



# Social Security Benefits for Noncitizens

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## Summary

Concerns about the number of unauthorized (illegal) aliens residing in the United States and the totalization agreement with Mexico have fostered considerable interest in the eligibility of noncitizens for U.S. Social Security benefits. The Social Security program provides monthly cash benefits to qualified retired and disabled workers, their dependents, and survivors. Generally, a worker must have 10 years of Social Security-covered employment to be eligible for retirement benefits (less time is required for disability and survivor benefits). Most U.S. jobs are covered under Social Security, and as a result, noncitizens who are authorized to work in the United States are eligible for a Social Security number (SSN). Noncitizens who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the United States working temporarily or without authorization. There are some exceptions. Generally, the work of aliens who are citizens of a country with which the United States has a “totalization agreement,” coordinating the payment of Social Security taxes and benefits for workers who divide their careers between two countries, is not covered if they work in the United States for less than five years. Also, by statute, the work of aliens under certain visa categories is not covered by Social Security.

The Social Security Protection Act of 2004 (P.L. 108-203) requires an alien whose application for benefits is based on an SSN assigned January 1, 2004, or later to have work authorization at the time an SSN is assigned, or at some later time, to gain insured status under the Social Security program. Aliens whose applications are based on SSNs assigned before January 1, 2004, may count all covered earnings toward insured status, regardless of work authorization. The Social Security Act also prohibits the payment of benefits to aliens in the United States who are not “lawfully present”; however, under certain circumstances, alien workers as well as their dependents and survivors may receive benefits while residing outside the United States (including benefits based on unauthorized work).

In June 2004, the United States and Mexico signed a totalization agreement. In early 2007, a copy of the agreement was made publicly available. The agreement has not been transmitted to Congress for review and has not been finalized. Currently, because Mexico meets the “social insurance country” definition, a Mexican *worker* may receive U.S. Social Security benefits outside the United States. Family members of the Mexican worker must have lived in the United States for at least five years to receive benefits in Mexico. The agreement does not waive the requirements that aliens in the United States must be lawfully present to receive benefits in the United States, and that aliens must have work authorization at some time to gain insured status, but would allow payment of benefits to alien *dependents and survivors* who have never lived in the United States. The Social Security Administration reports that the projected cost of the agreement would average \$105 million annually over the first five years. The Government Accountability Office reports that “the cost of [the] totalization agreement ... is highly uncertain” due to the large number of unauthorized aliens from Mexico estimated to be living in the United States.

This report will be updated as legislative activity occurs or other events warrant.

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## Current Policy

### Background

The Social Security program provides monthly cash benefits to retired and disabled workers and their dependents, and to the survivors of deceased workers.<sup>1</sup> To qualify for benefits, workers (whether citizens or noncitizens)<sup>2</sup> must work in Social Security-covered jobs for a specified period of time, among other requirements. Generally, workers need 40 credits (sometimes referred to as “quarters of coverage”) to become “insured” for benefits (fewer credits are needed for disability and survivor benefits, depending on the worker’s age). In 2010, a worker earns one credit for each \$1,120 in earnings, up to a maximum of 4 credits for the year (i.e., with annual earnings of \$4,480 or more).

### Social Security-Covered Employment

The Social Security program is financed primarily by mandatory payroll taxes levied on wages and self-employment income. Most jobs in the United States are covered under Social Security (about 94% of the work force is required to pay Social Security payroll taxes). In 2010, Social Security-covered workers and their employers each pay 6.2% of earnings up to \$106,800 (this amount is increased annually according to average wage growth if a Social Security cost-of-living adjustment is payable). The self-employed pay 12.4% on net self-employment income up to \$106,800 and may deduct one-half of payroll taxes from federal income taxes. The following workers are exempt from Social Security payroll taxes:

- **State and local government workers** who participate in alternative retirement systems,
- **Election workers** who earn less than \$1,500 in 2010,
- **Ministers** who elect not to be covered, and members of certain religious sects,
- **Federal workers** hired before 1984,
- **College students** who work at their academic institutions,
- **Household workers** who earn less than \$1,700 in 2010, or those under age 18 for whom household work is not their principal occupation, and
- **Self-employed workers** who have annual net earnings below \$400.

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<sup>1</sup> The Social Security program is administered by the Social Security Administration (SSA). SSA also administers the Supplemental Security Income (SSI) program, a *means-tested* entitlement program. Eligibility requirements for noncitizens differ under Social Security and SSI. For more information on noncitizen eligibility for SSI, see CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by Ruth Ellen Wasem.

<sup>2</sup> An *alien* is “any person not a citizen or national of the United States” and is synonymous with *noncitizen*. Aliens/Noncitizens includes those who are legally present and those who are in violation of the Immigration and Nationality Act (INA).

In 2006, an estimated 13.9 million noncitizens were in the U.S. labor force comprising approximately 9.2% of the labor force.<sup>3</sup> Aliens who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the United States working temporarily and those who may be working in the United States without authorization.<sup>4</sup> There are some exceptions. Generally, the work of aliens who are citizens of a country with which the United States has a “totalization agreement” (see below) is not covered by Social Security if they work in the United States for less than five years. In addition, by statute, the work of aliens under certain visa categories (such as H-2A agricultural workers, F and M students)<sup>5</sup> is not covered by Social Security.

Currently, there are no official published data on the amount of money paid into the Social Security system by aliens, either legal or unauthorized. It is important to note that an alien may be authorized to be in the United States, but not authorized to work. Therefore, an alien who does not have work authorization is not necessarily an illegal alien.<sup>6</sup> The Social Security Administration (SSA) maintains an “earnings suspense file” that represents an estimated \$520 billion in wages that cannot be posted to individual work records because the names and Social Security numbers (SSNs) on wage reports submitted by employers to SSA (W-2 forms) do not match SSA’s records.<sup>7</sup> The mismatched information may be due to typographical or other clerical errors (such as a misspelled name or an individual’s failure to report a new married name to SSA), as well as to the use of invalid or stolen Social Security numbers by aliens who are working in the United States without authorization. There is no official published data on the amount of wages posted to the earnings suspense file that is directly attributable to aliens who are working in the United States without authorization based on fraudulent documents. However, SSA Inspector General Patrick P. O’Carroll stated in testimony before Congress that “we believe the chief cause of wage items being posted to the [earnings suspense file] instead of an individual’s earnings record is unauthorized work by noncitizens.”<sup>8</sup> SSA’s Office of the Chief Actuary estimates that about 5.6 million unauthorized immigrants were working and paying Social Security taxes in 2007.<sup>9</sup>

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<sup>3</sup> Calculations performed by the Congressional Research Service (CRS) using the average of the monthly Current Population Surveys (CPS’s) for 2006. The CPS does not include a variable on immigration status.

<sup>4</sup> For Social Security payroll taxes to be withheld from wages, a worker must provide a Social Security number (SSN) to his or her employer. An alien who is working in the United States without authorization (1) may have an SSN because he or she worked in the United States legally and then fell out of status; or (2) may have obtained an SSN fraudulently.

<sup>5</sup> Most of these nonimmigrant visa categories are defined in §101(a)(15) of the INA. These visa categories are commonly referred to by the letter and numeral that denotes their Subsection in §101(a)(15), e.g., B-2 tourists, E-2 treaty investors, F-1 foreign students, H-1B temporary professional workers, J-1 cultural exchange participants, or S-4 terrorist informants.

<sup>6</sup> For example, an alien present in the United States on a B-2 tourist visa may remain in the United States for six months, but is not legally permitted to work. In addition, the spouses of most temporary noncitizen workers do not have employment authorization. For more information on which categories of noncitizen are entitled to work in the United States, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

<sup>7</sup> Annually, SSA reviews W-2 forms and credits Social Security-covered earnings to workers. If a name or SSN on a W-2 form does not match SSA’s records, the earnings credits go into an earnings suspense file while SSA attempts to reconcile the discrepancy. The figure shown here represents the amount of wages (from 255 million wage items) posted to the earnings suspense file through tax year 2003, as of October 2005.

<sup>8</sup> Statement of the Honorable Patrick P. O’Carroll, Inspector General, Social Security Administration, Before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006.

<sup>9</sup> Unpublished estimate by SSA’s Office of the Chief Actuary.

## **Social Security Payment Rules**

Workers become *eligible* for Social Security benefits when they meet the insured status and age requirements specified in the Social Security Act.<sup>10</sup> They become *entitled* to benefits when they have met all of the eligibility requirements and filed an application for benefits. Because Social Security is an *earned* entitlement program, there are few restrictions on benefit payments once a worker becomes entitled to benefits. The Social Security Act does prohibit the payment of benefits to individuals residing in certain countries;<sup>11</sup> individuals confined to a jail, prison, or certain other public institutions for commission of a crime; most individuals removed from the United States (i.e., deported);<sup>12</sup> aliens residing in the United States unlawfully; and, in some cases, aliens residing outside the United States for more than six months at a time.

## **Social Security Protection Act of 2004**

On March 2, 2004, the President signed into law the Social Security Protection Act of 2004 (P.L. 108-203, H.R. 743). Among other changes, P.L. 108-203 restricts the payment of Social Security benefits (retirement, survivors, and disability benefits) to certain noncitizens who file an application for benefits based on an SSN assigned on or after January 1, 2004. Specifically, a noncitizen who files an application for benefits based on an SSN assigned *on or after* January 1, 2004, is required to have work authorization at the time an SSN is assigned, or at some later time, to gain insured status under the Social Security program (see Section 214(c) of the Social Security Act).<sup>13</sup> If the individual had work authorization at some point, all of his or her Social Security-covered earnings would count toward insured status. If the individual *never* had authorization to work in the United States, none of his or her earnings would count toward insured status and Social Security benefits would not be payable on his or her work record (i.e., benefits would not be payable to the worker or to the worker's family).<sup>14</sup>

A noncitizen who files an application for benefits based on an SSN assigned *before* January 1, 2004, is not subject to the work authorization requirement under P.L. 108-203. All of the individual's Social Security-covered earnings would count toward insured status, regardless of his or her work authorization status.

The treatment of earnings based on unauthorized work for Social Security purposes is an issue of recent congressional interest. For example, in June 2007, the Senate approved an amendment to the Comprehensive Immigration Reform Act of 2007 that would have precluded earnings credits based on work performed without authorization in 2004 or later (with respect to individuals who

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<sup>10</sup> In the case of disability benefits, a worker is eligible for benefits when he or she has met insured status requirements and established a period of disability.

<sup>11</sup> U.S. Treasury Department regulations or Social Security restrictions prohibit payments to individuals living in Cuba, North Korea, Cambodia, Vietnam and areas that were in the former Soviet Union (excluding Armenia, Estonia, Latvia, Lithuania and Russia).

<sup>12</sup> One exception would be aliens who are removed on status violations (i.e., removed from the United States because they are illegally present, not because they have committed a crime).

<sup>13</sup> The 2004 law provides exceptions to the work authorization requirement for certain noncitizens (i.e., noncitizens who are admitted to the United States under a B visa (for business purposes) or D visa (for service as a crew member) at the time quarters of coverage are earned).

<sup>14</sup> Before enactment of P.L. 108-203, all Social Security-covered earnings would count toward insured status regardless of an alien's work authorization status.

are assigned an SSN in 2004 or later). The Comprehensive Immigration Reform Act of 2007 was not enacted.

The following table summarizes the treatment of earnings based on unauthorized work for Social Security purposes under current law.

<b>Treatment of Earnings Based on Unauthorized Work for Social Security Purposes</b>
<b>Current Law</b>
<ul style="list-style-type: none"><li>The treatment of earnings based on unauthorized work for Social Security purposes differs, depending on when an individual is assigned a Social Security number (SSN). Individuals who were assigned an SSN before 2004 are not required to have authorization to work in the United States at any point to qualify for Social Security benefits. Individuals who are assigned an SSN in 2004 or later are required to have work authorization at some point to qualify for benefits.</li></ul>
<b>Individuals Assigned an SSN Before 2004</b>
<ul style="list-style-type: none"><li>All Social Security-covered earnings are credited for purposes of qualifying for benefits, regardless of an individual's work authorization status (an individual is not required to have work authorization at any point to count all earnings for Social Security purposes).</li></ul>
<b>Individuals Assigned an SSN in 2004 or Later</b>
<ul style="list-style-type: none"><li>With respect to benefit applications based on an SSN assigned on or after January 1, 2004, an individual must have work authorization when an SSN is assigned, or at any later time, to gain insured status under the Social Security program.</li></ul>
<p>If an individual has work authorization at some point, <i>all</i> of his or her Social Security-covered earnings count toward qualifying for benefits (all earnings from authorized and unauthorized work).</p>
<p>If an individual never obtains work authorization, <i>none</i> of his or her Social Security-covered earnings count toward qualifying for benefits.</p>

### *Assignment of Social Security Numbers to Noncitizens*

The treatment of earnings based on unauthorized work for Social Security purposes differs, depending on whether an individual was assigned an SSN before 2004, or in 2004 or later. The policy with respect to SSN assignment for noncitizens was changed in late 2003. Noncitizens who are authorized to work in the United States by DHS can be assigned an SSN. Noncitizens who are not authorized to work can be assigned an SSN for a valid nonwork reason. Following a regulatory change that went into effect in late 2003, the only valid nonwork reason for assignment of an SSN would be if an individual needs an SSN to receive federal, state, or local government benefits to which he or she has otherwise established entitlement [see 20 C.F.R. 422.104]. Before the regulatory change, the policy for assignment of nonwork SSNs was less restrictive, and noncitizens could be assigned an SSN for a variety of nonwork purposes, such as to obtain a driver's license.<sup>15</sup> (For more information on the assignment of SSNs to noncitizens, see "Social Security Cards and Noncitizens" section.)

<sup>15</sup> The regulation is available on the SSA website at [http://www.ssa.gov/OP\\_Home/cfr20/422/422-0104.htm](http://www.ssa.gov/OP_Home/cfr20/422/422-0104.htm).

## Special Payment Rules for Noncitizens

Section 202(y) of the Social Security Act requires noncitizens in the United States to be “lawfully present” to receive benefits.<sup>16</sup> If a noncitizen is entitled to benefits, but does not meet the lawful presence requirement, his or her benefits are suspended. In such cases, a noncitizen may receive benefits while residing outside the United States (including benefits based on work performed in the United States without authorization) if he or she meets one of the exceptions to the “*alien nonpayment provision*” under Section 202(t) of the Social Security Act. Under the alien nonpayment provision, a noncitizen’s benefits are suspended if he or she remains outside the United States<sup>17</sup> for more than six consecutive months,<sup>18</sup> unless one of several broad exceptions is met. For example, an alien may receive benefits outside the United States if he or she is a citizen of a country that has a social insurance or pension system that pays benefits to eligible U.S. citizens residing outside that country (a “social insurance country”), or if he or she is a resident of a country with which the United States has a totalization agreement (see **Table 1**). If an alien does not meet one of the exceptions to the alien nonpayment provision, his or her benefits are suspended beginning with the seventh month of absence and are not resumed until he or she returns to the United States lawfully for a full calendar month.

In addition, to receive payments outside the United States, alien *dependents and survivors* must have lived in the United States for at least five years previously (lawfully or unlawfully), and the family relationship to the worker must have existed during that time (see **Table 2**). The law provides several broad exceptions to the five-year U.S. residency requirement for alien dependents and survivors. For example, an alien is exempt from the five-year U.S. residency requirement if he or she is a citizen of a “treaty obligation” country (i.e., if nonpayment would be contrary to a treaty between the United States and the individual’s country of citizenship), or if he or she is a citizen or resident of a country with which the United States has a totalization agreement (see **Table 3**).

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<sup>16</sup> The definition of “lawfully present” is provided in **Appendix B**. The lawful presence requirement was added by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). For more information, see the section of the report titled “Legislative History of Payment Rules for Noncitizens.”

<sup>17</sup> “Outside the United States” means outside the territorial boundaries of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

<sup>18</sup> The six-month period of absence begins with the first full calendar month following the period in which the individual has been outside the United States for more than 30 consecutive days. If the individual returns to the United States for any part of a day during the 30-day period, the 30-day period starts over.

### Table I. Exceptions to the Alien Nonpayment Provision for Workers and Dependents/Survivors

An alien's benefits are suspended if he or she is outside the United States for more than six consecutive months, unless one of the following exceptions is met:

- the individual is a citizen of a country that has a social insurance or pension system under which benefits are paid to eligible U.S. citizens who reside outside that country (see **Appendix A** for a complete list of countries)
- the individual is entitled to benefits on the earnings record of a worker who lived in the United States for at least 10 years or earned at least 40 quarters of coverage under the U.S. Social Security system (exception does not apply if the individual is a citizen of a country that does not provide social insurance or pension system payments to eligible U.S. citizens who reside outside that country)
- the individual is entitled to benefits on the earnings record of a worker who had railroad employment covered by Social Security
- the individual is outside the United States while in the active military or naval service of the United States
- the individual is entitled to benefits on the earnings record of a worker who died while in the U.S. military service or as a result of a service-connected disease or injury
- the nonpayment of benefits would be contrary to a treaty obligation of the United States in effect as of August 1, 1956 (i.e., the individual is a citizen of a treaty obligation country; see **Appendix A** for a list of countries)
- the individual is a resident of a country with which the United States has a totalization agreement<sup>a</sup> (see **Appendix A** for a list of countries)
- the individual was eligible for Social Security benefits as of December 1956

**Source:** Section 202(t) of the Social Security Act.

- a. Under the agreement with Australia, the United States pays Social Security benefits to an Australian citizen who resides in the United States, Australia, or a third country with which the United States has a totalization agreement. If an Australian citizen resides elsewhere, he or she is subject to the alien nonpayment provision. The agreement with Denmark contains a similar provision.

### Table 2. Additional Residency Requirement for Alien Dependents/Survivors Outside the United States

In addition to the requirements in **Table I**, to receive payments outside the United States, an alien dependent/survivor must have lived in the United States for at least five years (lawfully or unlawfully) under one of the following circumstances:

**A spouse, divorced spouse, widow(er), surviving divorced spouse, or surviving divorced mother or father:**

must have resided in the United States for at least five years and the spousal relationship to the worker must have existed during that time

**A child:**

must have resided in the United States for at least five years as the child of the worker; or the worker and the child's other parent (if any) each must have either resided in the United States for at least five years or died while residing in the United States

**An adopted child:**

must have been adopted in the United States; *and* lived in the United States with the worker; *and* received at least half of his or her support from the worker in the year before the worker's entitlement or death

**Source:** Section 202(t) of the Social Security Act.

### Table 3. Exceptions to the Additional Residency Requirement for Alien Dependents/Survivors Outside the United States

An alien dependent/survivor living outside the United States is not subject to the five-year U.S. residency requirement if one of the following exceptions is met:

- the individual was eligible for Social Security benefits before January 1, 1985
- the individual is entitled to benefits on the earnings record of a worker who died while in the U.S. military service or as a result of a service-connected disease or injury
- the nonpayment of benefits would be contrary to a treaty obligation of the United States in effect as of August 1, 1956 (i.e., the individual is a citizen of a treaty obligation country; see list of countries in **Appendix A**)
- the individual is a citizen or resident of a country with which the United States has a totalization agreement<sup>a</sup> (see list of countries in **Appendix A**)

**Source:** Section 202(t) of the Social Security Act.

- a. Under the agreement with Australia, Australian dependents and survivors who do not reside in the United States, Australia, or a third country with which the United States has a totalization agreement must meet the five-year U.S. residency requirement to receive payments abroad. The agreement with Denmark contains a similar provision.

### Legislative History of Payment Rules for Noncitizens

When the Social Security program began paying benefits in 1940, there were no restrictions on benefit payments to noncitizens. In 1956, amid concerns that noncitizens were working in the United States for relatively short periods and returning to their native countries where they and their family members would collect benefits for many years, Congress enacted restrictions on benefits for alien *workers* living abroad (restrictions did not apply to alien dependents and survivors). The Social Security Amendments of 1956 (P.L. 84-880) required noncitizens to reside in the United States to receive benefits and suspended benefits if the recipient remained outside the United States for more than six consecutive months, with broad exceptions (see **Table 1**).

In 1983, Congress placed restrictions on benefit payments to alien *dependents and survivors* living abroad. The Social Security Amendments of 1983 (P.L. 98-21) made dependents and survivors subject to the same residency requirement as workers (described above) and further required that they (or their parents, in the case of a child's benefit) must have lived in the United States for at least five years, with broad exceptions (see **Table 2** and **Table 3**).

Several factors led to the enactment of tighter restrictions on benefit payments to alien dependents and survivors living abroad in 1983, including the large number of dependents that were being added to the benefit rolls (in some cases under fraudulent circumstances) after workers had returned to their native country and become entitled to benefits, and difficulties associated with monitoring the continued eligibility of recipients living abroad.

At the time, the General Accounting Office (GAO, now named the Government Accountability Office) estimated that, of the 164,000 dependents living abroad in 1981, 56,000 were added to the benefit rolls after the worker became entitled to benefits. Of that number, an estimated 51,000 (or 91%) were noncitizens.<sup>19</sup> Two years earlier, the Social Security Commissioner stated that SSA investigators had found evidence that some recipients living abroad were faking marriages and

<sup>19</sup> General Accounting Office, *Issues Concerning Social Security Benefits Paid to Aliens*, GAO/HRD-83-32, March 24, 1983, available at <http://archive.gao.gov/d40t12/120895.pdf>.

adoptions and failing to report deaths in order to “cheat the system.” At the time, the Commissioner stated that such problems were particularly acute in Greece, Italy, Mexico and the Philippines, where large numbers of beneficiaries were residing. He stated further that, in some countries, “there is a kind of industry built up of so-called claims-fixers who, for a percentage of the benefit, will work to ensure that somebody gets the maximum benefit they can possibly get out of the system.”<sup>20</sup>

In 1996, Congress enacted tighter restrictions on the payment of Social Security benefits to aliens residing in the United States. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>21</sup> prohibited the payment of Social Security benefits to aliens in the United States who are not lawfully present, unless nonpayment would be contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision).<sup>22</sup> This provision became effective for applications filed on or after September 1, 1996. Subsequently, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>23</sup> added Section 202(y) to the Social Security Act. Section 202(y) of the act, which became effective for applications filed on or after December 1, 1996, states:

Notwithstanding any other provision of law, no monthly benefit under [Title II of the Social Security Act] shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States as determined by the Attorney General.

## **Social Security Cards and Noncitizens**

All U.S. citizens are eligible for Social Security numbers (SSNs). In addition, noncitizens (aliens) who are authorized to work in the United States are eligible for SSNs. Noncitizens who are eligible to work in the United States include those who are admitted to the United States permanently and are often referred to as immigrants (e.g., legal permanent residents, asylees, refugees), and those who are admitted temporarily (e.g., H-2A– temporary agricultural workers, H-2B– temporary professional workers, J-1– cultural exchange visitors).

Social Security cards issued to noncitizens who are residing permanently in the United States are identical to those issued to U.S. citizens. Social Security cards issued to noncitizens who are in the United States temporarily bear the inscription, “VALID FOR WORK ONLY WITH DHS AUTHORIZATION.” The Social Security Administration (SSA) also issues SSNs to noncitizens who are not authorized to work if the noncitizen is legally in the United States and needs an SSN to receive state or federal benefits or services.<sup>24</sup> SSNs issued for this purpose bear the legend, “NOT VALID FOR EMPLOYMENT.”

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<sup>20</sup> CRS Issue Brief IB82001, *Social Security: Alien Beneficiaries*, by David S. Koitz (out of print; available from Dawn Nuschler or Alison Siskin on request).

<sup>21</sup> P.L. 104-193, § 401(b)(2).

<sup>22</sup> Also, under PRWORA, federal agencies that administer “federal public benefits” are required to report to the Department of Homeland Security (DHS) information on any alien that is known to be unlawfully present in the United States. (P.L. 104-193, §404). Nonetheless, this requirement does not apply to SSA with respect to Title II of the Social Security Act (Old-Age, Survivors and Disability Insurance Program). *Federal Register*, vol. 65, no. 189, September 28, 2000, pp. 58301-58302.

<sup>23</sup> P.L. 104-208, § 503(a).

<sup>24</sup> See 20 C.F.R. 422.104. As noted, prior to late 2003, the policy for assignment of nonwork SSNs was less restrictive, and noncitizens could be assigned an SSN for a variety of nonwork purposes, such as to obtain a driver’s license.

Importantly, the SSN issued to a noncitizen does not change if the noncitizen adjusts status (e.g., a person who is in the United States temporarily may marry a U.S. citizen, become a legal permanent resident, and then naturalize and become a U.S. citizen). Although the noncitizen is supposed to report any change of status to SSA, this does not always occur. As a result, it is possible that some U.S. citizens have Social Security cards with the inscription, “VALID FOR WORK ONLY WITH DHS AUTHORIZATION.”

In addition, there are statutory evidentiary requirements to receive an SSN. The Social Security Amendments of 1972 (P.L. 92-603) required the SSA to obtain evidence to establish age, citizenship, or alien status, and identity of the applicant. As of November 2008, the SSA requires applicants to present for identification a document that shows name, identifying information, and preferably a recent photograph. The SSA also requires that all documents be either originals or copies certified by the issuing agency.

## **Tax Treatment of Social Security Benefits**

Noncitizens who reside outside the United States are subject to different rules regarding federal income tax treatment of Social Security benefits. U.S. citizens and resident aliens<sup>25</sup> pay federal income tax on a portion of their benefit if their income exceeds specified thresholds. Specifically, they pay federal income tax on up to 50% of their benefit if their modified adjusted gross income (adjusted gross income (AGI) plus tax-exempt interest income plus 50% of Social Security benefits) is more than \$25,000 but no more than \$34,000 for a single person, or more than \$32,000 but no more than \$44,000 for a married couple filing jointly. They pay federal income tax on up to 85% of their benefit if their modified AGI is more than \$34,000 for a single person or more than \$44,000 for a married couple filing jointly. These thresholds do not apply to married couples who live together and file separate returns. Currently, about one-third of Social Security recipients pay federal income tax on their benefits.

Noncitizens who live outside the United States pay federal income tax on their benefits without regard to these thresholds. Section 871 of the Internal Revenue Code imposes a 30% rate of tax withholding on the U.S. income of noncitizens who live outside the country (unless a lower rate is established by treaty) because there is no practical way for the U.S. government to determine the income of such persons. Under the withholding, noncitizens who reside outside the United States pay 30% of the maximum taxable amount of Social Security benefits (85%) in federal income taxes. For example, the tax withholding on an annual Social Security benefit of \$12,000 would be \$3,060 [(\$12,000 x 0.85) x 0.30].<sup>26</sup>

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<sup>25</sup> Resident alien is a term used in tax law. An alien is considered to be a U.S. resident for income tax purposes if he or she (1) is a lawful permanent resident of the United States at any time during the calendar year; (2) meets the requirements of the “substantial presence” test; or (3) makes the first-year election under 26 U.S.C. § 7701(b)(4) and 26 C.F.R. § 301.7701(b)-4(c)(3). An alien individual meets the substantial presence test if: (1) the alien is present in the United States for at least 31 days during the calendar year and (2) the sum of the number of days on which such individual was present in the U.S. during the current year and the two preceding calendar years (when multiplied by the applicable multiplier—one for the current year, one-third for the first preceding year, and one-sixth for the second preceding year) equals or exceeds 183 days. Even though an alien individual otherwise meets the requirements of the substantial presence test, there are circumstances when an alien will not be considered a resident of the United States. An alien who does not qualify under either of these tests will be treated as a nonresident alien for purposes of the income tax. [26 U.S.C. § 7701(b)].

<sup>26</sup> For more information on the taxation of noncitizens, see CRS Report RS21732, *Federal Taxation of Aliens Working in the United States and Selected Legislation*, by Erika K. Lunder.

## Totalization Agreements

As shown in **Table 1** and **Table 3**, alien workers and alien dependents/survivors may receive payments while living outside the United States if they are a resident of a country with which the United States has a totalization agreement.<sup>27</sup> Section 233 of the Social Security Act authorizes the President to enter into a totalization agreement with a foreign country to coordinate the collection of payroll taxes and the payment of benefits under each country's Social Security system for workers who split their careers between the two countries. For example, without a totalization agreement, an individual who is sent by a U.S. company to work in a foreign country (and his or her employer) must contribute to the Social Security systems in both countries, resulting in dual Social Security coverage and taxation based on the same earnings. With one exception (Italy), totalization agreements allow workers (and their employers) to contribute only to the foreign system if the worker is employed in that country for five or more years, or only to the U.S. system if the worker is employed in that country for less than five years.

Totalization agreements also allow workers who divide their careers between the two countries to combine earnings credits under both systems to qualify for benefits if they lack sufficient coverage under either system.<sup>28</sup> While a worker may combine earnings credits to *qualify* for benefits under one or both systems, his or her benefit is prorated to reflect only the number of years the worker paid into each system. The same treatment applies to foreign workers in the United States.

Totalization agreements are subject to congressional review. Section 233(e) of the Social Security Act requires the President to submit to Congress the text of the agreement and a report on (1) the estimated number of individuals who would be affected by the agreement and (2) the estimated financial impact of the agreement on programs established by the Social Security Act. Section 233(e)(2) of the Social Security Act specifies that a totalization agreement automatically goes into effect unless the House of Representatives or the Senate adopts a resolution of disapproval within 60 session days of the agreement's transmittal to Congress.

It should be noted that Section 233(e)(2), which allows for the rejection of a totalization agreement upon adoption of a resolution of disapproval by either House of Congress is functionally identical to the legislative veto provision that was held unconstitutional in *INS v. Chadha*.<sup>29</sup> In that case, the Supreme Court struck down a provision in the Immigration and Nationality Act that gave either House of Congress the authority to overrule deportation decisions made by the Attorney General.<sup>30</sup> The Court declared that a legislative veto constitutes an exercise of legislative power, as its use has "the purpose and effect of altering the legal rights, duties, and

<sup>27</sup> Social Security regulations (20 C.F.R. § 404.1928) specify that a totalization agreement "may provide that a person entitled to benefits under title II of the Social Security Act may receive those benefits while residing in the foreign country party to the agreement, regardless of the alien non-payment provision."

<sup>28</sup> This applies to Social Security retirement and disability benefits. Generally, a minimum of 40 credits is required to qualify for Social Security retirement benefits. Fewer credits are required to qualify for disability benefits, depending on the worker's age at the onset of the disability. In some cases, a worker may qualify for disability benefits with a minimum of six credits.

<sup>29</sup> 462 U.S. 919 (1983).

<sup>30</sup> *Id.* Shortly after its decision in *Chadha*, the Court without opinion and with one dissent summarily affirmed lower court opinions that had struck down a two-House legislative veto provision of the Federal Trade Commission Improvements Act, 15 U.S.C. § 57a-1. See *United States Senate v. Federal Trade Commission*, 463 U.S. 1216 (1983); *United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1983).

relations of persons ... outside the legislative branch.”<sup>31</sup> Accordingly, the Court invalidated the disapproval mechanism, holding that Congress may exercise its legislative authority only “in accord with a single, finely wrought and exhaustively considered procedure,” namely bicameral passage and presentation to the President.<sup>32</sup> In its decision, the Court explicitly acknowledged that its holding was not limited to the provision at issue, but would instead affect other similar laws, stating: “our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.”<sup>33</sup> The Court has emphasized its categorical disapproval of the legislative veto in subsequent cases, noting in *Printz v. United States*, for instance, that “the legislative veto, though enshrined in perhaps hundreds of federal statutes ... was nonetheless held unconstitutional” in *Chadha*.<sup>34</sup> The maxim delineated in *Chadha*, as consistently reaffirmed by the Court, is fully applicable in the current context.<sup>35</sup> Accordingly, given that the disapproval mechanism in Section 233(e)(2) authorizes “congressional invalidation of executive action” outside the strictures of bicameralism and presentment, there is no discernible basis upon which it may be argued successfully that its utilization by Congress would withstand judicial scrutiny.<sup>36</sup>

Congress has never rejected a Social Security agreement. As a result, the apparent constitutional infirmity of Section 233(e)(2) has not been an issue. Congressional utilization of the mechanism in Section 233(e)(2) to reject a Social Security agreement could give rise to a judicial challenge, potentially resulting in an invalidation of the disapproval mechanism and a determination that the agreement is effective. Specifically, in considering the effect of the unconstitutional disapproval mechanism, a reviewing court would consider whether the remainder of Section 233 is valid, or whether the entire statute must be nullified. The Supreme Court has held that “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is a fully operative law.”<sup>37</sup> In *Westcott v. Califano*, the court noted that “the existence of a broad severability clause in the Social Security Act reflects the Congressional wish that judicial interpretation of the act leave as much of the statute intact as possible.”<sup>38</sup> The existence of this severability clause, coupled with the fact that the operative provisions of Section 233 would remain fully functional absent the disapproval mechanism in Subsection (e)(2), gives rise to the

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<sup>31</sup> *Chadha*, 462 U.S. at 952.

<sup>32</sup> 462 U.S. at 951.

<sup>33</sup> 462 U.S. at 944-45.

<sup>34</sup> 521 U.S. 898, 918 (1997). *See also*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (stating: “[w]e think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to Congressional invalidation of executive action.”).

<sup>35</sup> *See*, e.g., *Taylor v. Barnhart*, 399 F.3d 891, 894 (8<sup>th</sup> Cir. 2005) (indicating applicability of the holding in *Chadha* to Section 233(e)(2)).

<sup>36</sup> The unconstitutionality of legislative veto provisions is noted at 42 U.S.C.A. § 433 (2003), where it is further stated that the provisions of § 233(e) are similar to those struck down in *INS v. Chadha*. For a consideration of bicameralism and presentment requirements generally, see CRS Report RL30249, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, by T. J. Halstead.

<sup>37</sup> *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 [1932]).

<sup>38</sup> 460 F.Supp 737 (D. Mass 1978). In *Califano*, the court was referring to 42 U.S.C. § 1303, which states: “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.”

likelihood that a reviewing court would invalidate any attempt to utilize the disapproval mechanism, while giving effect to an otherwise properly executed Social Security agreement.<sup>39</sup>

Since 1978, the United States has entered into totalization agreements with 24 countries (the effective date for each agreement is shown in **Appendix A**):

Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, South Korea, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

In addition to these 24 totalization agreements, the United States has a pending totalization agreement with Mexico that was signed on June 29, 2004. After an agreement has been signed, SSA and the foreign Social Security agency meet and address implementation issues, formulating operations procedures to be used in administering the agreement. When that process has been completed, the agreement is forwarded to the U.S. Secretary of State for review. After review at the State Department has been completed, the agreement is sent to the President for review. The President is required by law to transmit the agreement to Congress for a period of review (60 session days) before the agreement can go into effect.<sup>40</sup> To date, the totalization agreement with Mexico has not been transmitted to Congress. Reportedly, as of January 2010, the agreement is under review at SSA (i.e., SSA has not forwarded the agreement to the State Department).<sup>41</sup>

Although the specific terms of each totalization agreement may differ, the provisions of a totalization agreement must be consistent with the Social Security Act. Section 233(c)(4) of the Social Security Act states: “any such agreement may contain other provisions which are not inconsistent with the other provisions of [Title II of the Social Security Act] and which the President deems appropriate to carry out the purposes of this section.” In December 2007, about \$28 million was paid in monthly benefits to about 146,200 recipients under U.S. Social Security agreements.<sup>42</sup>

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<sup>39</sup> In light of the Court’s holding in *Chadha*, it is apparent that any congressional action taken to restrict or control executive authority to enter into Social Security agreements, or to invalidate any such agreements, must be accomplished through bicameral passage and presentment to the President. Accordingly, congressional options in this regard would appear to be limited to imposing additional requirements on the adoption of Social Security agreements, restricting authority to enter into such agreements unless approved by both Congress and the President on a case by case basis, or passing a law disapproving a particular agreement before or after it is finalized. See *Chadha*, 462 U.S. at 951. Analysis of legal issues regarding Section 233(e)(2) of the Social Security Act prepared by T.J. Halstead, CRS Specialist in American Law.

<sup>40</sup> The agreement is subject to ratification in the foreign country as well.

<sup>41</sup> Information provided by the Social Security Administration to the Congressional Research Service in January 2010. General information on the status of totalization agreements is available on the SSA website at <http://www.ssa.gov/international/status.html>. For more detailed information on totalization agreements, see CRS Report R41009, *International Social Security Agreements*, by Dawn Nuschler.

<sup>42</sup> In December 2007, there were about 50 million Social Security recipients. Therefore, those who received benefits under U.S. Social Security agreements represented about 0.3% of the total. SSA, *Social Security Bulletin, Annual Statistical Supplement, 2008*, Table 5.A1, available at <http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2008/5a.pdf>.

## Issues

### Perceived Disparate Treatment Under Social Security and Immigration Law

Some believe there is somewhat of a disconnect between how the Social Security and immigration rules affect unauthorized aliens. Basically, immigration policies are designed to discourage and penalize those unauthorized to work in the United States. On the other hand, under Social Security rules there are certain circumstances when an unauthorized alien can collect Social Security benefits. As a result of this perceived inconsistency, some oppose paying Social Security benefits to such aliens, arguing that aliens who violate immigration law should not be rewarded by receiving Social Security benefits. Others contend that aliens who work in Social Security-covered employment (i.e., had payroll taxes withheld from their earnings) should be eligible for benefits whether or not they had employment authorization.

### Totalization Agreement with Mexico

On June 29, 2004, the Social Security Administration announced that a totalization agreement with Mexico had been signed by U.S. and Mexican government officials. In a press release and summary document, SSA reports that the agreement would save 3,000 U.S. workers and their employers approximately \$140 million in Mexican payroll taxes over the first five years of the agreement. In addition, SSA reports that the projected cost to the U.S. Social Security system would average \$105 million annually over the first five years.<sup>43</sup> To date, the totalization agreement with Mexico has not been transmitted to Congress for review.

In the 110<sup>th</sup> Congress, Senator Ensign offered an amendment to H.R. 3043 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2008) to prohibit the Commissioner of Social Security and the Social Security Administration from using funds appropriated by the measure to pay the compensation of SSA employees to administer Social Security payments under a totalization agreement with Mexico that would not otherwise be payable in the absence of an agreement. The Ensign amendment (S.Amdt. 3342) was agreed to by a vote of 91-3.<sup>44</sup> Although H.R. 3043 was vetoed by President Bush on November 13, 2007, and the House failed to override the veto,<sup>45</sup> the provision was included as §526 of P.L. 110-161, The Consolidated Appropriations Act, 2008.<sup>46</sup>

The announcement in 2004 that an agreement with Mexico had been signed revived a debate that began in December 2002 following media reports that negotiations were underway on a potential totalization agreement between the United States and Mexico.<sup>47</sup> Among the approximately 7.2

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<sup>43</sup> The SSA press release and summary document are available on the SSA website at <http://www.ssa.gov/pressoffice/pr/USandMexico-pr-alt.htm>.

<sup>44</sup> Record vote number 347.

<sup>45</sup> Roll call vote 1122. The vote was 277 to 141.

<sup>46</sup> Signed into law on December 26, 2007.

<sup>47</sup> See, for example, Jonathan Weisman, "U.S. Social Security May Reach Mexico," *Washington Post*, December 19, 2002, p. A1.

million Mexican-born workers in the U.S. labor force in 2006, approximately 5.6 million (80%) were noncitizens<sup>48</sup> and 1.5 million (20%) were naturalized citizens.<sup>49</sup> The effects of the totalization agreement with Mexico depend on the specific terms and language of the agreement, which have not been finalized. The following discussion pertains to the version of the agreement that SSA released on January 4, 2007, in response to the Freedom of Information Act (FOIA) request from the TREA Senior Citizens League.<sup>50</sup>

As with most totalization agreements, the totalization agreement with Mexico would waive the five-year U.S. residency requirement for alien dependents and survivors to receive benefits outside the United States (see **Table 2** and **Table 3**). Under current law, an alien *worker* entitled to Social Security benefits (based on work performed with or without authorization in the United States) may receive benefits outside the United States if he or she is a citizen of Mexico, because Mexico meets the definition of a “social insurance country.” An alien *dependent or survivor* entitled to Social Security benefits may receive benefits outside the United States only if he or she lived in the United States previously for at least five years (and the family relationship on which benefits are based existed during that time), unless he or she meets one of several exceptions. The totalization agreement with Mexico would allow alien dependents and survivors in Mexico who have never lived in the United States to receive Social Security benefits outside the United States.

As discussed above, Section 202(y) of the Social Security Act prohibits the payment of benefits to aliens in the United States who are not lawfully present. Although some observers have expressed concern that a totalization agreement with Mexico could allow unauthorized aliens to receive payments in the United States, the version of the agreement signed in June 2004 does not waive this requirement.<sup>51</sup> Similarly, another concern has been that the totalization agreement would waive the provision of law that requires an alien whose application for benefits is based on an SSN assigned in 2004 or later to have work authorization at the time an SSN is assigned, or at any later time, to gain insured status under the Social Security program (i.e., the alien must have work authorization at some point to count work credits for insured status purposes). Reportedly, in 2006, SSA sent a diplomatic note to the Mexican government clarifying that the agreement would not waive the “work authorization” requirement. Still others express concern that a totalization agreement with Mexico could provide an incentive for unauthorized workers from Mexico to come to the United States. In addition, given the Social Security system’s projected long-range funding shortfall, some question the feasibility of adding a potentially large number of recipients to the rolls in the absence of structural Social Security reform.

Others argue that an agreement (that precludes payments to unauthorized aliens in the United States) could be beneficial to the United States and that the cost could be reasonable.<sup>52</sup> They argue that there could be substantial savings for certain U.S. workers and employers by removing the burden of double taxation. For example, without a totalization agreement, U.S. citizens and legal

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<sup>48</sup> As discussed above, “noncitizens” include aliens who are legally present, as well as those who are unauthorized. The Current Population Survey (CPS) does not include a variable on immigration status.

<sup>49</sup> Calculations performed by CRS using the average of the monthly CPSs for 2006.

<sup>50</sup> The text of the U.S.-Mexico totalization agreement is available on the TREA Senior Citizens League website (in pdf format) at <http://www.tscl.org/NewContent/102697.asp>. In addition, the agreement is available on the SSA website (in html format) at [http://www.ssa.gov/international/Agreement\\_Texts/mexico.html](http://www.ssa.gov/international/Agreement_Texts/mexico.html).

<sup>51</sup> None of the current totalization agreements make such a provision.

<sup>52</sup> Joel Mowbray, “Illegal but Paid? The Question of Social Security for Mexicans,” *National Review*, January 27, 2003, pp. 22-23.

permanent residents (LPRs)<sup>53</sup> sent by U.S. companies to work in Mexico must contribute to both the U.S. and Mexican Social Security systems. Moreover, some workers may not qualify for U.S. or Mexican Social Security benefits because they do not have enough earnings credits under either system. In addition, proponents of totalization agreements argue that such agreements remove financial barriers to multinational companies and their employees working in foreign countries.

## General Accounting Office Study

In February 2003, the House Committee on Ways and Means and the House Committee on the Judiciary asked the General Accounting Office (GAO)<sup>54</sup> to provide information to Congress on the possible effects of a totalization agreement with Mexico. In a press release dated February 24, 2003, House Ways and Means Social Security Subcommittee Chairman E. Clay Shaw, Jr., and House Judiciary Committee Chairman F. James Sensenbrenner, Jr., expressed particular interest in the potential impact of an agreement with Mexico on the Social Security trust funds, given the large number of noncitizens who may be working in the United States without authorization. According to the press release, the committee asked specifically for information on the potential effects of an agreement on workers, beneficiaries, service delivery by the SSA, program finances, immigration and illegal work by noncitizens.

In September 2003, GAO presented its findings before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims at a hearing titled *Should There Be a Totalization Agreement with Mexico?* and shortly afterward released its report to Congress—*Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges*.<sup>55</sup> Among the advantages associated with totalization agreements, GAO notes that they foster international commerce, protect benefits for workers who divide their careers between the United States and a foreign country, allow multinational companies and their employees to avoid paying dual Social Security taxes on the same earnings, and enhance diplomatic relations. GAO also notes that, because such agreements represent a cost to the U.S. Social Security system, associated risks should be assessed and mitigated during the negotiation process. Overall, GAO found that the procedures followed by SSA in the development of the totalization agreement with Mexico (and all other agreements) are not well documented. GAO goes on to state: “SSA provided no information showing that it assessed the reliability of Mexican earnings data and the internal controls in place to ensure the integrity of information that SSA will rely on to pay Social Security benefits.”<sup>56</sup> Records on which SSA would rely to determine a worker’s (and family members’) initial and continued eligibility for benefits include birth, death and marriage records.

In addition, GAO found that a totalization agreement with Mexico would increase the number of Mexican workers and their family members eligible for Social Security benefits for two reasons. First, Mexican workers who otherwise would not have enough earnings credits to qualify for

<sup>53</sup> Foreign nationals may be admitted to the United States temporarily or may come to live permanently. Those admitted on a permanent basis are known as immigrants or legal permanent residents.

<sup>54</sup> Since this study was published, the General Accounting Office has been renamed the Government Accountability Office.

<sup>55</sup> The September 11, 2003 testimony (GAO-03-1035T) may be accessed online at <http://www.gao.gov/new.items/d031035t.pdf>. The September 30, 2003 GAO report (GAO-03-993) may be accessed online at <http://www.gao.gov/new.items/d03993.pdf>.

<sup>56</sup> GAO-03-1035T, p. 2.

benefits in the United States could combine U.S. and Mexican credits to qualify for a partial U.S. Social Security benefit. Second, more family members in Mexico would qualify for U.S. Social Security benefits because a totalization agreement generally exempts dependents and survivors residing outside the United States from the five-year U.S. residency requirement.

In terms of the potential cost of a totalization agreement with Mexico, GAO evaluated a March 2003 cost estimate prepared by SSA's Office of the Chief Actuary. SSA projects that an agreement with Mexico would cost \$78 million in the first year and \$650 million (constant 2002 dollars) by 2050. The cost estimate assumes an initial increase of 50,000 new beneficiaries in Mexico based on the number of persons (U.S. citizens and others) in Mexico currently receiving U.S. Social Security benefits and projects that the number of additional beneficiaries under the agreement would increase to 300,000 over time. SSA projects that the totalization agreement with Mexico would have a negligible effect on the long-range actuarial balance of the Social Security trust funds.<sup>57</sup>

GAO found that "the cost of a totalization agreement with Mexico is highly uncertain," even more so than for previous agreements, because of the large number of unauthorized immigrants from Mexico estimated to be living in the United States. According to GAO's assessment, the base used for the number of initial new beneficiaries in Mexico under a totalization agreement (50,000) does not take into account the "estimated millions of current and former unauthorized workers and family members from Mexico and appears small in comparison with those estimates."<sup>58</sup> Furthermore, GAO points out that the cost estimate does not take into account the potential change in behavior by Mexican citizens under a totalization agreement. GAO notes that an agreement could provide an additional incentive for unauthorized workers from Mexico to come to the United States.

In regard to the number of unauthorized immigrants from Mexico currently living in the United States, GAO cites a range of estimates. For example, the Pew Hispanic Center estimates the number to be between 3.4 and 5.7 million, whereas the Urban Institute estimates the number to be more than 4 million. The federal government estimates that there are about 5 million unauthorized immigrants from Mexico living in the United States (as of January 2000) and that the number is expected to increase by 240,000 each year. According to federal government statistics, unauthorized immigrants from Mexico make up an estimated 69% of unauthorized immigrants in the United States. By comparison, the number of unauthorized U.S. immigrants from all of the other totalization countries combined is estimated at less than 3%.

In regard to the potential number of former unauthorized workers who have returned to Mexico, GAO points out that fewer than one-third of immigrants from Mexico stay in the United States for more than 10 years, the minimum number of years of Social Security-covered earnings generally needed to qualify for Social Security retirement benefits. Given the limited information regarding the age, work history, Social Security coverage and number of dependents of these former unauthorized workers, the potential cost of a totalization agreement with Mexico is considered even more difficult to predict.

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<sup>57</sup> SSA's March 2003 cost estimate of a totalization agreement with Mexico (and GAO's evaluation) do not incorporate the effects of P.L. 108-203 (discussed above). However, SSA has stated that the cost estimate is still appropriate following enactment of the work authorization requirement in P.L. 108-203. To clarify, SSA projects that an additional 50,000 workers and an additional 17,000 dependents and survivors would receive totalized benefits under the agreement by the end of the first five years.

<sup>58</sup> GAO-03-1035T, p. 2.

As mentioned previously, the SSA cost estimate shows that a totalization agreement with Mexico would have a negligible effect on the long-range actuarial balance of the Social Security trust funds. However, a sensitivity analysis performed by SSA at GAO's request shows that a 25% or more increase in the number of initial new beneficiaries (i.e., 13,000 or more above the base estimate of 50,000) would result in a measurable impact on the long-range actuarial balance of the trust funds. GAO found that error rates in estimating the number of initial new beneficiaries under previous totalization agreements often exceeded 25%. Based on the large number of unauthorized workers from Mexico in the United States, GAO considers the estimated cost of a totalization agreement with Mexico more uncertain than cost estimates for previous agreements. In its report, GAO states that "a totalization agreement with Mexico is both qualitatively and quantitatively different than any other agreement signed to date."<sup>59</sup>

### **SSA Comment on the GAO Report**

The Social Security Commissioner and SSA's Office of the Chief Actuary provided written comments on a draft of the GAO report. SSA disagreed with the GAO evaluation on a number of issues.<sup>60</sup> Specifically, in regard to SSA's estimate of the number of persons who initially would receive totalized benefits under the agreement (50,000), SSA maintains that the estimate is "based on the best available data and includes potential benefits for both documented and undocumented workers in the U.S. in the past."<sup>61</sup> Furthermore, SSA notes that the unprecedented six-fold increase in this number (300,000 by 2050) takes into account recent increases in immigration and visas. SSA's response includes (but is not limited to) the following:

- Not all unauthorized Mexican workers work in Social Security-covered jobs. Those who are employed on an unofficial basis (i.e., paid cash in the "underground economy") do not qualify for benefits (with or without a totalization agreement) because their earnings are not reported for Social Security purposes. SSA notes that the percentage of unauthorized workers who could become eligible for benefits is more limited than GAO suggests, because GAO does not include this group of workers in their discussion.
- GAO found that SSA's proxy for the number of individuals who initially would receive totalized benefits under the agreement (i.e., the number of Social Security recipients currently living in Mexico) seems low and bears no direct relationship to the estimated number of current and former unauthorized Mexican workers in the United States and their family members. SSA maintains that this is a reasonable proxy and points out that the 50,000 Social Security recipients currently living in Mexico include Mexican citizens who qualified for benefits based on unauthorized work in the United States.
- GAO points out that the agreement could provide an additional incentive for unauthorized Mexican workers to come to the United States. In SSA's view, this type of behavioral effect would be very small. SSA contends that most Mexican citizens who come to the United States to work without authorization are young

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<sup>59</sup> GAO-03-993, p. 17.

<sup>60</sup> The full text of SSA's comments are provided in Appendix II of the GAO report.

<sup>61</sup> GAO-03-993, p. 27.

and more likely to be motivated by current earnings than the prospect of future Social Security retirement benefits.

- In evaluating whether the number of Social Security recipients currently living in Mexico is a reasonable proxy for the number of individuals who initially would receive totalized benefits under an agreement with Mexico, SSA used comparison data for Canada, a country with which the United States has had a totalization agreement for 20 years, because it too is a NAFTA trading partner and shares a border with the United States. By applying the same ratio of totalized to non-totalized (fully insured) Canadian beneficiaries to the number of current non-totalized Mexican beneficiaries, SSA came up with an estimate of 37,000 initial new beneficiaries under the agreement and determined that the 50,000 proxy was reasonable. According to GAO, such comparisons between Canada and Mexico are problematic because of the much higher estimates of illegal immigration from Mexico. While SSA acknowledges the large number of unauthorized Mexican citizens estimated to be in the United States, it contends that these individuals tend to be young and would become eligible for totalized benefits well into the future. SSA points out that the purpose of the Canada/Mexico comparison is to provide a current estimate of totalized beneficiaries under an agreement with Mexico.
- GAO states that error rates associated with SSA's projections of new beneficiaries under previous agreements frequently have exceeded 25%. SSA acknowledges that for six of the 11 agreements that became effective between 1985 and 1994, the number of individuals receiving totalized benefits in the fifth year after implementation exceeded their estimates. SSA further points out, however, that estimates for recent agreements have been high. For example, SSA overestimated the number of individuals receiving totalized benefits for the four agreements that became effective between 1992 and 1994. Overall, for the 11 agreements, SSA estimates that their projections have been within 3% of the actual number.

## **No-Match Letters**

Over the past few years, a policy change at SSA which substantially increased the number of “no-match” letters sent to employers has received much attention because of the impact on unauthorized aliens. In 1994, SSA began sending no-match letters to employers to inform them of a discrepancy between a W-2 form and SSA's records. Importantly, as discussed above, receipt of a no-match letter does not imply that the employee is using a fraudulent SSN; the discrepancy could be the result of a clerical error. For tax years 1993 through 2000, an employer received no-match letters only if more than 10 employees had discrepancies and the number of employees with mismatches equaled more than 10% of the employer's workforce.<sup>62</sup>

For the 2001 tax year, SSA implemented a new policy of sending no-match letters to every employer with at least one employee with discrepancies on their W-2. For tax year 2000,<sup>63</sup> SSA sent out approximately 110,000 no-match letters<sup>64</sup> compared to approximately 950,000 for tax

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<sup>62</sup> “Social Security No-Match Letter,” *Interpreter Releases*, vol. 80, April 7, 2003, pp. 508-509.

<sup>63</sup> No-match letters for tax year 2000 are sent in calendar year 2001.

<sup>64</sup> “Social Security No-Match Letter,” *Interpreter Releases*, vol. 80, April 7, 2003, p. 508.

year 2001.<sup>65</sup> Employers are not required to respond to or act on the letters; however, under the INA employers are subject to penalties for hiring or retaining unauthorized alien workers.<sup>66</sup> Additionally, the Internal Revenue Service can penalize employers for providing incorrect information on wage forms (W-2's).<sup>67</sup>

SSA maintained that the letters were sent to employers to ensure that workers are properly credited with their earnings. Because of the controversy surrounding the increase in the number of no-match letters, SSA currently sends a no-match letter to an employer only if more than 10 employees have discrepancies and the number of employees affected equals more than 0.5% of the employer's workforce. In 2005, SSA sent 127,652 no-match letters for tax year 2004.<sup>68</sup>

Some argue that SSA should not reduce the number of no-match letters that are sent to employers. They contend that SSA should coordinate with other agencies to locate unauthorized alien workers, and that no-match letters can be a tool to help reduce the unauthorized population in the United States. Additionally, the no-match letters may help employers who do not know that the employees' documents are fraudulent but would be liable if they were caught employing unauthorized aliens.

Others contend that SSA has no immigration-related enforcement powers, and it is not SSA's job to enforce laws. In addition, immigration advocates contend that tens of thousands of immigration aliens left their jobs or were fired as a result of the letters.<sup>69</sup> They argue that no-match letters do little to combat unlawful employment as those who use false documents simply find employment in another company, increasing the risk of workplace exploitation. Additionally, they contend that some firms may have experienced a loss of revenue caused by worker shortages or by terminated employees who do not have employment authorization moving to competitors. The letters also raised concerns that employers were discriminating based on alienage (i.e., that an employer who received a no-match letter for a noncitizen would fire the noncitizen worker without ascertaining if they have employment authorization).

## **No-Match Regulation**

On August 15, 2007, the Department of Homeland Security published a final rule that would have amended the regulations relating to the unlawful hiring or continued employment of aliens who lack work authorization.<sup>70</sup> The regulation would have created "safe-harbor" procedures for employers who receive a no-match letter to follow, to ensure that DHS would not find the employer guilty of knowingly hiring or continuing to employ an alien who lacks work authorization (i.e., that the employer had violated §274A of the Immigration and Nationality Act).

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<sup>65</sup> Mary Beth Sheridan, "Social Security Scales Back Worker Inquiries," *Washington Post*, June 18, 2003, p. A6. No-match letters for tax year 2001 are sent in calendar year 2002.

<sup>66</sup> INA § 274A.

<sup>67</sup> 26 U.S.C. § 6647.

<sup>68</sup> Unpublished data from SSA.

<sup>69</sup> Sheridan, "Social Security Scales Back Worker Inquiries."

<sup>70</sup> Department of Homeland Security, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," 72 *Federal Register* 45611, August 15, 2007. See also U.S. Immigration and Customs Enforcement, *Partners: Safe Harbor*.

Because of litigation resulting in a temporary restraining order, the regulation was never implemented. On October 7, 2009, DHS rescinded the regulation.<sup>71</sup>

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<sup>71</sup> DHS announced its intention to rescind the regulation on July 8, 2009. Department of Homeland Security, “Safe-Harbor Procedures for Employers who Receive a No-Match Letter: Rescission,” 74 *Federal Register* 51447-51452, October 7, 2009. The proposed rule was published on August 19, 2009. Department of Homeland Security, “Safe-Harbor Procedures for Employers who Receive a No-Match Letter: Rescission,” 74 *Federal Register* 41801-41805, August 19, 2009. For more information, see **Appendix C**.

## Appendix A. Exception Countries

The following lists of countries, which are subject to change periodically, are taken from the *Electronic Code of Federal Regulations (e-CFR)* with data current as of June 1, 2009, and the Social Security Administration's Program Operations Manual System (POMS). The *e-CFR* is available at <http://ecfr.gpoaccess.gov/>. The POMS are available at <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms>.

### Social Insurance or Pension System Countries

Under the alien nonpayment provision, a noncitizen's benefits are suspended if he or she remains outside the United States for more than 6 consecutive months, unless one of several broad exceptions is met. For example, an alien may receive benefits outside the United States if he or she is a citizen of a country that has a social insurance or pension system that pays benefits to eligible U.S. citizens residing outside that country. The following countries meet the social insurance or pension system exception in Section 202(t)(2) of the Social Security Act:

Albania, Antigua and Barbuda, Argentina, Austria, Bahamas, Barbados, Belgium, Belize, Bolivia, Bosnia-Herzegovina, Brazil, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Cote D'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Grenada, Guatemala, Guyana, Hungary, Iceland, Jamaica, Jordan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Mexico, Federated States of Micronesia, Monaco, Montenegro, Nicaragua, Norway, Palau, Panama, Peru, Philippines, Poland, Portugal, St. Kitts and Nevis, St. Lucia, Samoa, San Marino, Serbia, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, The Netherlands, Trinidad-Tobago, Turkey, United Kingdom, Uruguay, Venezuela

(SSA POMS, Section RS 02610.015 (Status of Countries for Applying Exceptions Based on Citizenship), at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0302610015!opendocument>.)

### Treaty Obligation Countries

To receive benefits outside the United States, alien *dependents and survivors* must have lived in the United States previously for at least five years (lawfully or unlawfully), and the family relationship to the worker must have existed during that time. The law provides several broad exceptions to the five-year U.S. residency requirement for alien dependents and survivors. For example, an alien dependent or survivor is exempt from the U.S. residency requirement if he or she is a citizen of a treaty obligation country (i.e., if nonpayment of benefits would be contrary to a treaty between the United States and the individual's country of citizenship). The following countries meet the "treaty obligation" exception in Section 202(t)(3) of the Social Security Act:

Germany, Greece, Ireland, Israel, Italy, Japan, Netherlands\* (20 C.F.R. § 404.463)

\*The Treaty of Friendship, Commerce, and Navigation now in force between the United States and the Kingdom of the Netherlands creates treaty obligations precluding the application of the alien nonpayment provision to citizens of that country with respect to monthly survivor benefits only.

## Totalization Agreement Countries

The following countries meet the “totalization agreement” exception in Section 202(t)(11)(E) of the Social Security Act. The effective date is shown for each agreement.

**Table A-1. U.S. Social Security Agreements in Force**

Australia	October 1, 2002
Austria	November 1, 1991
Belgium	July 1, 1984
Canada	August 1, 1984
Chile	December 1, 2001
Czech Republic	January 1, 2009
Denmark	October 1, 2008
Finland	November 1, 1992
France	July 1, 1988
Germany	December 1, 1979
Greece	September 1, 1994
Ireland	September 1, 1993
Italy	November 1, 1978
Japan	October 1, 2005
South Korea	April 1, 2001
Luxembourg	November 1, 1993
Netherlands	November 1, 1990
Norway	July 1, 1984
Poland	March 1, 2009
Portugal	August 1, 1989
Spain	April 1, 1988
Sweden	January 1, 1987
Switzerland	November 1, 1980
United Kingdom	1985/1988 <sup>a</sup>

**Source:** Social Security Administration, Status of Totalization Agreements, available at <http://www.ssa.gov/international/status.html>.

**Note:** The agreements with Austria, Belgium, Germany, Sweden and Switzerland permit an individual to receive benefits as a dependent or survivor of a worker while a *resident* in those countries only if the worker is a U.S. citizen or a citizen of the country of residence.

- a. Provisions that eliminate double taxation became effective January 1, 1985; provisions that allow persons to use work in both countries to qualify for benefits became effective January 1, 1988.

## Appendix B. Definition of “Lawfully Present”

The following is the definition of the term “lawfully present” aliens for purposes of applying for Title II Social Security benefits under P.L. 104-193 (the Personal Responsibility and Welfare Reform Act) as defined in 8 C.F.R. § 103.12.

An alien who is lawfully present in the United States includes

- (1) A “qualified alien” as defined by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA);<sup>72</sup>
- (2) An alien who has been inspected and admitted to the United States and who has not violated the terms of his status;
- (3) An alien who has been paroled<sup>73</sup> into the United States pursuant to Section 212(d)(5) of the act for less than one year, except: (i) Aliens paroled for deferred inspection or pending exclusion proceedings under Section 236(a) of the act; and (ii) Aliens paroled into the United States for prosecution pursuant to 8 C.F.R. § 212.5(b)(3);
- (4) An alien who belongs to one of the following classes of aliens permitted to remain in the United States because the Attorney General has decided for humanitarian or other public policy reasons not to initiate deportation or exclusion proceedings or enforce departure: (i) Aliens currently in temporary resident status pursuant to Section 210 or 245A of the INA; (ii) Aliens currently under Temporary Protected Status (TPS);<sup>74</sup> (iii) Cuban-Haitian entrants, as defined in Section 202(b) P.L. 99-603, as amended; (iv) Family Unity beneficiaries pursuant to Section 301 of P.L. 101-649, as amended; (v) Aliens currently under Deferred Enforced Departure (DED); (vi) Aliens currently in deferred action status pursuant to Service Operations Instructions at OI

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<sup>72</sup> PRWORA created the term “qualified alien,” a term which does not exist in immigration law, to encompass the different categories of noncitizens who were not prohibited by PRWORA from receiving federal public benefits. Qualified aliens (noted in P.L. 104-193 § 431; 8 U.S.C. § 1641) are defined as:

- (1) Legal Permanent Residents (an alien admitted for lawful permanent residence (LPRs));
- (2) refugees (an alien who is admitted to the United States under § 207 of the Immigration and Nationality Act (INA));
- (3) asylees (an alien who is granted asylum under INA § 208);
- (4) an alien who is paroled into the United States (under INA § 212(d)(5)) for a period of at least one year;
- (5) an alien whose deportation is being withheld on the basis of prospective persecution (under INA § 243(h) or § 241(b)(3));
- (6) an alien granted conditional entry pursuant to INA § 203(a)(7) as in effect prior to April 1, 1980; and
- (7) Cuban/Haitian entrants (as defined by P.L. 96-422).

For a discussion of the different categories of noncitizens, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem. Additionally, victims of trafficking (T-visa holders) are treated as refugees for the purpose of receiving benefits.

<sup>73</sup> “Parole” is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status.

<sup>74</sup> For more information on TPS, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

242.1(a)(22); (vii) Aliens who are the spouse or child of a United States citizen whose visa petition has been approved and who have a pending application for adjustment of status;

(5) Applicants for asylum and applicants for withholding of removal under Section 241(b)(3) of the act or under the Convention Against Torture who have been granted employment authorization, and such applicants under the age of 14 who have had an application pending for at least 180 days.

An alien may not be deemed to be lawfully present solely on the basis of the Service's decision not to, or failure to, issue an Order to Show Cause or solely on the basis of the Service's decision not to, or failure to, enforce an outstanding order of deportation or exclusion.

## Appendix C. History of No-Match Regulation

On August 15, 2007, the Department of Homeland Security published a final rule that would have amended the regulations relating to the unlawful hiring or continued employment of aliens who lack work authorization.<sup>75</sup> The regulation would have created “safe-harbor” procedures for employers who received a no-match letter to follow, to ensure that DHS would not find the employer guilty of knowingly hiring or continuing to employ an alien who lacks work authorization (i.e., that the employer had violated §274A of the Immigration and Nationality Act). Under the rule, the employer would have had to take reasonable steps, within 93 days of receipt of the no-match letter, to resolve the discrepancy. These steps would have included checking records for clerical errors and, if such errors were found, informing SSA of the correct information; or asking the employee to confirm the name and SSN, and if they were correct, requesting that the employee resolve the discrepancy with SSA.<sup>76</sup>

Although the regulation was to become effective on September 14, 2007, it never became effective. In a lawsuit filed on August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union (ACLU), and other groups sought a temporary restraining order (TRO). The plaintiffs alleged that inaccuracies in SSA’s database coupled with the rule would threaten the jobs of those working legally in the United States. On August 31, 2007, the judge in the U.S. District Court of Northern California set a hearing for October 1, 2007, and issued a TRO prohibiting SSA from mailing any no-match letters and prohibiting the rule from becoming effective.<sup>77</sup> On October 10, 2007, the judge granted a preliminary injunction stopping the DHS from implementing the regulation, including mailing or otherwise sending employers SSA no-match letters that were to include DHS guidance letters explaining the regulation.<sup>78</sup> On December 5, 2007, the Department of Justice on behalf of DHS filed an appeal of the injunction.<sup>79</sup> Notably, SSA decided not to mail no-match letters for tax year 2006, maintaining that it was too late for those letters to aid in the correction of wage reports.<sup>80</sup>

On March 26, 2008, DHS published a supplemental proposed rule on the “safe harbor” procedures.<sup>81</sup> The proposed rule aimed to clarify certain aspects of the August 2007 final rule and to respond to the three findings underlying the district court injunction. On October 28, 2008, DHS published the supplemental final rule to the safe harbor regulation, that did not “make any substantive changes from the August 2007 Final Rule.”<sup>82</sup> Nonetheless, on December 5, 2008, the

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<sup>75</sup> Department of Homeland Security, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” 72 *Federal Register* 45611, August 15, 2007. See also U.S. Immigration and Customs Enforcement, *Partners: Safe Harbor*.

<sup>76</sup> For more information on the regulation, see CRS Congressional Distribution Memorandum, “No-Match Letters and the ‘Safe Harbor’ Procedures,” by Alison Siskin, available from the author.

<sup>77</sup> *American Federation of Labor and Congress of Industrial Organizations et al. v. Chertoff et al.*, NO. 3:07cv04472, slip op. (N.D.Cal. August 31, 2007).

<sup>78</sup> *American Federation of Labor, et al. v. Chertoff, et al.*, 2007 WL 2972952 (N.D. Cal., October 10, 2007).

<sup>79</sup> DHS has interpreted the injunction as applying nationwide, and, thus, the regulation was never implemented. Personal Correspondence with Tiffany Kebodeaux, DHS Congressional Relations, October 24, 2007.

<sup>80</sup> Personal Correspondence with Kitty Chilcoat, SSA Office of Legislation and Congressional Affairs, November 14, 2007.

<sup>81</sup> Department of Homeland Security, “Safe Harbor Procedures for Employers who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis,” 73 *Federal Register* 15944, March 26, 2008.

<sup>82</sup> Department of Homeland Security, “Safe Harbor Procedures for Employers who Receive a No-Match Letter: (continued...)”

U.S. District Court for the Northern District of California rejected a DHS request to dismiss *AFL-CIO v. Chertoff*, the litigation challenging the Safe Harbor regulation issued in August 2007. The TRO remained in effect because the judge ruled that he wanted the new administration to look at the rule before he would lift the TRO.<sup>83</sup> On July 8, 2009, Secretary of Homeland Security Napolitano announced that it was DHS's intention to rescind the Safe Harbor regulation.<sup>84</sup> DHS published the final rule rescinding the regulation on October 7, 2009.<sup>85</sup>

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Clarification; Final Regulatory Flexibility Analysis," 73 *Federal Register* 63861, October 28, 2008.

<sup>83</sup> Court's order setting schedule for any motions for summary judgment and motion to vacate preliminary injunction, *American Federation of Labor v. Chertoff*, No. 07-4472-CRB (N.D. Cal. December 5, 2008).

<sup>84</sup> Department of Homeland Security, *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify*, Press Release, Washington, DC, July 8, 2009.

<sup>85</sup> Department of Homeland Security, "Safe-Harbor Procedures for Employers who Receive a No-Match Letter: Rescission," 74 *Federal Register* 51447-51452, October 7, 2009. The proposed rule was published on August 19, 2009. Department of Homeland Security, "Safe-Harbor Procedures for Employers who Receive a No-Match Letter: Rescission," 74 *Federal Register* 41801-41805, August 19, 2009.