Testimony of Barry Rutenberg

On Behalf of the

National Association of Home Builders

Before the

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Subcommittee on Immigration Policy and Enforcement

Hearing on

"*Legal Workforce Act*"

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Chairman Gallegly, Ranking Member Lofgren, Chairman Smith and Members of the Subcommittee on Immigration Policy and Enforcement, on behalf of the 160,000 members of the National Association of Home Builders (NAHB), I want to thank you for this opportunity to testify today on the potential for a mandatory E-Verify program and the employer community's role in addressing the illegal immigration issue. My name is Barry Rutenberg and I am the First Vice Chairman of the Board of the National Association of Home Builders, and a single family builder from Gainesville, Florida.

The immigrant community has throughout our nation's history played a vibrant and important role in the construction industry. Each wave of immigrants—from Irish, to Italian, to German, to Hispanic—have been active participants in the industry, often bringing their trade-related expertise and skills to enhance the quality of our finished product. Immigrant workers and American workers working alongside of one another is not a new development for us, and we are proud to say that many immigrants who have come to America and joined our industry have been able to develop their skills, start their own industry-related businesses, and get a firm foothold in the American middle class. There has always been a significant presence of immigrants in the industry, and in 2009 foreign-born workers accounted for almost 21% of the workforce in residential construction nationwide.

However, the influx of illegal immigrants into the United States is a concern for all business owners, and the members of the National Association of Home Builders do not support illegal immigration. For many years, NAHB has supported Congressional efforts to examine the illegal immigration issue and find ways to appropriately address the problem, and we continue to believe that a significant driver of illegal immigration is the broken legal immigration and visa system in the United States.

Perhaps a more immediate and integral part of addressing the problem of illegal immigration is investigating the ways in which the employer community can and should be playing an enhanced role to ensure that all workers in the United States are work-authorized. Without a doubt, the American public has been clear that it believes employers must step forward to be part of the solution to the problem. As you know, employers already play a role—and have since 1986—by complying with the I-9 process, which requires them to review the identity and work authorization documents of each new hire. Yet given the numbers of illegal immigrants estimated to be in the U.S. workforce, it is clear that the I-9 system is not sufficient to track and identify those who are not work-authorized.

The voluntary Basic Pilot Program, now known as E-Verify, has increasingly become an attractive tool for employers to verify work authorization. Given the advancements in everyday

technology and the average American's increasing access to computers, the E-Verify program is much more accessible than it was only a few years ago. Yet NAHB, and the employer community generally, has often expressed grave concerns about mandating the E-verify program for all U.S. employers. Many of those concerns have come from a natural business and employer apprehension over increasing the layers of federal bureaucracy, paperwork, and regulation of their hiring decisions. Many employer concerns have also been about the question of how to successfully mandate E-Verify without addressing issues like the legal flow of future workers; but concerns have also frequently been related to the workability and efficiency of an E-Verify program that was suddenly expanded from a small, voluntary program to one mandated for all U.S. employers.

As Congress looks into mandating E-Verify, and the Subcommittee works to prepare legislation for consideration in the House this year, we hope that you will take into consideration the key concerns of NAHB as they relate to ensuring that any mandatory E-Verify program is fair, efficient and workable for all U.S. employers and workers.

First, NAHB strongly believes that the program must continue to focus on the direct employer-employee relationship; holding every U.S. employer accountable for the identity and work authorization status of their direct employees. NAHB and the construction industry are not alone in their desire to ensure that an employer's responsibility in the E-Verify system is held to those employees whom they actually have the power to hire and fire. Under current law, employers are responsible for verification of the identity and work authorization status of their direct employees only. And, while employers do not verify the employees of subcontractors, they are precluded from knowingly using unauthorized subcontracted workers as a means of circumventing the immigration law. The draft legislation maintains current law in this matter, and NAHB strongly supports that decision.

Second, NAHB strongly believes that those entities whose primary purpose is to refer or supply workers to employers should also be required to verify the identity and work authorization of those workers before they are referred or supplied to an employer, regardless of whether that service is done for a fee. Unauthorized workers should not be able to make use of state hiring agencies, union hiring halls, and day laborer centers as a facilitating method of gaining employment. And, employers should not be put into the difficult position of going through the effort and expense of obtaining a worker through one of these entities only to find out after the fact that the worker is unauthorized.

The draft legislation currently under consideration requires that all entities who refer workers must also utilize the E-Verify system. NAHB supports this concept, and urges the Subcommittee to endorse this effort to make every entity accountable for the verification of workers that they refer for employment.

Third, NAHB strongly believes that any legislation which mandates the use of E-Verify by all U.S. employers must include a strong pre-emption clause, preventing state and local governments from creating and enforcing their own versions of verification requirements for employers. Many employers have already faced this problem as a number of states and localities have adopted E-Verify mandates, each mandating the program in subtlety different ways, applicable in differing circumstances, and for different employers. Given the recent Supreme Court decision in *Chamber of Commerce v. Whiting*, NAHB believes that many states will speed up consideration of their own verification laws. The result will be a patchwork quilt effect of varying laws which will be of great concern to employers who do not want to be placed into a position where compliance with one state's law could potentially make them non-compliant with federal requirements, or the requirements of another state or locality where the employer may have operations.

For this reason NAHB strongly believes that any federal legislation that mandates the use of E-Verify must include pre-emption language sufficient to address this issue. If employers are going to be required to use the federal E-Verify program, they must be assured there are only one set of rules needed for compliance: those established by the federal government that are applicable nationwide, and not a series of various conflicting state and local laws. Therefore, NAHB is pleased to note that the draft legislation includes language that would preempt any "State or local law, ordinance policy or rule….relate[d] to the hiring, continued employment, or status verification for employment eligibility purposes of unauthorized aliens."

We note in addition, however, that the language goes further to allow states and localities to use their authority over business licensing and similar laws to penalize employers who do not comply with this legislation. On the surface, this seems to be a reasonable use of state authority in the mandated federal program. However, we are concerned this language could open the door for every state to develop its own enforcement programs and requirements. There could be potential for finding ourselves in the same position we are in now: with a patchwork quilt of differing state-level enforcement regulations of the federal mandate, all related to business licensing. We look forward to working with the Subcommittee to ensure that the role of the states in this pre-emption language is clear.

Fourth, NAHB strongly believes that any mandatory federal E-Verify program must contain a robust safe harbor for employers in order to ensure that those who use the system in good faith will not be held accountable by the Department of Homeland Security, or by the employer's workers, for errors in the E-Verify system. While the agencies have worked aggressively over the past few years to minimize the error rates in the E-Verify system, NAHB believes that universal use of E-Verify by all employers will necessarily lead to a significant increase in errors as more and more workers are run through the system, testing the limits of its capacity. It is

vitally important that employers are assured that their good faith efforts to comply will provide them with a safe harbor from prosecution by DHS, or from a discrimination lawsuit by an employee, if mistakes are made due to system error. An employer who hires a worker who has cleared E-Verify, and who later turns out to be unauthorized, or who terminates an actually legal worker that E-Verify says is unauthorized should not be penalized because the federal database was wrong.

The draft legislation appears to address NAHB's concerns with these issues by providing employers with a good faith defense, and by limiting recourse for workers who believe they were unfairly terminated due to a database error to action under the *Federal Tort Claims Act*. NAHB believes that this safe harbor provides a balance that fairly protects 'good actor' employers who are using the system in good faith, and any workers unfairly terminated due to system error.

Tangential to NAHB member concerns about a robust safe harbor is one of the most significant and biggest criticisms of the E-Verify program—and one that is not easily fixed: the issue of identity theft. Under the law, employers are required to use the "reasonable person test" when reviewing identity and work authorization documents. When a new hire presents documents that would to a reasonable person appear to be genuine documents, an employer must accept them, and the employer may not demand additional documents to test their validity.

However, E-Verify as it is currently structured can only confirm work authorization based on those documents that are presented. E-Verify cannot confirm whether the person presenting these documents *is* in fact the same person represented in the documents. The issue of identity fraud must be better addressed by Congress to ensure that a mandated, universally-used E-Verify system is not rendered useless by a resultant upswing in the utilization of false documents that reflect information gleaned from the stolen identities of U.S. citizens and other authorized workers. This is further reason why NAHB members feel so strongly about having an effective safe harbor in any new legislation. Until E-Verify is a system that can detect cases of fraud, employers who use E-Verify should not be held accountable for unauthorized workers who have cleared the system because of identity theft.

The draft legislation addresses this issue by creating a system that allows for better coordination and understanding on the part of the government in circumstances where identities are being used multiple times with multiple employers. The legislation also establishes a biometric employment eligibility verification pilot program. While NAHB has not formed an opinion as to the sufficiency of these specific efforts, we do strongly support the efforts of the drafters to address the issue of identity theft.

Fifth, any attempt to mandate E-Verify must include provisions to ensure that the system is workable for all U.S. employers, including small employers. According to NAHB's most recent

membership census, approximately 84% of our members have ten or fewer employees. It is vitally important that a mandatory E-Verify system recognize some basic facts: not all U.S. employers own computers or are computer savvy, not all U.S. employers conduct business or hiring in an office setting, and not all U.S. employers have a human resources or a legal department. If E-Verify is mandated, it must work for the smallest U.S. employer, as well as the largest. NAHB believes that several key components must be in place in order for the smaller employers in our industry to effectively utilize the E-Verify system:

· E-Verify must permit telephonic access to the system. While more Americans have access to computers and smart phones, the government cannot assume that every employer has closed the "technology gap" and has a high-speed internet connection. Also, many employers in our industry spend most of their days—not at computers—but working out of their pickup trucks or on active jobsites. To comply with E-Verify, these employers must have access to the system over a telephone.

The draft legislation specifically provides that the system operate "through a toll-free telephone and other toll-free electronic media". NAHB appreciates the drafters' acknowledgement of the technological diversity among small businesses. NAHB further appreciates the drafters' acknowledgement that the system should not be operated on a fee-for-use basis. NAHB supports establishing a system that is free for employers, given concerns that a fee-based system—that charges an employer each time they verify a worker—might encourage some employers to go around the system.

· E-Verify should allow employers to begin the worker verification process as soon as possible in the hiring process. Under a mandatory E-Verify system, backlogs of tentative non-confirmations may be likely. Employers should have the opportunity to begin the verification process as soon as possible, thus allowing businesses enough lead time to handle tentative non-confirmations, to ensure these are rectified before the employee's start date. This will also work to prevent instances where an employee has completed training and started critical job functions, only to necessarily be terminated at this late date because a final non-confirmation was belatedly received.

The draft legislation clearly creates an expanded opportunity to begin the verification earlier in the hiring process by allowing employers to conduct verifications as early as the application stage. NAHB appreciates the drafters' acknowledgement that commencing the verification process earlier will help to make a smoother hiring process for both the employer and worker. However, we do have some questions about how other requirements in the draft legislation would work for employers who choose to verify during the application stage.

The draft legislation requires employers to retain copies of the completed verification form for five years following the date of "recruiting" the individual. NAHB has concerns that this would require employers who verify the work authorization of job applicants to maintain verification paperwork for five years on every person who applies for a job, regardless of whether they are hired by the company.

The draft legislation also states that "in no case shall an employer terminate employment of an individual" because that individual has received a tentative non-verification (TNV) from the E-Verify system. While NAHB supports the concept that an employer should never terminate an employee because of a TNV, the draft legislation is silent on whether an employer would have the right not to pursue a job *applicant* who has received a TNV. Would employers be required to await final confirmation or non-confirmation for each job applicant before deciding whether they want to move forward with an applicant? NAHB looks forward to working with the Subcommittee to address and clarify our questions on these issues.

· A mandatory E-Verify system must be phased in based on business size, ensuring that larger employers—who have human resources and legal departments—enter the system first, and then gradually bringing in smaller and smaller businesses in future phases. NAHB members, as previously stated, typically have ten or fewer employees and their average annual gross receipts as a business are just under $1 million. NAHB remains concerned that mandatory, universal E-Verify usage will place strains on system capacity and functionality. Moving the best-equipped businesses into the system first will provide a test of E-Verify's ability to handle increased demand, and will ensure the transition to universal use is not short-circuited by a systemic failure. A reasonable phase-in period will also provide smaller employers time to learn about the new E-Verify requirements and how to use the online or telephonic system.

The draft legislation provides for a phase in of employers based on size, but one that only extends for two years. Given the need to bring over seven million employers into the system, and the strong likelihood that the system could become encumbered with a backlog and errors as it adjusts to the higher usage, NAHB urges the Subcommittee to consider extending the total phase-in time period to at least four years.

· As for future changes in the E-Verify system (e.g., a future decision by the Secretary to eliminate the use of a certain verification document), the government must create a better notification system beyond a simple notice in the *Federal Register*. Small businesses, for the most part, have never heard of the *Federal Register* and do not have ready access to or read the *Federal Register*. There must be a broader effort to inform and educate small businesses about changes that are to be made in the program. NAHB urges the Subcommittee to consider including in either bill language or report language information on how an employer would be notified and educated about future changes beyond a simple *Federal Register* notification.

· It is vitally important that any mandatory E-Verify program's enforcement component allow employers the ability to fix paperwork errors, rather than simply being fined immediately for a mistake that was made as part of a good faith effort to comply. Given the fact that most small businesses do not have human resources departments, it is essential that these small employers be given a fair opportunity to correct paperwork- related errors.

The draft legislation provides an exemption from penalty for an initial good faith violation and also provides that the Secretary of Homeland Security must give employers no less than 30 days to correct a paperwork violation if the violation was made in good faith. NAHB strongly supports allowing employers who are acting in good faith a 30 day window to fix paperwork errors.

Conclusion

NAHB recognizes the importance of the employer's role in addressing the illegal immigration issue. Over the years, as more and more states have taken it upon themselves to pass their own versions of mandatory E-verify laws, it has become increasingly obvious to our members that a single, federal requirement is the best way to address the issue to avoid confusion, and resultant compliance failures. Using E-Verify, provided it is fair, efficient, and workable, would greatly enhance employers' ability to determine who is work-authorized in the United States, thus making federal immigration law much more viable and effective.

NAHB looks forward to working with you as you seek to advance mandatory E-Verify legislation, and we hope to play a productive role in not only creating that fair, efficient and workable system, but also in doing our part to help address the illegal immigration issue through creating an enhanced role for employers in the work authorization program. However, we also continue to strongly believe that Congress should not stop in its efforts to address immigration issues by only enacting a mandatory E-Verify program. E-Verify may be a first step, but it should not be the only step. It is vitally important that Congress continue to work towards a revision and improvement of the nation's broken immigration and visa systems, and to seek a pathway for workers to legally enter the United States for employment when the economy needs them.

I appreciate the opportunity to speak with the Subcommittee about our thoughts on the possibility of a mandatory E-Verify program, and we look forward to continuing to work with you as this issue moves forward.