ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTHERN CALIFORNIA
FOUNDATION

April 24, 2008

VIA UPS OVERNIGHT MAIL

Marissa Hernandez
U.S. Immigration and Customs Enforcement
425 I St. NW, Suite 1000
Washington D.C., 20536

Re: ACLU and ACLU of Northern California's Comments to DHS Proposed Rule; Docket No. ICEB-2006-0004

Dear Ms. Hernandez:

The American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Northern California ("ACLU-NC") submit these comments in opposition to the supplemental proposed rule on Safe Harbor Procedures for Employers Who Receive a No-Match Letter ("proposed rule").

The ACLU, America's oldest and largest civil liberties organization, representing more than 500,000 members and its 53 affiliates nationwide is pleased to join the ACLU-NC in submitting comments in opposition to the proposed rule. The ACLU Immigrants' Rights Project has been actively participating as counsel in the pending litigation challenging the previously issued rule (*AFL-CIO et al. v. Chertoff et al.*, No. 07-4472-CRB (N.D. Cal.)).

The ACLU-NC, an affiliate of the ACLU, is also a civil liberties advocacy and membership organization that works to promote and protect civil liberties such as freedom of speech and expression, equal protection of the law, due process, and privacy. We also work to extend rights to segments of our population that have traditionally been denied their rights, including Native Americans and other people of color; lesbians, gay men, bisexuals and transgender people; women; mental-health patients; prisoners; people with disabilities; immigrants; and the poor. The ACLU-NC is the largest affiliate of the ACLU, representing about 55,000 members and covering 47 Northern California counties. Staff attorneys from the ACLU-NC are also participating as co-counsel for plaintiffs in *AFL-CIO et al. v. Chertoff et al.*

For decades, the ACLU has opposed legislative or regulatory expansion of the use of social security numbers beyond the purposes for which they were derived, *i.e.*, the speedy and efficient provision of retirement and disability benefits. The ACLU has also long opposed the conversion of an individual's social security number, a unique identifier, into a *de facto* national identification number. Further, the ACLU opposes conversion of the Social Security Administration ("SSA") into an immigration enforcement agency, particularly when record

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numbers of Americans are due to retire and the SSA faces well-documented backlogs in fulfilling its existing mission. The proposed rule is contrary to these three ACLU recommendations.

Sending no-match letters directly (and solely) to employees serves the purpose of allowing employees to correct errors that prevent the efficient administration of their social security benefits. However, the use of social security numbers for immigration enforcement turns employers into *de facto* immigration agents. This goes well beyond the scope of SSA's mission and poses a risk of serious harm to workers' privacy, to their livelihoods, and their right to work free from discrimination and retaliation. In light of the many well-documented reasons law-abiding workers could be the subject of a mismatch, the huge proportion of authorized workers who have errors in their government records, and the many obstacles workers face in correcting such inconsistencies, the mere generation of a no-match letter or an employee's inability to correct a mismatch is legally insufficient to provide notice that a worker lacks work authorization. For these reasons, as explained below, the ACLU and ACLU-NC oppose the proposed rule.

I. The Proposed Rule Does Not Adequately Address Concerns that Errors in the SSA Database Will Result in the Firing of Authorized Workers.

As the district court held and the government has acknowledged, the SSA database (hereinafter the "database") is full of errors. *Order Granting Preliminary Injunction* at 7. In fact, nearly 70% of the errors in the database relate to native born U.S. citizens.

In addition, the 90-day correction period prescribed by the rule is inadequate to allow authorized workers time to correct mistakes that led to the mismatch. The SSA is already overburdened with its current workload of delivering services for which the agency was created. To cite just one example, SSA estimates that the average wait time for more than three quarters of a million cases awaiting a hearing decision on disability cases is 499 days. SSA Field Offices receive over 60 million phone calls each year and over half the callers receive a busy signal. The SSA will be hard pressed to respond to the nearly 13 million ***authorized*** workers whose SSA records contain discrepancies within a 90-day period. The SSA itself has conceded that the 90-day period will be insufficient to resolve mismatches for some authorized workers. 72 Fed.Reg. at 45617.

Not only will SSA be unable to resolve mismatches presented by authorized workers within the 90-day period, many low wage workers will be unable to complete the steps necessary to address any errors in the requisite time frame. Many such workers do not have any vacation leave, sick leave, or other compensated leave time to devote to fighting federal government red tape. In some industries, such as the agricultural labor context, workers are employed continuously for extended periods during which they would be unable to leave work during a week day. For many low wage workers, taking any time off to correct an error in their records would mean loss of pay and, in many instances, job loss, as employers act to replace them in order to maintain production targets.

For immigrant workers, these obstacles are compounded. 'Workers who are monolingual non-English speakers or who have limited English proficiency may need to find a friend or relative to take time from work to accompany them to the SSA or to other public

agencies to secure other relevant documents. Immigrant workers may need to obtain and translate documents from abroad, which can take several months or longer.

Given the large proportion of errors relating to authorized workers, and the inadequacy of the proposed cure period, numerous U.S. citizens and other lawful workers will be at risk of losing their jobs. Indeed, according to DHS's own estimates, over 70,000 authorized workers could be wrongfully terminated due to the rule. Most important, an employee who is terminated in compliance with the proposed rule due to failure to resolve a discrepancy within 90 days will have no remedy against his or her employer or the Department of Homeland Security ("DHS"), even if the employee is authorized to work. As a matter of due process, the proposed rule cannot and must not be implemented without adequate safeguards to ensure both the accuracy of the SSA database and the availability of remedies for lawful employees who are terminated in accordance with the rule.

II. The Proposed Rule Does Not Provide Due Process for Work-Eligible Workers Who Suffer Adverse Employment Consequences Caused by Government Data Errors.

It should be self-evident that the government systems may not effect a denial of benefits absent clear, efficient, and fair procedures to ensure those systems' accuracy and accountability. The government's proposed rule does not require that SSA institute such procedures, nor can SSA adequately establish such procedures or hire and train sufficient staff to carry out fair procedures under the proposed timeline. Despite SSA's admission that its records contain approximately 17.8 million database errors—and the unjustified terminations that are the likely result of these errors—the proposed rule does not provide sufficient time or any real avenue for wronged employees to promptly correct government data errors. Many workers may not possess additional documents to resolve erroneous government data that includes omissions, transpositions of numbers or letters or is confused with the data of a person with a similar name. Similarly, the proposed rule is likely to cause the issuance of no-match letters to victims of identity theft and identity fraud without providing sufficient recourse to prevent adverse actions by their employers. In short, this proposed rule contemplates the establishment of a system with very real economic consequences for thousands of work-eligible Americans without adequate procedural safeguards against or remedies for known errors. The ACLU and ACLU-NC believe that the proposed rule must be withdrawn because it will deny employees due process of law.

III. The Proposed Rule Will Disproportionately Impact Already Vulnerable Populations.

There are many reasons for mismatches between an employer's records and those contained in the SSA database. Clerical errors in data entry will account for many. However, certain groups are more likely to be identified as mismatches—despite being authorized to work—due to their particular circumstances. The ACLU and ACLU-NC are opposed to the proposed rule because it is likely to disproportionately impact authorized workers of color, transgender workers, and those who appear or sound "foreign."

Transliteration and Use of Multiple Surnames

Authorized workers with multiple surnames or with names that required transliteration from non-Roman alphabets upon their migration to this country are particularly likely to have identification documents that contain alternative spellings or name configurations. The risk of such errors is further magnified for workers with limited English skills, who may need to rely on co-workers or other third parties to fill out their employment documents. The burdens imposed on lawful workers under the proposed rule will fall most heavily on recent immigrants from countries that use multiple surnames (*e.g.* Latin American countries) as well as countries with Arabic, Russian, and Asian languages. Compounding the problem of intentional anti-immigrant discrimination that Congress sought to prevent in the Immigration Reform and Control Act, the proposed rule will likely result in disproportionate termination of lawful workers from certain cultures and countries even when employers are not intending to discriminate.

Women and Transgender Workers

Employees who change their names due to changes in marital status or gender identity are also particularly likely to have discrepancies in the SSA database despite being legally authorized to work. Requiring transgender employees to correct these discrepancies within a 90-day period is especially burdensome because they may be faced with a choice between termination and disclosure of their transgender status to their employer. Workers can try to obtain a court-ordered legal name change, but that process can take up to six months in some states, precluding compliance with the 90-day correction period in the proposed rule. In addition, because SSA rules require proof of "sex reassignment surgery" to change a person's gender marker in the SSA database, a gender no-match letter to the employer will ***only*** be resolvable by disclosure of one's transgender status to the employer for some transgender workers.[1] The proposed rule would essentially force many transgender workers to share extremely private personal information—information that may subject them to harassment and discrimination by their employer and co-workers—or face termination. This cost to privacy far outweighs the government's interest in carrying out such an ineffective immigration enforcement strategy.

Discrimination Based on Perceived Immigrant Status/Racial Profiling

Employer compliance with the proposed rule is likely to be burdensome. The district court in *AFL-CIO et al. v. Chertoff et al.* noted that "employers who want to take advantage of the safe harbor provision will have to develop costly human resources systems capable of resolving problems" within the proposed 90-day period. *Order Granting Motion for Preliminary Injunction* at 9. The ACLU and ACLU-NC fear that many employers will avoid that cost by summarily terminating employees for whom it receives no-match letters, particularly those employees who appear or sound "foreign." In addition, we believe the rule will result in more discrimination based on perceived immigration status at the hiring stage, as employers attempt to avoid application of the proposed rule. Again, the cost in discrimination that will be suffered

[1] We understand that gender mismatches may not be covered by the proposed rule. However, just as many employers are likely to believe the rule applies to individual employee no-match letters (DECOR) rather than only the multiple-employee no-match letters (EDCOR), there is a serious risk that employers will also implement the guidelines in the proposed rule for employees with gender no-match information.

by authorized workers far outweighs the benefit of using an error-ridden retirement and disability benefit system as an immigration enforcement tool.

IV. Undermining Labor Protections—Speech Rights at Work and No-Match Retaliatory Firings.

The ACLU and ACLU-NC are aware of several instances in which SSA no-match letters have been used as an excuse to terminate workers who have engaged in union organizing or otherwise sought to improve their working conditions or enforce labor protections under the law. It is undisputed that even undocumented workers have rights under the National Labor Relations Act, California's Agricultural Relations Act, the Fair Labor Standards Act, and other laws governing wages, working conditions, and the right to organize. The proposed rule increases the ability of employers to use no-match letters to stymie organizing campaigns and struggles for compliance with wage and hour laws because it eliminates the argument available under DHS's and legacy Immigration and Naturalization Services' previous position that a no-match letter is not grounds for termination or re-verification of work authorization. Given DHS's failure to provide new information regarding the ***accuracy*** of the SSA database, there is no rationale offered in the proposed rule discussion to justify a conclusion that no-match letters are evidence of unauthorized status, or, by extension, grounds for termination or re-verification. Given the burdens on employees and the SSA to resolve discrepancies for authorized workers within 90 days, failure to resolve discrepancies within that time frame will also be unpersuasive evidence of an employee's lack of work authorization. Nevertheless, the proposed rule will provide employers a stronger pretext for retaliatory firings and re-verification drives.

We are also concerned that the proposed rule will prove so burdensome that it will drive many employers "underground." For fear of losing both lawful and unauthorized workers—including the time it will take lawful workers to resolve discrepancies—or facing employer sanctions, some employers may choose not to report earnings to SSA and the Internal Revenue Service at all. Forcing otherwise lawful employment out of government systems of regulation will be harmful to workers, employers, and the rule of law. Given the absence of a reliable correlation between SSA no match letters and employees' lack of work authorization, the proposed rule risks ***increasing*** unlawful employment practices to implement an inefficient and flawed immigration enforcement mechanism.

V. Conclusion.

The ACLU and ACLU-NC strongly oppose the reissuance of the "DHS Safe Harbor Procedure for Employers Who Receive a No-Match Letter." The proposed rule fails to remedy the most troubling aspects of the previous rule, namely: the lack of correlation between no-match letters and unauthorized work status, the burdens on the privacy and livelihood of lawful workers, and the likelihood that the rule will result in discrimination and retaliation against workers who appear foreign or try to assert workplace rights. For the foregoing reasons, we request that DHS withdraw its proposed safe harbor rule.

Thank you for your attention to this matter.

Sincerely,

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