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March 18, 2005

VIA FACSIMILE

(Original to follow by U.S. mail)

Office of Management and Budget
Attn: Desk Officer for SSA,
New Executive Building, Room 10235
725 17th St., NW
Washington, DC 20503

Social Security Administration, DCFAM
Attn: Reports Clearance Officer
1338 Annex Building
6401 Security Blvd.
Baltimore, MD 21235

Re: Expansion of the Social Security Number Verification Service (SSNVS)

Dear Sir/Madam:

The National Immigration Law Center (NILC) respectfully submits these comments on behalf of NILC, the National Employment Law Project (NELP), and the American Federation of Labor – Congress of Industrial Organizations (AFL-CIO) in response to the Social Security Administration's (SSA) request for public comments on its plans to implement the SSNVS nationally as published in the Federal Register on February 17, 2005 (70 FR 8128).

Based in Los Angeles, with offices in Oakland and Washington, D.C., NILC is a national legal advocacy organization whose sole mission is to protect and promote the rights and opportunities of low-income immigrants and their families. Since its inception in 1979, NILC has earned a national reputation as a leading expert on immigration law and the employment and public benefit rights of low-income immigrants. We conduct policy analysis, advocacy, and impact litigation, as well as providing training, publications, and technical assistance for a broad range of groups throughout the U.S., including immigrants' rights coalitions, legal aid programs, community and faith-based groups, workers' rights advocates, labor unions, government agencies, policymakers, and the media.

The NELP has worked for over 30 years to advance the workplace rights of low-wage workers, including immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has represented thousands of immigrant workers attempting to enforce their labor rights. NELP attorneys have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

The AFL-CIO is a voluntary federation of 58 national and international labor organizations representing 13 million working men and women.

We applaud SSA's ongoing efforts to ensure that all workers receive proper credit for their earnings so that their future disability or retirement benefits are properly calculated. We also recognize the pressure SSA is under to reduce the growing Earnings Suspense File (ESF). We share the concern that millions of hard working and taxpaying individuals' earnings form part of the \$463 billion currently in the ESF. However, the efforts currently underway to reduce the ESF, such as the SSA's no-match letters and now the SSNVS, are ill conceived and have grave unintended consequences. Together, NILC and the undersigned organizations have assisted thousands of workers throughout the country who have been adversely affected by the SSA's no-match letter program and the Employee Verification Service available to employers.

We reiterate our shared interest of ensuring that all workers receive proper credit for their earnings but do not believe SSA should undertake policies or programs that encourage or actually facilitate national origin and/or citizenship discrimination against individuals whose information is submitted for verification. While we appreciate SSA taking into consideration and adopting some of the recommendations we made in the comments submitted by many of the undersigned organizations on July 19, 2002 when the SSNVS was first proposed, we continue to have many of the same concerns.

Based on our experiences, we urge the SSA not to expand the SSNVS when it has piloted the service with only 100 employers selected by the SSA. We strongly believe that the problems low-wage immigrant workers face as a result of the no-match letters and EVS will only be exacerbated by the SSNVS. Additionally, in an age of identity fraud and computer hackers, we are deeply concerned with the privacy concerns raised by programs such as the SSNVS which allow for the transmission of employees' Social Security Numbers (SSNs) via the Internet. Accordingly, we respectfully submit the following comments about the proposed national expansion of the SSNVS for your consideration.

The SSNVS program should not be expanded nationwide because it will result in increased adverse employment actions against immigrant workers.

We have worked closely with SSA throughout the years to improve the language of the no-match letter to include warnings to employers about engaging in such discriminatory conduct. However, as SSA is well aware, the no-match letter program has still resulted in adverse employment actions taken against employees – a disproportionate number of who are low-wage immigrant workers – who are listed as a no-match. We acknowledge the language SSA has included in the SSNVS attestation once again warning against adverse actions, but know it will prove insufficient and ineffective just as the improved language on no-match letters has.

In a study conducted by the University of Illinois at Chicago's Center for Urban Economic Development (CUED) in November 2003 regarding the SSA's no-match letter program, CUED found that employers mistakenly believe the no-match letter means the workers are undocumented immigrants despite the fact that the letter clearly states that it does not make any statement about the worker's immigration status.¹ This resulted in employers firing or suspending workers, often without an opportunity to correct information. Of the workers surveyed, the study found that:

- Thirty-four percent of workers surveyed reported their employer did not give them any time to correct the alleged discrepancy

¹ Chirag Mehta, Nik Theodore, and Marielena Hincapié, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights*, Center for Urban Economic Development, University of Illinois at Chicago, November 2003, available at <http://www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf>.

- Twenty-five percent of workers surveyed reported their employer fired them in retaliation for exercising their workplace rights
- Twenty-one percent of workers surveyed reported their employer fired them in retaliation for protected union activity
- Fifty-four percent of workers surveyed reported their employer fired them because they were listed on the no-match letter.

We believe that immigrant workers will face similar, if not worse, consequences by being listed on the SSNVS as a no-match. Indeed, it is perplexing why an employer would check the SSNVS after receiving a no-match letter, if they will only obtain the same information: that there is not a match between the employee's name and SSN and SSA's records. The SSNVS will create enormous challenges for low wage immigrant workers by giving employers added tools and more readily available information to exploit and unlawfully terminate workers. For these reasons, we strongly recommend that the SSNVS and plans for its expansion be abandoned.

If SSA proceeds with the SSNVS, it is critical that it then suspend all correspondence to employers regarding these discrepancies in the form of no-match letters or other letters. We also make the following specific recommendations:

The SSNVS should incorporate stronger language for employers regarding impermissible use of the service.

Nationwide expansion of the SSNVS creates the potential for many abuses. The SSNVS attestation currently has language that notifies employers about the permissible uses of the SSNVS. However, as it is currently structured, the SSNVS depends on an "honor system" where the employer attests that s/he fully understands the permissible scope of the verification service. Given the level of abuse already taking place as a result of the no match letters, we believe that the SSNVS will in fact become a way for employers to circumvent the anti-discrimination protections that are currently part of the I-9 process. Although the SSNVS stated purpose is to correct information on an employee's wage and earnings record, we fear that the SSNVS has the potential to become a de facto employment verification projects such as the Basic Pilot Program jointly operated by the Department of Homeland Security (DHS) and SSA. SSA faces the enormous but critical challenge of ensuring that the SSNVS is used solely for the purpose of correcting wage reporting information -- a challenge we believe SSA cannot meet given how the SSA no-match letters have been used.

We applaud the SSA's decision to incorporate protective language similar to that included in the SSA no match letters warning against impermissible uses of the SSNVS. We think it is critical that this language be included on each screen an employer sees in a prominent location, as well as on any publications regarding the SSNVS. In light of the abuses of the no-match problem that have continued despite modifications to the no-match letter, we urge SSA to add stronger language to the SSNVS screens employers would see. For example, many employers who receive no-match information terminate workers and then withhold the payment of their wages thinking they cannot pay a worker whose number does not match.

Specifically, we recommend that SSA revise the first section of the attestation entitled "*Proper Use of Social Security Number Verification Services (SSNVS)*" as follows. The new suggested language is in italics:

- Do not use the service to verify SSNs of potential new hires or contractors. *Such impermissible use may be a violation of federal law.*
- Third party use of SSNVS is strictly limited to organizations that handle wage reporting responsibilities for employers and have an authorized and valid contract to do so. *SSNVS cannot be used by individuals/companies who conduct identity verification, background checks or other related services for employers or other parties. Such impermissible use may be a violation of federal law.*
- Add/Revise the fifth bullet to read the information you receive from SSNVS does NOT make any statement regarding a worker's immigration status, and does NOT authorize you to reverify a worker's employment eligibility.

Finally, we recommend that SSA add three new bullets under the one that currently reads, "This response does not make any statement about your employee's immigration status". The new bullets should state:

- *This response should not trigger any reverification of your employee's immigration status.*
- *This response does not call into question any documents presented by your employer through the I-9 employment eligibility verification process*
- *This response should not result withholding or nonpayment of wages.*

SSA should issue an official letter that employers must give to workers who come up as a no-match on the SSNVS.

We recommend that SSA provide employers with a letter on SSA letterhead that employers would be required to give to workers whose information did not match when the employer verified their SSN through the SSNVS. Similar to the letter the DHS provides employers who participate in the Basic Pilot program, this letter would provide workers with notice that their employer verified their SSN which would give workers who feel they have been unlawfully pre-screened, discriminated, or retaliated against, some proof that they can then use as evidence against employers. Equally important, this letter would provide workers with critical information about how to correct any discrepancy and what their rights are as a result of being listed as a no match on the SSNVS. Finally, this letter that employers would give to workers after checking the SSNVS should replace the no-match letter SSA currently sends out.

For these reasons, this letter from SSA should contain at least the following information.

- This notice does NOT imply that you intentionally provided incorrect information about your name or *social* security number. We understand that this is NOT a statement about your immigration status, and therefore does not mean that we think you are undocumented. It is simply an attempt to ensure that your wages are correctly reported and credited to you by the Social Security Administration. Please also be aware that federal and/or state law prohibits us as your employer from relying solely on the mismatch to:
- Suspend, lay off, terminate or discriminate against you;

- Require you to present documents to re-verify your immigration status or to fill out a new I-9 form;
- Retaliate against you because of your participation in a union campaign or for complaining about any alleged workplace violations.
- Please be advised:
 - If you feel that any action against you is related to labor union activities or union organizing activities, you may contact the National Labor Relations Board (NLRB), an agency of the U.S. government (<http://www.nlr.gov>). Check under the blue pages of your local directory for the nearest NLRB office in your area.
 - If you think that any action against you is related to your race, color, sex, religion or national origin, you may call the Equal Employment Opportunity Commission (EEOC) toll free at 1-800-669-4000 or 1-800-669-6820 (TDD for the hearing impaired), or visit their website at <http://www.eeoc.gov>
 - If you have questions or concerns about unfair practices by your employer that may be related to your national origin or citizenship status, you may call the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) toll free at 1-800-255-7688, or 1-800-237-2515 (TDD for the hearing impaired). The OSC can also be reached via their website at www.usdoj.gov/crt/osc. The OSC can provide you with assistance and written outreach materials in other languages. The OSC is NOT a part of the Immigration and Naturalization Service (INS) and does not share information with the INS.

We recommend that the SSA provide links to this information translated into other languages so that it can be included in notices to limited English proficient (LEP) employees. Based on our experience, protective language in an employee notice may not actually have a significant impact on the reporting of employer abuses of the no match process.

The SSNVS should adopt audit procedures aimed at protecting workers from employers who abuse their access to the SSNVS.

We recommend that the SSA take proactive measures to protect the rights of workers whose information is being submitted for verification to the SSNVS. In order to more meaningfully address this problem, we recommend that the SSA enter into a Memorandum of Understanding with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) that authorizes:

- The use of OSC employee testers whose assigned social security numbers will alert the SSA to an employer's unauthorized use of the SSNVS for prescreening
- The OSC to conduct random audits of participating employers to confirm that employers are in fact using the system appropriately;
- The OSC to conduct periodic audits of employers for which it has received informal complaints and/or actual charges of citizenship/national origin discrimination or document abuse.
- In order to assist the OSC with its audits, the following information must be tracked by the SSNVS:

- The date, time and purpose for the employer's verification;
- A field which will collect information about the date of hire of the employee whose information is being submitted for verification; and
- A field requiring employers to provide up to date information about the current total number of employees and the total number of new hires each time they access the SSNVS.

This information once collected can then be compared against an employer's own records during an audit. Part of the audit process may also include anonymous surveys administered to employees about the employer's no match policy and actions, particularly as they pertain to any workplace disputes.

The SSNVS should also facilitate an on-line audit trail access for workers. Employees should be able to obtain a list of any inquiries made on their SSNs detailing when the inquiry was made and by whom. Moreover, employees should be able to make Freedom of Information Act (FOIA) requests querying who has verified their SSN, what information was provided during the verification process and whether such information was shared with any third parties.

Together, this information will be of great assistance to workers and advocates seeking to deter further abuse of the verification process and mismatch information.

The SSNVS should incorporate protections to prevent unauthorized access to the online verification system:

We strongly support the SSA's incorporation of information on both the SSA's privacy policies and details outlining the proper use of the SSNVS. However, because the information is to be accessed electronically, we believe that additional safeguards are needed. More specifically, we recommend that the SSA follow the model of other earlier verification programs such as the Telephone Verification System (TVS) or the EVS (Employment Verification System) insofar as only a designated phone line or modem is permitted to access the verification system. This will help decrease the risk that an unauthorized user will gain access to highly confidential information.

Additionally, we recommend that the password and PIN required of employers for IRES (Integrated Registration for Employers and Submitters) periodically expire. Requiring password and PIN renewal should alleviate some of the problems of unauthorized access due to human resources staff turnover or other breaches in an employer's ability to secure employee records. For example, information currently required such as the Employer Identification Number is easily obtainable from any W-2 wage statement. As an added measure and incentive for security, the online registration system should require additional identifying information other than a PIN and password prompt. We also recommend that employers be required to designate and register authorized users with the SSA.

The SSA must adequately train staff to address discrimination and privacy concerns.

We recommend that SSA engage in thorough training of staff who will be managing the SSNVS and who will be answering questions from employers regarding the service. Additionally, it is critical that SSA also train their Field Office employees. Training for SSA employees in answering questions about anti-discrimination and privacy concerns is another critical part of ensuring that the SSNVS

process and SSA's staff does not give out inappropriate and/or harmful additional information to participating employers. In addition to screening to ensure that training materials adequately address these concerns, the SSA should monitor SSA employees' responses to questions to make sure that correct information is being provided to telephone requests for additional information.

This is critical given that NILC and many of the undersigned organizations have received disturbing reports regarding employer calls to SSA Field Offices in response to a no-match letter or to verify SSNs through the EVS. While SSA's Policy and Procedures Manual explains to SSA employees that they are only to tell employers whether there is a match or not, there have been grave privacy breaches that often result in adverse consequences for employers.

Finally, we recommend that SSA work with advocates and the OSC to obtain input into the type of training needed for SSA personnel.

The SSA must proactively develop policies to prevent security breaches of the SSNVS.

Given the growth of electronic record keeping, preventing unauthorized access to social security numbers online is especially challenging. The SSA should set the standard for protecting SSN's from public access, particularly as the public and private sector are increasingly requiring SSNs in order to provide services. Because the SSNVS will greatly expand the number of individual employers with access to SSN information, we recommend that the SSA establish and publish guidelines outlining the SSA's attempts to prevent security breaches of the SSNVS before implementing employer access to the service. The GAO has already recommended that the SSA and other federal agencies develop security plans based on adequate risk assessments, document security policies and implement mechanisms designed to evaluate the effectiveness of selected security methods. Recent reports of unauthorized access to government records and private entities like LEXIS-NEXIS, including recent reports about computer hackers breaking into state personnel computers, magnify the sense of urgency for improved security in government electronic record keeping.

The SSA must establish an evaluation mechanism for the SSNVS.

In order to ensure that the benefits of the online verification truly outweigh its costs, an evaluation tool should be established to assess the SSNVS. This evaluation tool should include an analysis of the number of employers using the system, the number of employees verified, the number of unverified no matches and the number of errors that are actually corrected as a result of the verification system. Community groups and other organizations that have substantial knowledge and expertise on the impact of the SSA no-match letters in perpetuating discrimination should play a critical role in designing the evaluation tool to be used.

In conclusion, we reiterate our concern with the nationwide expansion of the SSNVS and urge SSA and OMB to hold off on these plans until the concerns we set forth above are addressed. Finally, we believe it is critical that SSA recognize that just as the no-match letters have been ineffective at reducing the ESF, so will the SSNVS. As was recommended by the University of Illinois at Chicago's Center for Urban Economic Development as a result of its national survey of workers in November 2003, until there is comprehensive immigration reform, the ESF will not be truly reduced. In the meantime, SSA should be very wary of using taxpayer money to propose and implement programs that result in *de facto* immigration enforcement programs.

Once again, we greatly appreciate SSA adopting many of the suggestions we made in 2002 and sincerely hope you will do the same this time. Thank you for the opportunity to submit these comments. We look forward to a continued and cooperative relationship with the SSA and encourage you to contact us if we can provide any additional information or further clarification on the comments we have submitted.

Sincerely,

Marielena Hincapié
Director of Programs
National Immigration Law Center