself, but by inaccuracies in the SSA and DHS databases. In this regard, depending on the particular circumstances, the employee and the government both bear the responsibility for failing to update the information. In any event, the erroneous result can result in administrative burden for the employers, and inconvenience or even financial hardship to the employee in the rare case of an erroneous final non-confirmation.

Finally, the system imposes burdens on legal U.S. workers who must ensure their documents are in order when applying for a job, giving them yet another reason to worry about identity theft. And one unexpected consequence of the Hurricane Katrina disaster was that employers were hesitant to hire those who had fled the area without their documents. In addition, U.S. workers assigned to federal contracts have had to take time off work to go to the Social Security Administration to obtain new cards, or to correct other errors that appear during the E-Verify reverification process.

Under the current system, the level of uncertainty may foster skepticism toward all employees, especially those who are perceived to look or sound "foreign." The less certainty there is for employers, the more likely unsophisticated employers will revert to personal biases in an abundant exercise of caution. An easy and certain "yes/no" in the verification process would mean that employers could no longer use subjectivity as an excuse for discriminatory hiring practices.

As early as 1993 and 1994, I testified before the House Subcommittee on International Law, Immigration and Refugees in favor of a credit card-like verification system which checks the government databases to confirm identity and work authorization. My concern was that the system subjected *law-abiding* employers to penalties because of inadvertent clerical errors on the I-9, while the lack of effective enforcement allowed *law-breakers* to continue employing illegal workers with impunity.

I have the same concern today. As technologies have advanced, so have fraudulent practices. The ultimate solution is a system that offers employers who wish to follow the law the assurance of certainty.

Recently, USCIS has been incorporating photographs from U.S. passports and DHS-issued immigration documents (“green cards” and employment authorization cards) into E-Verify. That allows employers to compare the photograph in the system with the photograph on the document that the employee presents, *if* the employee chooses to present a passport, green card or employment authorization card from DHS.

The “Records and Images from DMV’s for E-Verify” (RIDE) initiative, to be implemented later in 2011, will enlarge significantly the pool of photographs for comparison purposes. But that will only happen if all or nearly all of the states elect to participate in the program *and* improve their respective data integrity by complying with Real ID Act requirements or taking similar steps. USCIS should be commended for its relentless efforts to stop identity theft, but at this point, the agency does not have access to sufficient data across the country to stop identity fraud in a meaningful way.

In addition, this photo-comparison effort only stops fraud successfully when there has been a photo substitution on a document. It does not remove subjectivity on the part of the employer who must determine whether the employee *resembles* the likeness in the photograph. Because of concerns about discrimination, employers are hesitant to ask for more or different documentation if the person reasonably resembles the photograph. It also should be noted that many identity theft schemes begin with fraudulent breeder documents, which can lead to subsequent documents being issued “legitimately” to persons who assumed false identities.

Finally, USCIS is to be commended for launching the E-Verify “Self Check” last month. This feature allows individuals to check their own employment eligibility *before* having to undergo verification for a new job, allowing U.S. workers to resolve any errors before starting a new job. A crucial part of the Self Check process is that it requires employees to confirm their identity through a process that ensures that they are running a check on themselves. An independent service generates an identity assurance quiz on demographic and/or financial data about the individual that is generated by a third-party service—in the case of this pilot phase, the credit rating agency Equifax. This identity information is not shared with the DHS in any way, with the department notified only that a user’s identity is verified and that self-check may proceed.

The chairman of this subcommittee should be recognized as having introduced this concept in the New Employee Verification Act (NEVA). Self Check is not designed to prevent identity theft in this current construct, but it certainly should be considered.

The Solution:

An accurate and responsive electronic system is a critical component of an effective employment verification program. Congress and agency officials must address the shortcomings of the current program. The following are some recommendations for policymakers in both the legislative and executive branches to consider:

1. Provide funding and resources to reconcile mismatches in the Social Security database:

First, whatever requirements are placed on the Social Security system must do no harm to the system or affect its mission of providing benefits to retirees, those with disabilities, or survivors.

Second, the data errors in the Social Security Administration's database must be cleaned up. Advance appropriated resources and staffing must be provided to Social Security to address this issue before any more requirements are placed on the agency.

According to a SHRM survey, 92 percent of U.S. employers actually want to participate in an electronic verification program—provided the system is accurate, efficient and easy to use. To accomplish that, the underlying databases upon which the verification is based must be accurate.

For most U.S. citizens and lawful permanent residents, E-Verify checks the information on the Form I-9 against the Social Security Administration's database. Errors in the database result in a "non-confirmation" response from the system. While it is the employee's responsibility to correct this information, the employer must continue to employ and train the worker during this time. If employers are mandated to use an electronic verification system, the government must invest the resources to minimize the false non-confirmations for legal workers, and to establish systems that allow the employee to correct errors quickly and easily.

2. Provide clearer instructions on Social Security mismatches:

While the government works on reconciling the SSA database, employers need better guidance on the potential impact of mismatch notices on work authorization. The Department of Homeland Security promulgated regulations on this issue in 2006, and again in 2008, to comply with a federal court order. ACIP and SHRM supported this regulation because it provided safe-harbor procedures for employers to follow. The regulation was rescinded in July 2009.

Now, even though there is no longer a regulatory mandate to act affirmatively, an employer's inaction after receiving notice of a Social Security mismatch still can be corroborating evidence to be used against the employer in a worksite action. The problem is that SSA and the Internal Revenue Service continue to notify employers of mismatches, and in fact, this month, SSA is resuming the practice of sending "decentralized correspondence" to employers again when the employees involved in the

mismatch do not have a valid address. Meanwhile, there is not any clear instruction from ICE on what the employer should do.

I do not question the Department of Homeland Security's decision to rescind the regulation, nor am I here to defend the merits of that particular rule. I do, however, emphasize that if employers are to remain responsible for resolving Social Security mismatches, then employers should have clearer guidance from the government.

One tool which is available to employers to reconcile payroll records with the SSA database is the Social Security Number Verification Service (SSNVS). It can be effective in identifying name and number mismatches, but its utility is limited as it is not linked to any immigration databases, and it is ineffective against identity theft. In fact, the Department of Justice Civil Rights Division, SSA, and even ICE have repeatedly instructed employers that SSNVS is to be used only for payroll purposes, not employment eligibility verification. This instruction is important to prevent discriminatory acts, but the government needs to do a better job explaining what employers *should* do in case of a mismatch from SSNVS. The current instructions confuse employers on what they can or must do with information from SSNVS.

3. Verification should only apply to new hires.

To use enforcement resources wisely and to limit the impact on government databases, only new hires should be required to be checked for work authorization. As you know, there are 145 million individuals employed in the U.S. and, due to job turnover, there are approximately 60 million new hires annually. On average, most individuals would be run through an employment verification system within three to four years.

One issue that has raised substantial concern for many employers is the idea of mandatory re-verification. Under current law, only federal contractors are required, and permitted, to re-verify the existing workforce. Employers learned from experience implementing the FAR amendment that re-verification can be very costly, up to several million dollars for some of America's largest employers.

For industries that typically do not have a problem with unauthorized employment, it is hard to get them to support mandatory re-verification because the cost far outweighs the benefit. On the other hand, there are other sectors where employers want to re-verify the current workforce. If E-Verify is mandated for all employers, re-verification should not be required, but be available for those who wish to reverify their existing workforce. Of course, employers would not be permitted to re-verify in a discriminatory fashion, and must have a consistent and nondiscriminatory policy.

Right now, the employer is stuck between a rock and a hard place. Perceived inaction will result in prosecution from ICE, overzealous follow-up can result in charges of discrimination, and the employer does not know where the line is drawn.

4. *Incorporate biometric or other "paperless" technology to remove "guessing."*

The government must appreciate that IRCA's verification requirements are premised on *trust*, not *skepticism*, between the employer and the government. Additionally, the purpose of the statute is to curb unauthorized employment, not to penalize unsuspecting employers for paperwork or procedural errors.

Presently, even though ICE does target industries that are either critical to infrastructure protection or have higher instances of unauthorized employment, the focus still is on employers' paperwork errors. It makes little sense to entrust, and to burden, employers with the I-9, and in many cases E-Verify obligations, if the results cannot be trustworthy anyway. Enforcement action therefore must be consistent with that statutory intent and be executed in a cooperative and not adversarial spirit.

The best long-term solution is to create a system that provides a much higher degree of certainty, thereby placing the burden of ensuring data integrity on the government. Moreover, as part of the "certainty," the system must have the capability to stop identity theft.

There may be no other way to achieve this certainty than to establish a truly paperless process that incorporates biometric identifiers in the verification process. This also was a proposal in the Johnson-Giffords NEVA bill. Ultimately, regardless of what kind of technology the government ultimately chooses, the end product must be fast and accurate. In other words, employers deserve a "yes" or "no" answer that is unambiguous.

The benefit to biometric technology, or comparable technology ensuring the same degree of certainty, is that the employer only has to attest to having gone through the process of verification. It does not have to make subjective judgments or risk having an unauthorized worker because the system is inherently unreliable.

I am aware of the skepticism toward creating a biometric-based system because of anticipated cost, but it truly is the most effective way to stop illegal migration. Border security is critical, but we already have seen smuggling patterns adjusting to border enforcement. At what point will enforcement stop being practical and we fence the entire country, including coastlines?

In addition, while SEVIS and US-VISIT are important programs to track the compliance of temporary visa holders, they alone cannot stop temporary visa holders from overstaying. An effective worksite enforcement program, along with strong border and interior enforcement, is critical to ensuring the integrity of our immigration system.

While we speak of the importance of immigration enforcement and stopping unauthorized employment, it is equally important to protect the rights of those who are *legally* in the workforce, regardless of appearance, accent, or citizenship status. We must commend the Office of Special Counsel and organizations such as the National Immigration Law Center, and many others, for protecting the rights of all legal workers, especially those who are most vulnerable because of their national origin or citizenship status.

As Westat found in 2009, naturalized citizens are especially adversely affected by government database errors, as are immigrants with hyphenated names. As impressive as the E-Verify improvements have been over the past five years or so, we must be sensitive to how devastating it must be for work-authorized persons and their families to lose a job because of government error, or misuse of verification tools.

At the same time, we must understand that employers discriminate, either deliberately or out of ignorance, because the current system allows subjectivity. The benefit of achieving certainty in the verification process extends beyond just ensuring a legal workforce. By removing subjectivity, employers would no longer experience the anxiety of not knowing whether the workforce is legal. Employers would no longer have the tendency to treat certain workers disparately, either in making hiring decisions or in document examination. At the same time, employers who do discriminate intentionally would have no credible defense for their actions.

5. *Create a truly federal electronic verification system that preempts the confusing patch-work of state laws.*

An effective employment eligibility verification system at the federal level will strengthen the argument for federal preemption of state and local immigration enforcement laws, which is supported by business and civil rights communities.

Currently, one of the often repeated refrains against preemption is that the federal government is not "doing its job" in stopping illegal immigration or unauthorized employment. An effective verification system will refute that argument and support federal preemption.

Employers, of course, welcome federal preemption because it is much easier to comply with one set of laws than 50 state laws, plus additional local ordinances. This constant shift makes it very difficult for employers in multiple jurisdictions to remain compliant.

Recently, the governor of Minnesota let his predecessor's executive order mandating use of E-Verify to lapse. Of course, to obey the previous executive order, many employers had already invested the money and training to get the programs in place. Earlier this year, the governor of Florida issued an executive order that mirrors the FAR and mandates re-verification of current workers. But since the legal basis for re-verification is not there for the Florida executive order, compliance with the state requirement could mean violation of federal law.

In addition, as E-Verify expands we should make it a truly electronic system by eliminating the current paper-based I-9 process and establish a streamlined process for attestation and verification.

Conclusion

Vigilant enforcement of immigration laws at the worksite is an integral part of any successful immigration reform package. Effective enforcement is only possible with a system that provides employers with certainty and treats employers as partners—not suspects.

Incorporation of biometric or accurate technology is an important component to achieving the desired level of certainty, which then leads to fewer cases of discrimination and racial profiling, as well.

Finally, an effective federal worksite enforcement program will justify strong federal preemption, thus eliminating the need for inconsistent state and local laws that confuse employers.