

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER
to
THE DEPARTMENT OF DEFENSE, GENERAL SERVICES ADMINISTRATION AND
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.
Federal Acquisition Regulation; FAR Case 2007-013;
Employment Eligibility Verification.

The Department of Defense (DOD), General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) [hereinafter, agencies] have issued a proposed rule to amend the Federal Acquisition Regulations (FAR) to require certain contractors to use the E-Verify system "as a the means for verifying that certain of their employees are eligible to work in the United States."¹ Pursuant to that notice, the Electronic Privacy Information Center (EPIC) hereby files these comments. The Electronic Privacy Information Center is a not-for-profit research center based in Washington, DC. Founded in 1994, EPIC focuses on the protection of privacy and the First Amendment.

EPIC has analyzed and testified about databases and verification programs used by federal entities. In June 2007, Congressional testimony, EPIC Executive Director Marc Rotenberg urged Congress to strengthen privacy and security safeguards associated with employment eligibility verification systems and the underlying databases.² In February 2007, we explained that the Transportation Security Administration's "internal quality assurance procedures" were not working, and urged the agency to fully apply Privacy Act requirements of notice, access, and correction to the new traveler redress program called "TRIP" and its underlying watch list system.³ In Congressional testimony in 2005, Executive Director Rotenberg also described some of the problems that would likely result from a poorly designed employment eligibility system, and some changes were made to EEVS based on EPIC's recommendations.⁴ EPIC has analyzed flaws in such systems in a number of reports.⁵ EPIC has also focused on employment verification systems as part of its "Spotlight on Surveillance" series.⁶

¹ Department of Defense; General Services Administration; National Aeronautics and Space Administration, Federal Acquisition Regulation; FAR Case 2007-013; Employment Eligibility Verification, *Proposed Rule*, 73 Fed. Reg. 33,374 (June 12, 2008) [hereinafter, E-Verify Proposed Rule].

² Marc Rotenberg, Exec. Dir., EPIC, *Testimony and Statement for the Record at a Hearing on Employment Eligibility Verification Systems (EEVS) Before the Subcomm. on Social Sec., H. Comm on Ways & Means*, 110th Cong. (June 7, 2007), available at http://www.epic.org/privacy/ssn/eevs_test_060707.pdf.

³ EPIC, *Comments on Docket Nos. DHS-2007-0003: Implementation of Exemptions; Redress and Response Records System* (Feb. 20, 2007), available at http://www.epic.org/privacy/airtravel/profiling/trip_022007.pdf.

⁴ Marc Rotenberg, Exec. Dir., EPIC, *Testimony and Statement for the Record at a Hearing on H.R. 98, the "Illegal Immigration Enforcement and Social Security Protection Act of 2005," Before the Subcomm. on Immigration, Border Sec., and Claims, H. Comm on the Judiciary*, 109th Cong. (May 12, 2005), available at <http://www.epic.org/privacy/ssn/51205.pdf>

⁵ See EPIC, Social Security Numbers, <http://epic.org/privacy/ssn/>; EPIC, Secure Flight, <http://www.epic.org/privacy/airtravel/secureflight.html>; and EPIC, National ID Cards and the REAL ID Act, <http://epic.org/privacy/id-cards/>.

⁶ See EPIC, *E-Verify System: DHS Changes Name, But Problems Remain for U.S. Workers* (July, 2007), <http://epic.org/privacy/surveillance/spotlight/0707/default.html>; EPIC,

An expansion of E-Verify has severe implications for national and individual security, civil liberties and privacy. It is tempting to believe that technology and new systems of identification can help solve long-running policy problems, such as determining eligibility to work in the United States. But the reality may be that new systems of identification will create new privacy risks for employees and new burdens for employers. At a Congressional hearing in June 2008, the Government Accountability Office detailed the many problems associated with implementing mandatory electronic employment verification systems.⁷

I. History and Operation of Employment Eligibility Verification

The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal for employers to "knowingly" employ unauthorized workers, and E-Verify (then known as "Basic Pilot") grew out of the requirement for work-eligibility verification.⁸ Basic Pilot, a joint project of U.S. Customs and Immigration Services and the Social Security Administration, is an electronic employment eligibility verification system created in 1997 and implemented in all 50 states.⁹

A new employee is required to fill out an Employment Eligibility Verification form (commonly known as an I-9 form) stating that she is authorized to work in the United States, and produce identification documents.¹⁰ Employers do not need to verify the authenticity of the ID documents, but they do need to keep a copy of them on file: for three years after the date of hire or one year after the date employment ends, whichever is later.¹¹ The documents must merely pass a good-faith test: Do they look real? If an employee is found to be unauthorized, the employer must terminate her employment. Employers who do not fire unauthorized workers or who knowingly hire unauthorized workers may be fined up to \$11,000 for each ineligible employee.¹²

An employer can voluntarily sign up for the E-Verify program. In E-Verify, an employer fills out an online form with the new employee's name, date of birth and Social Security Number, and if the new hire states she is not a U.S. citizen, the "A" Number or I-94 Number within three days of the employee's hire date.¹³ This information is checked against Social Security Administration databases "to verify the name, SSN, and date of birth of newly-hired employees, regardless of citizenship."¹⁴ The SSA "maintains a record of each Social Security card, both

National Employment Database Could Prevent Millions of Citizens From Obtaining Jobs (May, 2007), <http://epic.org/privacy/surveillance/spotlight/0507/default.html>.

⁷ Government Accountability Office, *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System*, GAO-08-895T, (June 10, 2008), *available at* <http://www.gao.gov/new.items/d08895t.pdf>.

⁸ Immigration Reform and Control Act, 8 U.S.C. §1324a (1986), supplanted by Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. §1324a(b) (1996) ["IRIRA"].

⁹ *Id.*, Basic Pilot Extension Act, Pub. L. 107-128 (2001); and Basic Pilot Program Extension and Expansion Act, Pub. L. No. 108-156 (2003)

¹⁰ IRIRA, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Accuracy of the Social Security Administration's Numident File*, A-08-06-26100, Appendix D (Dec. 18, 2006) ["Inspector General Report on SSA Database"], *available at* <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>.

¹⁴ *Id.*

original and replacement cards, in a system of records called the Numerical Identification File ("NUMIDENT").¹⁵ NUMIDENT includes "all relevant data connected to the issuance of the Social Security card, including the appropriate codes related to citizenship status and the type of Social Security card issued."¹⁶

If the work authorization cannot be determined by the data in the SSA databases or if the employee is a non-citizen, her data is then checked against the Department of Homeland Security databases to verify employment eligibility.¹⁷ If eligibility cannot be confirmed, E-Verify sends a "tentative nonconfirmation" of work authorization status to the employer.¹⁸ There are several reasons for a "tentative nonconfirmation" determination including, "when the SSN, name, or date of birth does not match the information in SSA's database or if a death indicator is present," "if the new hire indicated he or she was a U.S. citizen and SSA's records did not show that the person was a U.S. citizen," or if "DHS' database does not show the newly-hired noncitizen as authorized for employment."¹⁹

The employer must inform the employee of the "tentative nonconfirmation" and the employee has eight business days to contest this decision.²⁰ If the employee contests the determination, SSA or DHS "is required to determine work-authorization status within 10 Federal working days."²¹ If the review by DHS or SSA still cannot determine if the employee is eligible to work in the United States, a "final nonconfirmation" is issued.²² A "final nonconfirmation" also is issued if the employee does not contest the "tentative nonconfirmation."²³ A "final nonconfirmation" means the employee must be fired.²⁴

II. Known Problems at E-Verify Are Not Addressed, Thus Expanding the Number of Affected Individuals.

The proposed rule expands the number of individuals who will be subjected to E-Verify, and does not address the substantial problems with the system. The proposed rule will mandate that nearly 170 thousand contractors and subcontractors sign up for E-Verify, causing 3.8 million employees to be checked via E-Verify.²⁵ The system is vulnerable to employer fraud or misuse. The databases used by E-Verify are error-filled. Expansion would create enormous backlogs. Also, the cost would be enormous.

In August 2005, Citizenship and Immigration Services officials told the Government Accountability Office that a substantial expansion of the program would create significant backlogs in employment verification, in part because of the staff and resources that would be

¹⁵ Inst. for Survey Research, Temple Univ., and Westat, Findings of the Basic Pilot Evaluation (June 2002) ["Detailed Independent Analysis of Basic Pilot"].

¹⁶ *Id.* at 35.

¹⁷ Inspector General Report on SSA Database at Appendix D, *supra* note 13.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Detailed Independent Analysis of Basic Pilot at 44, *supra* note 15.

²² Inspector General Report on SSA Database at Appendix D, *supra* note 13.

²³ Detailed Independent Analysis of Basic Pilot at 44, *supra* note 15.

²⁴ Inspector General Report on SSA Database at Appendix D, *supra* note 13.

²⁵ E-Verify Proposed Rule at 33,377, *supra* note 1.

needed for manual verifications and investigations into "nonconfirmations."²⁶ With 8,863 active users of E-Verify, the Social Security Administration says that "for every 100 queries submitted to the System, SSA field offices or phone representatives are contacted three times," and SSA expects a corresponding increase in workload under a program expansion.²⁷ About 8 percent of queries require manual verification by DHS or SSA.²⁸ In fiscal year 2006, there were about 1.74 million verifications,²⁹ which can take up to two weeks to resolve.³⁰

A 2002 independent study of Basic Pilot, undertaken by the Immigration and Naturalization Service (INS), determined that 42% of final nonconfirmations were erroneous and the affected individual was eligible for work.³¹ Reports have also determined that employers are using electronic verification to prescreen applicants, in some instances denying them job opportunities because of faulty data maintained by the federal government.³² Thirty percent of pilot employers reported restricting work assignments while employees contest a tentative nonconfirmation. Among the 67 employees who decided to contest a tentative nonconfirmation, 45 percent reported one or more of the following adverse actions: were not allowed to continue working while they straightened out their records, had their pay cut, or had their job training delayed.³³ The report also found that "employers do not always follow Federally mandated safeguards for the . . . program."³⁴ The researchers found that employers took adverse action against an employee because of a "tentative nonconfirmation," though it is illegal.³⁵

Even though the practice of pre-screening is prohibited, it would seem obvious that employers will try to prescreen so as to avoid the additional burden that might result from a "further action" or "tentative nonconfirmation" notification. And the employee may never know the basis for the determination.

Current law also prohibits employers from pre-screening job applicants before making a hiring decision, yet some employers were doing just that. In December 2006, the Social Security Administration's Office of the Inspector General reviewed the employment eligibility verification system and found that 42 percent of employers used the program to prescreen employees, and 30 percent of employers used the program to verify the employment eligibility of their existing

²⁶ Gov't Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 6 (Aug. 2005) ["GAO Report on Basic Pilot"], available at <http://www.gao.gov/new.items/d05813.pdf>.

²⁷ Frederick G. Streckewald, Assistant Deputy Comm'r, Disability & Income Sec. Programs, Soc. Sec. Admin., *Testimony at a Hearing on Employment Eligibility Verification Systems Before the Subcom. on Social Sec., H. Comm. on Ways & Means*, 110th Cong. at 4 (June 7, 2007) ["SSA Testimony on Employment Eligibility Verification"], available at <http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=564>.

²⁸ *Id.* at 2

²⁹ *Id.*

³⁰ GAO Report on Basic Pilot at 24, *supra* note 26

³¹ Inst. for Survey Research, Temple Univ., and Westat, *INS Basic Pilot Evaluation Summary Report 8* (Jan. 29, 2002) ["Summary of Independent Analysis of Basic Pilot"], available at http://www.uscis.gov/files/natedocuments/INSBASICpilot_summ_jan292002.pdf

³² *Id.* at 19-20; Inspector General Report on SSA Database at 6, *supra* note 13.

³³ Summary of Independent Analysis of Basic Pilot at 19, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

workforce.³⁶ In 2002, the independent analysis found that, "[a]mong a sample of individuals classified on the transaction database as unresolved tentative nonconfirmations, 28 percent said that they did not receive a job offer from the pilot employer."³⁷ Also, these job applicants were not informed they were being pre-screened through the employment eligibility verification system, and "[c]onsequently, they were denied not only jobs, but also the opportunity to resolve any inaccuracies in their Federal records."³⁸

This problem ties in with another found by the researchers; though "procedures were also designed to protect employee rights to resolve verification problems . . . not all employers inform their employees of verification problems."³⁹ The report stated that, "73 percent of the employees who should have been informed of work authorization problems were not."⁴⁰ Because they did not know about the "tentative nonconfirmations," the employees were not able to contest the "tentative nonconfirmation" notices. A failure to contest a "tentative nonconfirmation" results in a "final nonconfirmation" decision against the affected employee. Employers are required to terminate the employment of any individual who receives a "final nonconfirmation."

The risks of misuse and data breach are very real. Every day new stories surface in which hapless people are the victims of identity theft or security breaches. These events are caused by both unauthorized and authorized users of databases. For example, in 2006 an official of the Maryland Motor Vehicle Administration was one of three people charged with conspiring to sell unlawfully produced identification cards.⁴¹ Similarly, in 2006, a police officer admitted accessing motor vehicle records to gather personal data on a romantic interest and co-workers.⁴²

III. VIS Privacy Act Exemptions Exacerbate Problems with Mandating Verification

Earlier this year the Department of Homeland Security ("DHS") announced a notice to alter a system of records and revised Privacy Impact Assessment ("PIA") for the Verification Information System, operated by the U.S. Citizenship and Immigration Services ("CIS").⁴³ The Verification Information System gathers and accesses a vast amount of personal data on citizens and immigrants and uses this data to underpin the federal government's Employment Eligibility

³⁶ Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Employer Feedback on the Social Security Administration's Verification Programs*, A-03-06-26106 (Dec. 18, 2006), available at <http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf>.

³⁷ Summary of Independent Analysis of Basic Pilot at 19, *supra* note 31.

³⁸ *Id.*

³⁹ *Id.* at 20.

⁴⁰ *Id.*

⁴¹ *Fake ID Cards*, Wash. Post, Mar. 15, 2006, at B02

⁴² Michael Kiefer, *Officer Admits to Tampering; Databases Used to Check on Women*, Ariz. Republic, Apr. 6, 2006, at B3.

⁴³ Dep't of Homeland Sec., *Notice to Alter a Privacy Act System of Records*, 73 Fed. Reg. 10,793 (Feb. 28, 2008) [hereinafter "Notice of Changes to VIS"], available at <http://edocket.access.gpo.gov/2008/E8-3833.htm>; and Privacy Office, Dep't of Homeland Sec., *Privacy Impact Assessment for the Verification Information System Supporting Verification Programs*, Feb. 22, 2008 [hereinafter "VIS Revised Privacy Impact Assessment"], available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cis_vis_update_ver.pdf.

Verification System. EPIC filed comments in response to the notice, arguing that consistent and broad application of the Privacy Act obligations are the best means of ensuring accuracy and reliability of the data used in a system that profoundly affects Americans' employment.⁴⁴

According to the Department of Homeland Security, "Verification Information System (VIS) is the technical infrastructure that enables USCIS to operate [its employment eligibility verification system]. VIS is a nationally accessible database of selected immigration status information containing in excess of 100 million records."⁴⁵ DHS says, "VIS is currently comprised of citizenship, immigration and employment status information from several DHS systems of records, including" Treasury Enforcement Communication Systems, Biometric Storage System, USCIS Central Index System, USCIS Computer Linked Application Information Management System, Immigration and Customs Enforcement's Student and Exchange Visitor Information System (SEVIS), and the Social Security Administration's NUMIDENT System.⁴⁶ In short, VIS gathers and accesses a vast amount of personal data on citizens and immigrants and uses this data to underpin the federal government's employment eligibility verification system.

Databases that comprise VIS claims numerous Privacy Act Exemptions. VIS gathers information from Treasury Enforcement Communications System ("TECS"), a database that the government says contains "every possible type of information from a variety of Federal, state and local sources," including the FBI's National Criminal Information Center and state motor vehicle records.⁴⁷ TECS is exempted from key fair information practices, such as the requirements that an individual be permitted access to personal information, that an individual be permitted to correct and amend personal information, and that an agency assure the reliability of personal information for its intended use.⁴⁸

IV. EPIC Recommendations

Employment verification relies upon the accuracy of the underlying data, the ease with which determinations can be made, the establishment of essential safeguards to ensure that the data collected is not subject to misuse, and procedural remedies to guarantee that when problems arise they can be quickly and fairly resolved.

First, the existing inaccuracies within agency databases ought to be corrected before establishing the verification systems on a nationwide basis. Otherwise there is a strong likelihood that millions of eligible workers face a laborious identity correction process. This would lead to lost productivity and unnecessary expense.

Second, all Privacy Act obligations should be applied to the databases used by E-Verify before mandatory screening. These will ensure accuracy, completeness and reliability for data used by E-Verify.

⁴⁴ EPIC Comments on VIS, (March 31, 2008), http://www.epic.org/privacy/ssn/epic_vis_033108.pdf.

⁴⁵ Notice of Changes to VIS at 10,793, *supra* note 43

⁴⁶ *Id.* at 10,793-794.

⁴⁷ Dep't of the Treasury, *Notice of Privacy Act System of Records*, 66 Fed. Reg. 52,983, 53,029 (Oct. 18, 2001) [hereinafter "TECS Privacy Act Notice"], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=f:18ocn2.pdf.

⁴⁸ *Id.* at 53,029.

Lastly, implementation should be limited to new hires. The notice claims that one of the benefits of the proposed rule is the increased workforce stability of contractors who will be less likely to hire illegal immigrants.⁴⁹ Requiring verification of current employees will severely impact workforce stability due to expected errors, delays and other disruptive effects such as employer misuse of tentative nonconfirmations. Electronic verification was established for "the hiring (or recruitment or referral) for employment."⁵⁰ Implementation should not expand beyond hiring to the verification of current employees.

Respectfully submitted,

Marc Rotenberg
Executive Director
Electronic Privacy Information Center
1718 Connecticut Ave NW, #200
Washington DC, 20009
<http://www.epic.org/>
(202) 483-1140 (tel)
(202) 483-1248 (fax)

Guilherme Roschke
Skadden Fellow

August 11, 2008.

⁴⁹ E-Verify Proposed Rule at 33,378, *supra* note 1.

⁵⁰ Pub. L. No 104-208, 110 Stat. 3009-659, §403 (1996).