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Testimony

Before the Committee on Homeland  
Security, House of Representatives

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# IMMIGRATION ENFORCEMENT

## Controls over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened

Statement of Richard M. Stana, Director  
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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement's (ICE) management of the 287(g) program. Recent reports indicate that the total population of unauthorized aliens residing in the United States is about 12 million.<sup>1</sup> Some of these aliens have committed one or more crimes, although the exact number of aliens that have committed crimes is unknown. Some crimes are serious and pose a threat to the security and safety of communities. ICE does not have the agents or the detention space that would be required to address all criminal activity committed by unauthorized aliens. Thus, state and local law enforcement officers play a critical role in protecting our homeland because, during the course of their daily duties, they may encounter foreign-national criminals and immigration violators who pose a threat to national security or public safety. On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act was enacted and added section 287(g) to the Immigration and Nationality Act.<sup>2</sup> This section authorizes the federal government to enter into agreements with state and local law enforcement agencies, and to train selected state and local officers to perform certain functions of an immigration officer—under the supervision of ICE officers—including searching selected federal databases and conducting interviews to assist in the identification of those individuals in the country illegally.<sup>3</sup> The first such agreement under the statute was signed in 2002, and as of February 2009, 67 state and local agencies were participating in this program.

My statement today is based on our January 30, 2009, report regarding the program including selected updates made in February 2009.<sup>4</sup> Like the report, this statement addresses (1) the extent to which Immigration and Customs Enforcement has designed controls to govern 287(g) program implementation and (2) how program resources are being used and the

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<sup>1</sup>Under section 101(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3), the term “alien” means any person not a citizen or national of the United States. It does not include foreign nationals who have become U.S. citizens.

<sup>2</sup>Pub. L. No. 104-208, div. C, §133, 110 Stat. 3009-546, 3009-563 to 64.

<sup>3</sup>The change to the Immigration and Nationality Act is codified in 8 U.S.C. §1357(g).

<sup>4</sup>GAO, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, GAO-09-109 (Washington, D.C.: January 2009).

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activities, benefits, and concerns reported by participating agencies. To do this work, we interviewed officials from both ICE and participating agencies regarding program implementation, resources, and results. We also reviewed memorandums of agreement (MOA) between ICE and the 29 law enforcement agencies participating in the program as of September 1, 2007, that are intended to outline the activities, resources, authorities, and reports expected of each agency. We also compared the controls ICE designed to govern implementation of the 287(g) program with criteria in GAO's Standards for Internal Control in the Federal Government, the Government Performance and Results Act (GPRA), and the Project Management Institute's Standard for Program Management.<sup>5</sup> More detailed information on our scope and methodology appears in the January 30, 2009 report. In February 2009, we also obtained updated information from ICE regarding the number of law enforcement agencies participating in the 287(g) program as well as the number of additional law enforcement agencies being considered for participation in the program. We conducted our work in accordance with generally accepted government auditing standards.

In summary, ICE has designed some management controls, such as MOAs with participating agencies and background checks of officers applying to participate in the program, to govern 287(g) program implementation. However, the program lacks other key internal controls. Specifically, program objectives have not been documented in any program-related materials, guidance on how and when to use program authority is inconsistent, guidance on how ICE officials are to supervise officers from participating agencies has not been developed, data that participating agencies are to track and report to ICE has not been defined, and performance measures to track and evaluate progress toward meeting program objectives have not been developed. Taken together, the lack of internal controls makes it difficult for ICE to ensure that the program is operating as intended. ICE and participating agencies used program resources mainly for personnel, training, and equipment, and participating agencies reported activities and benefits, such as a reduction in crime and the removal of repeat offenders. However, officials from more than half of the 29 state and local law enforcement agencies we reviewed reported

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<sup>5</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999); and GAO, *Executive Guide: Effectively Implementing the Government Performance and Results Act*, [GAO/GGD-96-118](#) (Washington, D.C.: June 1996). Additional program management standards we reviewed are reflected in the Project Management Institute's *The Standard for Program Management* (© 2006).

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concerns members of their communities expressed about the use of 287(g) authority for minor violations and/or about racial profiling. We made several recommendations to strengthen internal controls for the 287(g) program to help ensure that the program operates as intended. DHS concurred with our recommendations and reported plans and steps taken to address them.

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## ICE Lacks Key Internal Controls for Implementation of the 287(g) Program

ICE has designed some management controls to govern 287(g) program implementation, such as MOAs with participating agencies that identify the roles and responsibilities of each party, background checks of officers applying to participate in the program, and a 4-week training course with mandatory course examinations for participating officers. However, the program lacks several other key controls. For example

- **Program Objectives:** While ICE officials have stated that the main objective of the 287(g) program is to enhance the safety and security of communities by addressing serious criminal activity committed by removable aliens, they have not documented this objective in program-related materials consistent with internal control standards. As a result, some participating agencies are using their 287(g) authority to process for removal aliens who have committed minor offenses, such as speeding, carrying an open container of alcohol, and urinating in public. None of these crimes fall into the category of serious criminal activity that ICE officials described to us as the type of crime the 287(g) program is expected to pursue. While participating agencies are not prohibited from seeking the assistance of ICE for aliens arrested for minor offenses, if all the participating agencies sought assistance to remove aliens for such minor offenses, ICE would not have detention space to detain all of the aliens referred to them. ICE's Office of Detention and Removal strategic plan calls for using the limited detention bed space available for those aliens that pose the greatest threat to the public until more alternative detention methods are available.
- **Use of Program Authority:** ICE has not consistently articulated in program-related documents how participating agencies are to use their 287(g) authority. For example, according to ICE officials and other ICE documentation, 287(g) authority is to be used in connection with an arrest for a state offense; however, the signed agreement that lays out the 287(g) authority for participating agencies does not address when the authority is to be used. While all 29 MOAs we reviewed contained language that authorizes a state or local officer to interrogate any person believed to be an alien as to his right to be or remain in the

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United States, none of them mentioned that an arrest should precede use of 287(g) program authority.<sup>6</sup> Furthermore, the processing of individuals for possible removal is to be in connection with a conviction of a state or federal felony offense. However, this circumstance is not mentioned in 7 of the 29 MOAs we reviewed, resulting in implementation guidance that is not consistent across the 29 participating agencies. A potential consequence of not having documented program objectives is misuse of authority. Internal control standards state that government programs should ensure that significant events are authorized and executed only by persons acting within the scope of their authority. Defining and consistently communicating how this authority is to be used would help ICE ensure that immigration enforcement activities undertaken by participating agencies are in accordance with ICE policies and program objectives.

- **Supervision of Participating Agencies:** Although the law requires that state and local officials use 287(g) authority under the supervision of ICE officials, ICE has not described in internal or external guidance the nature and extent of supervision it is to exercise over participating agencies' implementation of the program. This has led to wide variation in the perception of the nature and extent of supervisory responsibility among ICE field officials and officials from 23 of the 29 participating agencies that had implemented the program and provided information to us on ICE supervision. For example, one ICE official said ICE provides no direct supervision over the local law enforcement officers in the 287(g) program in their area of responsibility. Conversely, another ICE official characterized ICE supervisors as providing frontline support for the 287(g) program. ICE officials at two additional offices described their supervisory activities as overseeing training and ensuring that computer systems are working properly. ICE officials at another field office described their supervisory activities as reviewing files for completeness and accuracy. Officials from 14 of the 23 agencies that had implemented the program were pleased with ICE's supervision of the 287(g) trained officers. Officials from another four law enforcement agencies characterized ICE's supervision as fair, adequate, or provided on an as-needed basis. Officials from three

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<sup>6</sup>While law enforcement officers without 287(g) designation are not prohibited from contacting ICE to get information on the immigration status and identity of aliens suspected, arrested, or convicted of criminal activity, the statutory authority of an ICE officer to interrogate individuals as to their immigration status is one of the federal immigration enforcement functions specifically delegated to state and local officers who are certified to perform this function under the 287(g) program.

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agencies said they did not receive direct ICE supervision or that supervision was not provided daily, which an official from one of these agencies felt was necessary to assist with the constant changes in requirements for processing of paperwork. Officials from two law enforcement agencies said ICE supervisors were either unresponsive or not available. ICE officials in headquarters noted that the level of ICE supervision provided to participating agencies has varied due to a shortage of supervisory resources. Internal control standards require an agency's organizational structure to define key areas of authority and responsibility. Given the rapid growth of the program, defining the nature and extent of ICE's supervision would strengthen ICE's assurance that management's directives are being carried out.

- **Tracking and Reporting Data:** MOAs that were signed before 2007 did not contain a requirement to track and report data on program implementation. For the MOAs signed in 2007 and after, ICE included a provision stating that participating agencies are responsible for tracking and reporting data to ICE. However, in these MOAs, ICE did not define what data should be tracked or how it should be collected and reported. Of the 29 jurisdictions we reviewed, 9 MOAs were signed prior to 2007 and 20 were signed in 2007 or later. Regardless of when the MOAs were signed, our interviews with officials from the 29 participating jurisdictions indicated confusion regarding whether they had a data tracking and reporting requirement, what type of data should be tracked and reported, and what format they should use in reporting data to ICE. Internal control standards call for pertinent information to be recorded and communicated to management in a form and within a time frame that enables management to carry out internal control and other responsibilities. Communicating to participating agencies what data is to be collected and how it should be gathered and reported would help ensure that ICE management has the information needed to determine whether the program is achieving its objectives.
- **Performance Measures:** ICE has not developed performance measures for the 287(g) program to track and evaluate the progress toward attaining the program's objectives.<sup>7</sup> GPRA requires that agencies clearly define their missions, measure their performance against the goals they have set, and report on how well they are doing

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<sup>7</sup>In general, performance measures are indicators, statistics, or metrics used to gauge program performance.

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in attaining those goals.<sup>8</sup> Measuring performance allows organizations to track the progress they are making toward their goals and gives managers critical information on which to base decisions for improving their programs. ICE officials stated that they are in the process of developing performance measures, but have not provided any documentation or a time frame for when they expect to complete the development of these measures. ICE officials also stated that developing measures for the program will be difficult because each state and local partnership agreement is unique, making it challenging to develop measures that would be applicable for all participating agencies. Nonetheless, standard practices for program and project management call for specific desired outcomes or results to be conceptualized and defined in the planning process as part of a road map, along with the appropriate projects needed to achieve those results and milestones. Without a plan for the development of performance measures, including milestones for their completion, ICE lacks a roadmap for how this project will be achieved.

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## Program Resources Are Used for Training, Supervision, and Equipment; Benefits and Concerns Are Reported by ICE and Participating Agencies

ICE and participating agencies used program resources mainly for personnel, training, and equipment, and participating agencies reported activities, benefits, and concerns stemming from the program. For fiscal years 2006 through 2008, ICE received about \$60 million to provide training, supervision, computers, and other equipment for participating agencies. State and local participants provided officers, office space, and other expenses not reimbursed by ICE, such as office supplies and vehicles.

ICE and state and local participating agencies cite a range of benefits associated with the 287(g) partnership. For example, as of February 2009, ICE reported enrolling 67 agencies and training 951 state and local law enforcement officers. At that time, ICE had 42 additional requests for participation in the 287(g) program, and 6 of the 42 have been approved pending approval of an MOA. According to data provided by ICE for 25 of the 29 program participants we reviewed, during fiscal year 2008, about 43,000 aliens had been arrested pursuant to the program.<sup>9</sup> Based on the

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<sup>8</sup>GAO/GGD-96-118.

<sup>9</sup>ICE provided data for 25 of the 29 participating agencies we reviewed. ICE also provided data for 4 other participating agencies, but we do not report them as they were not within the scope of our review. We used the data provided by ICE for illustrative purposes only and not to draw conclusions about the 287(g) program.

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data provided, individual agency participant results ranged from about 13,000 arrests in one location, to no arrests in two locations. Of those 43,000 aliens arrested pursuant to the 287(g) authority, ICE detained about 34,000, placed about 14,000 of those detained (41 percent) in removal proceedings, and arranged for about 15,000 of those detained (44 percent) to be voluntarily removed.<sup>10</sup> The remaining 5,000 (15 percent) arrested aliens detained by ICE were either given a humanitarian release, sent to a federal or state prison to serve a sentence for a felony offense, or not taken into ICE custody given the minor nature of the underlying offense and limited availability of the federal government's detention space.<sup>11</sup>

Participating agencies cited benefits of the program including a reduction in crime and the removal of repeat offenders. However, more than half of the 29 state and local law enforcement agencies we reviewed reported concerns community members expressed about the 287(g) program, including concerns that law enforcement officers in the 287(g) program would be deporting removable aliens pursuant to minor traffic violations (e.g., speeding) and concerns about racial profiling.

We made several recommendations to strengthen internal controls for the 287(g) program to help ensure the program operates as intended. Specifically, we recommended that ICE (1) document the objective of the 287(g) program for participants, (2) clarify when the 287(g) authority is authorized for use by state and local law enforcement officers, (3) document the nature and extent of supervisory activities ICE officers are expected to carry out as part of their responsibilities in overseeing the implementation of the 287(g) program, (4) specify the program information or data that each agency is expected to collect regarding their

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<sup>10</sup>A voluntary removal (called voluntary departure) occurs when an alien is allowed to depart the country at his or her own expense (escorted by ICE) in lieu of formal removal proceedings or prior to completion of such proceedings.

<sup>11</sup>Individuals arrested on administrative charges who may be sole caregivers or who have other humanitarian concerns, including those with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives, may be released by ICE. As appropriate, if ICE is provided with new information regarding a humanitarian condition after an arrestee has been processed and detained, ICE may consider the possibility of release on humanitarian grounds based on such information. In general, aliens given a humanitarian release or not taken into custody due to limited detention space receive a notice to appear in immigration court at a later date for removal proceedings. Removable aliens serving a sentence in federal state prison are to be processed for removal at the end of their sentences.

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implementation of the 287(g) program and how this information is to be reported, and (5) establish a plan, including a time frame, for the development of performance measures for the 287(g) program. DHS concurred with each of our recommendations and reported plans and steps taken to address them.

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Mr. Chairman and Members of the Committee, this concludes my statement. I would be pleased to respond to any questions you or other Members of the Committee may have.

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## **GAO Contacts and Staff Acknowledgments**

For questions about this statement, please contact Richard Stana at 202-512-8777 or [stanar@gao.gov](mailto:stanar@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this statement include Bill Crocker, Lori Kmetz, Susanna Kuebler, and Adam Vogt.

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