AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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March 18, 2011

Mary Ellen Callahan
Chief Privacy Officer
Privacy Office
Department of Homeland Security
Washington, DC 20528
Via: Federal e-Rulemaking Portal: www.regulations.gov

Re: Notice of Privacy Act System of Records:
E-Verify Self Check
Docket No.: DHS–2011–0007

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the notice of Privacy Act system of records: DHS/USCIS—013 E-Verify Self Check System of Records, Docket No. DHS–2011–0007 (76 Fed. Reg. 9034, Feb. 16, 2011).

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality, and the facilitation of justice in the field. Our members' collective expertise and experience makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States, and in complying with U.S. immigration laws and regulations. We appreciate the opportunity to comment on the notice regarding the E-Verify Self Check Program.

AILA applauds the administration's efforts to create defined vehicles that allow individual U.S. citizens, nationals, immigrants, nonimmigrants, and others to take steps to protect their identity. We certainly recognize that identity theft has, for a variety of reasons, become a constant and challenging concern for employers and individuals alike.

As a national bar association of lawyers who represent both employers and foreign nationals, we would ask the agency to consider several issues which we believe would further the goal of the Self Check

mechanism to reduce identity theft while incorporating safeguards against privacy violations and potentially inappropriate and discriminatory use against work-authorized foreign nationals. We also provide comments about making the Self Check mechanism available to foreign nationals who do not have sufficient information in their credit record to pass through the credit-based verification process that your agency has proposed.

1. **Prevent Use of Self Check as a Pre-Screening Tool**. The most significant concern to our organization is that some employers may inappropriately require applicants to present Self Check certifications as a condition of application for employment. Some employers may prefer imposing a Self Check requirement—which would effectively serve as an E-Verify pre-screening tool—over properly using the E-Verify program, as it would shift the costs and uncertainties of post-hire E-Verify Tentative Non-Confirmations from the employer to the applicant. We believe that this potential use of the Self Check process would seriously undermine the anti-discrimination provisions built into the current E-Verify process to ensure that authorized U.S. workers have the opportunity to contest E-Verify Tentative Non-Confirmations and document their eligibility to work.

   To deter such inappropriate conduct on the part of employers who are enrolled in the E-Verify program, we suggest that contemporaneously with the roll-out of Self Check, E-Verify amend its Memorandum of Understanding (MOU) to include a specific provision prohibiting employers from requiring Self Check as a condition for hire or using it to perform any type of pre-employment screening. To best protect the rights of U.S. workers, we believe that the prohibition on E-Verify employers to condition employment on Self Check results should be contractual and that a breach of the obligation should constitute grounds for appropriate sanctions to deter such conduct. In the case of employers who are not enrolled in E-Verify, we urge the agency to deter pre-screening of applicants through misuse of Self Check by establishing appropriate sanctions on employers and other third parties. We recommend that the agency coordinate its enforcement efforts with the Department of Justice's Office of Special Counsel. Finally, we recommend that the agency publish advisories and make other efforts to educate employers and third parties that the Self Check mechanism may only be used by individuals to verify their own E-Verify records and not as a tool for employers to pre-screen job applicants.

2. **Protect Privacy**. Protection of privacy and personal information is an increasing concern for both employers and individuals. Understandably, individuals fear that any increased accessibility of their personal information will put them at risk for identity theft. Employers are concerned about their liability for unknowingly employing workers who are using data that belongs to other individuals. Accordingly, while we note that the proposed Self Check regulations include some protocols for maintaining data privacy, we continue to have concerns about whether the proposed safeguards are sufficient to prevent personal data from being compromised. The proposed on-line identification mechanism does not require any biometrics or other strict access

protocols for secure identification of the individual. We are also concerned about the potential sharing of personal data and information regarding the use of the Self Check mechanism among government agencies without any clearly defined limits in the proposal. We appreciate that USCIS recognizes data privacy issues but we strongly urge the agency to review and augment the proposed access protocols so that identity thieves cannot mine data from public information sources and then use that data to gain access to Self Check data. Without strict access protocols, rather than protecting individuals from identity theft, Self Check would actually be a tool that identity thieves could use to verify that their victims' stolen data will successfully pass through the E-Verify system.

3. **Provide Options for Self Check Access to Individuals Without Credit Histories**. Our final concern is that because the proposed access protocol for Self Check relies entirely on background checks, it will render Self Check unavailable to populations of foreign nationals who have only recently arrived in the United States and therefore do not have a credit history. The individuals who are most likely to have complicated immigration situations—and corresponding errors in their E-Verify records—are refugees, asylees, and individuals with temporary protected status (TPS). Due to their recent arrival in the United States, these individuals will often lack the financial and credit history necessary to generate the questions for access into the Self Check system. Due to their often complex work authorization documentation, it is exactly these individuals who are likely to have the greatest need to update or correct their E-Verify records through Self Check. The proposed system of access based on credit history will leave those who are most likely to need the Self Check mechanism the least able to access it. We urge the agency to consider alternate means of identity verification to access the Self Check system, such as presentation of identity documents at an InfoPass appointment or Application Support Center and then conducting the Self Check query at that government office. Again, because asylees, refugees and TPS holders are among those who most need the opportunity to correct errors in the E-Verify system, we urge the agency to provide meaningful mechanisms through which these vulnerable populations can avail themselves of the benefit of the Self Check process.

AILA appreciates the opportunity to comment on this notice and we look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION